IN THE MATTER OF THE TENURE	:	
HEARING OF DAWN A. LEWIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

SYNOPSIS

Petitioner certified tenure charges of unbecoming conduct against respondent – a tenured special education teacher in the district – based upon her arrest for DWI and indictment for alleged unlawful possession of a controlled dangerous substance (CDS) in April of 2009. Respondent subsequently was admitted into a pre-trial intervention (PTI) program regarding the charge of possession of a CDS, third degree. The petitioning Board sought dismissal of respondent from her tenured teaching position. Respondent contended that because the incident at issue occurred away from the school and out of the district, the penalty of dismissal is unnecessary and unwarranted.

The ALJ found that: it is uncontested that respondent was driving while intoxicated and that she was in possession of a CDS; the fact that possession of the CDS occurred off school premises has no bearing on the determination that the behavior underlying respondent's arrest constituted conduct unbecoming; the petitioning Board had sustained its burden of proving that the respondent engaged in conduct unbecoming a teacher; and respondent's entry into a PTI program does not negate the fact that she engaged in unbecoming conduct sufficiently flagrant to warrant dismissal. The ALJ determined that the nature and severity of the offense require that respondent be dismissed from her tenured teaching position.

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 her 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.

March 26, 2010

OAL DKT. NO. EDU 11406-09
AGENCY DKT NO. 234-9/09

IN THE MATTER OF THE TENURE	:	
HEARING OF DAWN A. LEWIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent requested and was granted an extension of time within which to file exceptions to the Initial Decision. Such exceptions and the District's reply thereto were fully considered by the Commissioner in reaching his determination herein.

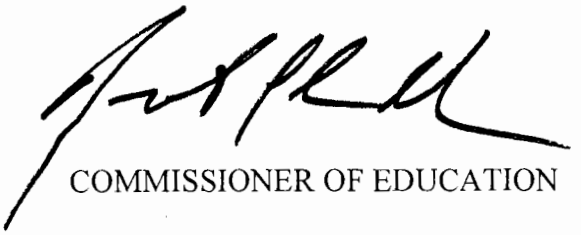
Respondent excepts solely to the Administrative Law Judge's (ALJ) recommendation of a penalty of termination of employment in this matter, maintaining that such a sanction is unwarranted because: 1) the incident at issue took place outside of the school and the district where respondent was employed; 2) respondent has been employed by the District since September 1996 and there is no evidence of any prior blemish on her record prior to the incident at issue here; and 3) respondent has accepted responsibility for her actions and the interests of justice dictate that she deserves a second chance. (Respondent's Exceptions at 1-3)

Upon his reasoned review of the record, the Commissioner concurs with the Administrative Law Judge, for the reasons comprehensively presented in her decision, that the District has established its charge of unbecoming conduct/other just cause against respondent

and – finding respondent's arguments to the contrary unpersuasive – that removal from her tenured position is the appropriate penalty here.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent is hereby terminated from her position with the School District of the City of East Orange. This matter will be forwarded to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED*



COMMISSIONER OF EDUCATION

Date of Decision: 3|26|10

Date of Mailing: 3|26|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11406-09
AGENCY DKT. NO. 234-9/09

CITY OF EAST ORANGE
BOARD OF EDUCATION,
Petitioner,
v.
DAWN A. LEWIS,
Respondent.

Joseph L. Roselle, Esq., and **Nicholas Celso III**, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Zitomer, attorneys)

Gregory T. Syrek, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: February 5, 2010 Decided: February 11, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about August 5, 2009, respondent Dawn A. Lewis was served with a copy of the Sworn Tenure Charges and Sworn Statement of Evidence filed against her by East Orange School District superintendent of schools Dr. Clarence Hoover. The charges included unbecoming conduct and/or other just cause. Respondent filed a

response under oath to the tenure charges on or about August 20, 2009. On or about September 1, 2009, respondent was suspended from her teaching duties with pay. On September 8, 2009, the Board certified the tenure charges to the Commissioner of Education and notified respondent of same. In addition, on or about September 8, 2009, respondent was suspended without pay concurrently with the Board's certification of the tenure charges to the Commissioner. On or about September 30, 2009, the Commissioner transmitted the tenure charges to the Office of Administrative Law (OAL) for hearing as a contested case. A pre-hearing telephone conference was held on October 6, 2009, during which discovery issues were discussed. The matter was scheduled for a hearing on December 17, 2009, and January 11, 13 and 14, 2010. The December 17 date was adjourned at the request of the District because its witnesses were not available. An additional day of hearing was scheduled for January 20, 2010. The matter was heard on January 11 and 13; the January 14 date was adjourned at the request of the respondent; and the case was concluded on January 20, 2010. At the close of testimony and after oral summations, I allowed the parties to submit citations of cases that would be applicable to the issue of penalty. The respondent submitted her case citations on February 2 and the petitioner responded on February 5, 2010.

ISSUE

The issue in this case is whether the respondent is guilty of conduct unbecoming a teaching staff member or other just cause warranting dismissal and revocation of tenure or a reduction in compensation as per N.J.S.A. 18A:28-5.

FINDINGS OF FACT

The following facts were stipulated by the parties:

1. Respondent holds a B.A. in Speech Communication from the University of North Carolina at Chapel Hill, in Chapel Hill, North Carolina.

2. Respondent holds an M.A. in Media Management.

3. Respondent holds an M.A. in Special Education from New York University in New York, New York.

4. Respondent holds certificates in the following areas: Substitute Teacher, Teacher of the Handicapped, Supervisor of Instruction and School Administrator.

5. Respondent began her employment in the East Orange School District on or about September 1, 1996, as a teacher.

6. Respondent became a tenured employee of the East Orange Board of Education on or about September 1, 1999.

7. Respondent is currently a tenured Special Education and Life Skills teacher, assigned to the East Orange Campus High School.

The following facts were not stipulated to by the parties. However, the respondent did not dispute the validity of these facts at the hearing:

1. Police Officer Jason Brooks, who is employed by the Union Township Police Department, was called to the scene of a one-car accident on April 4, 2009, at 1:09 a.m. to investigate. He saw a Mercedes sport utility truck blocking Morris Avenue near Kean University. The car had hit a utility pole.

2. He interviewed the driver, who was Dawn A. Lewis. She claimed that she had been cut off by another vehicle, but she could not describe the other car, nor did she know the traffic lane that she had been in prior to the accident.

3. In speaking with Ms. Lewis, Officer Brooks noted that her demeanor was vague, she had alcohol on her breath, and her eyes were watery.[1] She had trouble finding the credentials for the car. He observed that her movements were

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[1] These conditions were confirmed by Sgt. Mark Martin, Officer Brooks' supervisor, who was at the scene of the accident and who described Ms. Lewis as being uncooperative.

off and she had trouble with the balance and repetition tests that he administered at the scene.

4. As a result of his observations, he believed that he had probable cause to arrest Ms. Lewis. Therefore, he put her in handcuffs and placed her in the rear of his patrol car.

5. During the ride to headquarters, he heard Ms. Lewis fidgeting in the back seat and heard things falling. On several occasions he told her to sit still.

6. When they arrived at headquarters and Ms. Lewis was removed from the police car, he saw coins, lipstick and a tiny plastic bag containing a small rock-like substance on the back seat. He seized the bag and brought it inside with Ms. Lewis.

7. Ms. Lewis did not want to answer any questions without an attorney. The police officer informed her that she did not have a right to talk to her attorney until after certain tests were completed. The video camera was put on, but she did not submit to the Alcotest or the psychophysical or any other alcohol-related testing. She also refused to take the blood test. She insisted that she had to go to the bathroom, even though she had gone to the rest room immediately when she arrived at headquarters.

8. Ms. Lewis was charged with driving while intoxicated, refusal to take a breathalyzer test and possession of a controlled dangerous substance.

9. The plastic bag that Officer Brooks took from the back seat of the patrol car was placed in a heat-sealed bag and put in a secure room at police headquarters. It was logged into evidence and Det. Diane Spann transported the bag with its contents to the Union County lab in Westfield for testing on April 9, 2009. The chain of custody was properly memorialized.

10. Suzanne Fenske is employed by the Union County prosecutor's forensic laboratory in Westfield. She is responsible to test substances that are suspected to be controlled dangerous substances.

11. She was charged with testing the substance that was brought in the heat-sealed bag from the Union Township Police Department. She was the only person who had access to the substance in the bag. She performed a number of tests and determined that the bag contained 0.602 grams of cocaine.

12. Two coworkers testified in Ms. Lewis' behalf. Gloria Mosior, who teaches life skills for special education in East Orange, testified that she has known Ms. Lewis for ten years and worked closely with her for three years. She socialized with her one time outside of the office. She characterized Ms. Lewis as a good team player, very cooperative and good with her students. Donald R. Henderson, who also works in the district, is a "lead" teacher and a disciplinarian. He knew Ms. Lewis as a teacher in the building and because she attends a bible study class with him and other teachers two times per week. His impression was that she was a caring and compassionate person. He did not socialize with her outside of school, nor had he ever seen her teach in the classroom.

ANALYSIS OF THE LAW

The tenure of educational personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore it "is a 'statutory right imposed upon a teacher's contractual employment,' Zimmerman v. Newark Bd. of Ed., 38 N.J. [65,] 72 [(1982)]. It may not be forfeited or waived, Red Bank Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. [122,] 141 [(1978)]." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982). Tenure was designed to protect employees "from dismissal for 'unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (citing Zimmerman, supra, 38 N.J. at 71). Lack of fitness is usually demonstrated by a series of incidents, but it also may be found when there is a single incident that is 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). While tenure was designed to protect employees, teachers are responsible to act in a professional manner and to serve the welfare of the students in their care. In the final agency decision in In the Matter of the Tenure Hearing of Sammons, 1972 S.L.D. 302, 321, the Commissioner stated that

> . . . teachers of this State . . . 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. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.

As the administrative law judge stated in In the Matter of the Tenure Hearing of Johnston, 95 N.J.A.R.2d (EDU) 439, 443:

> Teaching is a calling requiring "an unusually high degree of self-restraint and controlled behavior." . . . Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves. . . . Being a teacher requires an intense dedication to civility and respect for people as human beings.
>
> [Citations omitted.]

Among the charges lodged against the respondent was that of "conduct unbecoming." This term was defined in In the Matter of the Tenure Hearing of Motley, 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.shtml>:

> "Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of

> good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office and position."
>
> [Citations omitted.]

Courts have held that the failure or refusal to undergo sobriety testing can constitute conduct unbecoming. In In re Emmons, 63 N.J. Super. 136 (App. Div. 1966), a police officer was given a ninety-day suspension for conduct unbecoming a police officer when he failed to cooperate in an examination to determine his sobriety following an off-duty automobile accident. The court refused to consider issues regarding due process or the right against self-incrimination in connection with the suspension hearing, holding that they were without foundation because the suspension hearing was disciplinary and not criminal in nature. The court was not persuaded that the officer's assertion that he acted on advice of counsel in refusing to take a blood test was a defense. The court held that advice of counsel was not a defense to a charge of misconduct. In another matter involving a tenured teacher, the administrative law judge found that possession of a controlled dangerous substance constituted conduct unbecoming and subjected the teacher to penalty under the tenure law. See In re Tenure Hearing of Carter-Lee, EDU 9825-07, Initial Decision (February 15, 2008), aff'd, Comm'r (March 19, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>; see also In re Tenure Hearing of Morton, EDU 253-97 and EDU 956-97, Initial Decision (June 11, 1999), aff'd, Comm'r (July 30, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. That possession of the controlled dangerous substance occurred off school premises has no bearing on the determination that the possession, in and of itself, constitutes unbecoming conduct. Willingboro Bd. of Educ. v. Lott, 93 N.J.A.R.2d (EDU) 516, aff'd, State Bd. of Educ., 94 N.J.A.R.2d (EDU) 35; In re Tenure Hearing of McIntyre, 96 N.J.A.R.2d (EDU) 718, aff'd, No. A-5942-94 (App. Div. July 10, 1996); In re Tenure Hearing of Wolfe, 1980 S.L.D. 721, aff'd, App. Div., 1981 S.L.D. 1537, 1539. Nor does the fact that Ms. Lewis received pre-trial intervention with regard to the drug-possession charge preclude a finding of unbecoming conduct as to that incident.

It is the obligation of the District to prove the tenure charges by a preponderance of the credible evidence. The Commissioner in In The Matter of the Tenure Hearing of Grundfest, Comm'r (June 20, 2000), aff'd, St. Bd. (November 1, 2000) <http://www.nj.gov/education/legal>, outlined what a board of education had to prove in order to meet its burden in a tenure charge:

> Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. The ramifications for respondent would be not only the loss of his tenured employment, but also the automatic referral of the matter to the State Board of Examiners for possible revocation of his teaching certificate, and the possible loss of his pension benefits. Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence [the tenure charges against the respondent].

In this matter it is uncontested that Ms. Lewis was driving while intoxicated and that she was in the possession of a controlled dangerous substance. Therefore, the only issue that needs to be decided is whether Ms. Lewis should lose her tenure as a result of this incident. The respondent has argued that because of her prior unblemished record she should not be subjected to a loss of tenure. In deciding whether the respondent should lose her tenure a balancing test must be employed. See McIntyre, supra, 96 N.J.A.R.2d at 725. However, in McIntyre the Commissioner determined that "with respect to the possession of controlled dangerous substances by an educator, analyses which consider quantity or measure shades of misconduct are inappropriate" because the Legislature and the State Board of Education have "assigned to the school districts of New Jersey a fundamental role in the prevention and intervention of substance use and abuse among students." McIntyre, supra, 96 N.J.A.R.2d at 725. Teachers serve as role models, a "heavy duty [which] requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Id. at 726 (citing Sammons, supra, 1972 S.L.D. at 321)). Accordingly, "possession of a controlled dangerous substance by an educator, absent mitigating circumstances, . . . is sufficiently flagrant conduct to warrant dismissal," even if it reflects

only one instance of misconduct. Ibid.; see also Willingboro, supra, 93 N.J.A.R.2d (EDU) 516.

Mitigating circumstances could include evidence of an exemplary record as a teacher. For example, in In the Matter of the Tenure Hearing of Valenti, 1990 S.L.D. 410, the teacher was arrested for possession of one marijuana joint and an additional 2.5 grams of marijuana. A principal, teacher and guidance counselor, all employees of the Board, testified as to the teacher's exemplary record over twenty years as a teacher, his rapport with his students and his integral part in the school community. While the Commissioner increased the penalty recommended by the administrative law judge from forfeiture of 120 days' pay to forfeiture of 180 days' pay, the Commissioner did not order Valenti removed from his tenured position. Respondent, in the case at bar, did not offer any mitigating circumstances. The only testimony put forth by Ms. Lewis was from two of her fellow teachers. Neither witness seemed to know anything about steps taken by Ms. Lewis to rehabilitate. In addition, Mr. Henderson stated that he had never seen the respondent teaching a class. His interaction with Ms. Lewis involved disciplinary matters, where he said that she appeared to care about her students. Ms. Mosior characterized Ms. Lewis as a team player and cooperative. While these are compliments, they certainly do not rise to the level of her being characterized as having an exemplary record. In addition, as the District pointed out, Mr. Valenti was charged with possession of a small amount of marijuana, which is considered a simple disorderly persons offense and never involved the possibility of imprisonment, as opposed to the charges lodged against Ms. Lewis, which included possession of cocaine in the third degree, driving while intoxicated, and refusal to undergo sobriety testing.

The other cases cited by the respondent for the proposition that termination of tenure is not warranted were equally unpersuasive. In In re Tenure Hearing of Passero, OAL Dkt. No. 3340-83, Initial Decision (September 2, 1983), aff'd, Comm'r (October 17, 1983), the tenured employee was a custodian who worked the night shift and therefore did not have contact with pupils. In addition, he was charged with simple possession of hashish and methamphetamines. While I am not diminishing the seriousness of that offense, it certainly is not on the level of possession of cocaine. In re Tenure Hearing of Koller, 97 N.J.A.R.2d (EDU) 157, is likewise inapposite to this case. There the tenured

teacher was found to have committed conduct unbecoming a teaching staff member. However, he asserted that he was an alcoholic and dismissing him from his position would be a violation under the New Jersey Law Against Discrimination (NJLAD). Ms. Lewis has never alleged that she suffers from a qualifying disability under the NJLAD and that her disability was the cause of her conduct.

CONCLUSIONS

Based on the foregoing, **I CONCLUDE** that the District has sustained its burden of proving that the respondent engaged in conduct unbecoming a teacher.

I further **CONCLUDE** that based on the nature and severity of the offense, the respondent should be dismissed from her position in the District.

ORDER

It is **ORDERED** that the tenure charges of conduct unbecoming are sustained and the respondent is to be **DISMISSED** from her teaching position in 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, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/11/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 2/11/10

Date Mailed to Parties: 2/11/10 db

db

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON
NEWARK, NJ 07102

APPENDIX

LIST OF WITNESSES

For Petitioner:

Officer Jason Brooks

Suzanne Fenske

Sgt. Mark Martin

Officer Daniel Mitchell

Det. Diane Spann

For Respondent:

Gloria Mosior

Donald R. Henderson

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

See Exhibit Book

For Respondent:

None

101-10

OAL DKT. NO. EDU 99-08

AGENCY DKT. NO. 396-12/07

IN THE MATTER OF THE TENURE	:	
HEARING OF CHERYL SWIDER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
HOLMDEL, MONMOUTH COUNTY.	:	
	:	

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 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 of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

Accordingly, the parties' 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: 3|29|10

Date of Mailing: 3|29|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00099-08
AGENCY DKT. NO. 396-12/07

IN THE MATTER OF THE TENURE HEARING OF CHERYL SWIDER, SCHOOL DISTRICT OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY.

Martin M. Barger, Esq., appearing for petitioner (Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, LLC, attorneys)

William B. Cunningham, Esq., appearing for respondent (Starkey, Kelly, Bauer, Kenneally & Cunningham, LLP, attorneys)

Record Closed: February 22, 2010 Decided: February 26, 2010

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

This matter arises out of the Holmdel Board of Education's filing of tenure charges against Cheryl Swider for conduct unbecoming a public school teacher. The Statement of Evidence attached to and filed in support of the Statement of Charges alleged that Swider, an athletic trainer and former assistant principal, engaged in on-going harassment of Superintendent of Schools, Barbara Duncan. The Board filed the charges on December 28, 2007, Swider filed her answer on January 9, 2008, and the

matter was transmitted to the OAL for hearing as a contested case on January 18, 2008.

Although the prehearing conference was held as scheduled on February 14, 2008, subsequent hearing dates were repeatedly adjourned for various reasons including the pendency of motions the Board had filed in Superior Court to obtain certain evidence that had been presented to a grand jury; the taking of depositions; scheduling conflicts, and other good cause shown. In the meantime, the parties continued to engage in settlement discussions until they finally reached an agreement on or about January 26, 2010. The fully executed Stipulation of Settlement, Exhibit J-1, was filed with this Administrative Law Judge on February 22, 2010.

N.J.A.C. 6A:3-5.6(a) provides:

> Once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (*S.L.D.*) 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;
>
> 3. Consent of both the charged and charging parties;
>
> 4. Indication that the charged party entered into the agreement with a full understanding of her rights;
>
> 5. A showing that the agreement is in the public interest; and
>
> 6. Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of the certificate.

After careful consideration of the record in this matter, I find that the parties have satisfied these six standards and shall address them sequentially.

1. Documentation. The Statement of Charges (Exhibit J-2), Statement of Evidence with Exhibits (Exhibit J-3), and Board Resolution/Certification of Charges (Exhibit J-4) have been appended to this Initial Decision.

2. Explication. As recited in the Stipulation of Settlement, the Superior Court of New Jersey, Monmouth County, Criminal Part, determined that since the Grand Jury had not issued an indictment and no other criminal action had been taken against Cheryl Swider and the other targets of the Monmouth County Grand Jury, it would be inappropriate to allow the Board access to or use of the Monmouth County Prosecutor's Report and Monmouth County Grand Jury Investigation. Moreover, a review of the deposition transcripts provided by the Board (Exhibits J-5 and J-6) disclosed that none of these prospective witnesses were going to say anything that might implicate Ms. Swider in the alleged harassment of Superintendent Duncan. Consequently, the Board concluded that it would have difficulty establishing the tenure charges and that it would be in the best interests of the parties and the public to resolve the matter amicably.

3. Consent. The Stipulation of Settlement has been signed by Cheryl Swider, her attorney, William P. Cunningham, Esq., and the Board's attorney, Martin M. Barger, Esq., who by letter dated February 22, 2010, (Exhibit J-7) indicated that he had been "authorized by the Board of Education to settle the matter and to sign on behalf of my client."

4. Understanding of Rights. By letter dated February 23, 2010 (Exhibit J-8), William P. Cunningham, Esq., indicated that Ms. Swider understood her right to have a hearing and that the file might be referred to the Board of Examiners by the Commissioner upon conclusion of the matter.

5. Agreement in the Public Interest. A careful reading of the Statement of Evidence – particularly the exhibits attached thereto – and deposition transcripts readily

discloses that the events leading up to the filing of the tenure charges have forced Superintendent Duncan to relive an exceptionally painful period of her life. It also discloses that at least some of the actors in this matter still bear a great deal of resentment, if not outright animosity, towards her. Needless to say, the dispute has polarized not only the teaching staff, but also the broader community. Additionally, ongoing litigation will only fan the flames of the dispute and it is unlikely that even a decision on the merits – particularly a finding that the Board had failed to meet its burden, if that were in fact the outcome – will placate those involved. Consequently, an amicable settlement is in the best interests of all concerned.

6. Knowledge of Commissioner's Duty. As indicated in item 4 above, Mr. Cunningham has fully advised Ms. Swider of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate. By virtue of her signature on the Stipulation of Settlement, she has nevertheless decided that it is still in her best interests to resolve this matter.

After careful consideration of the record before me, I find that the parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and that the settlement fully disposes of all issues in the controversy and is consistent with the requirements of In re Cardonick, supra, 1990 School Law Decisions (*S.L.D.*) 842.

I therefore conclude that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved; that the parties should be directed to comply with the settlement terms; and that these proceedings should be concluded. 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.

February 26, 2010
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency: MAR 2 2010

Date Mailed to Parties: MAR 3 2010

/bdt

EXHIBITS:

Jointly submitted:

J-1 Stipulation of Settlement
J-2 Statement of Charges
J-3 Statement of Evidence with Exhibits
J-4 Board Resolution/Certification of Charges
J-5 Cancalosi Deposition Transcript
J-6 Flaherty Deposition Transcript
J-7 Barger letter dated February 22, 2010
J-8 Cunningham letter dated February 23, 2010

J-1

RECEIVED

2010 FEB 23 A 11: 23

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STIPULATION OF SETTLEMENT

WHEREAS, Holmdel Township Board of Education filed tenure charges against Cheryl Swider on November 28, 2007; and

WHEREAS, Cheryl Swider filed an Answer to said tenure charges on January 9, 2008; and

WHEREAS, extensive discovery was conducted in this litigation, including depositions of Cheryl Swider and two (2) other main witnesses, and the transcripts of those depositions have been supplied to the Court; and

WHEREAS, the Holmdel Township Board of Education also sought permission from the Superior Court of New Jersey, Monmouth County, Criminal Division, to use the Monmouth County Prosecutor's Investigatory Report and the Monmouth County Grand Jury proceedings involving Cheryl Swider and others; and

WHEREAS, the Superior Court of New Jersey, Monmouth County, Criminal Division, determined that no action was taken against Cheryl Swider and others and, therefore, it would be inappropriate to use the Monmouth County Prosecutor's Report and Monmouth County Grand Jury Investigation, both of which are confidential, in this proceeding; and

WHEREAS, Holmdel Township Board of Education would have difficulty establishing the tenure charges without the above-described documentation; and

WHEREAS, the parties determined that, under the circumstances, it would be best for all concerned to enter into negotiations to settle this matter, and all other matters between Cheryl Swider and the Holmdel Township Board of Education; and

WHEREAS, the parties have reached a settlement, subject to recommendation by the Honorable Israel D. Dubin, A.L.J. and approved by the New Jersey Commissioner of Education, pursuant to all standards set forth in the ***Cardonick*** decision; and

WHEREAS, the parties understand that the entire file is subject to review by Judge Dubin prior to his recommendation and by the New Jersey Commissioner of Education prior to his approval, and that no settlement is permitted without said recommendation and approval; and

WHEREAS, the parties recognize that, pursuant to ***Cardonick***, the terms of any settlement will be subject to careful scrutiny to be essential to the maintenance of the integrity of the Tenure Employees Hearing Act, ensuring that all determinations will serve not only the interest of the parties but also the broader public interests;

NOW, THEREFORE, IT IS HEREY AGREED, AS FOLLOWS:

1. This settlement between Cheryl Swider and Holmdel Township Board of Education shall not take effect unless and until approved by the New Jersey Commissioner of Education.

2. The tenure charges against Cheryl Swider shall be withdrawn by the Holmdel Township Board of Education.

3. Cheryl Swider shall submit her resignation from the Holmdel Township School District, effective June 30, 2010.

4. Cheryl Swider is entitled to her salary and other benefits for the first 120 days of her suspension, which were withheld.

5. Holmdel Township Board of Education is entitled to mitigation for the compensation earned by Cheryl Swider at other institutions during the normal Holmdel school day during the time of her suspension.

6. It has been determined that items 4 and 5, as set forth above, are almost identical, and the parties therefore waive their financial claims for these items accordingly. Benefits and pension rights for Cheryl Swider shall remain in full force and effect.

7. Cheryl Swider is entitled to be compensated for unused sick leave pursuant to the terms of the Holmdel Township Education Association contract and subject to any limitations imposed by the regulations of the New Jersey Department of Education.

8. Cheryl Swider presently has a collateral claim against Holmdel Township Board of Education that is also being resolved as part of this total settlement.

9. In settlement of that collateral claim Cheryl Swider shall receive the sum of $25,000.00 and shall provide to the Holmdel Township Board of Education and all of its Administrators, other employees and agents a full General Release for any claims of any nature whatsoever that she may have against Holmdel Township Board of Education, its Administrators, and other employees and agents.

10. This shall constitute the full settlement between the parties and shall be binding on all heirs, successors and assigns.

Dated: 2/18/10

Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, L.L.C.
Attorneys for Holmdel Township Board of Education

BY: _____
Martin M. Barger
For the Firm

Dated:

Starkey, Kelly, Bauer, Kenneally & Cunningham
Attorneys for Cheryl Swider

2-8-2010

BY: _____
William P. Cunningham
For the Firm

Dated:
2-18-2010

_____
Cheryl Swider

SCHOOL ETHICS COMMISSION DKT. NO. C34-08
COMMISSIONER DKT. NO. 7-11/09A

TONY JOHN, MARTIN NOCK, CHRISTOPHER WALKER AND EFE OSAGIE,	:	
COMPLAINANTS-RESPONDENTS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
KEN GORDON, BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission, October 27, 2009

For Complainants-Respondents, Tony John, *Pro Se*[1]

For Respondent-Appellant, Thomas A. Abbate, Esq.
(DeCotiis, Fitzpatrick, Cole & Wisler, LLP)

The above-captioned matter came before the Commissioner of Education by way of a November 2, 2009 appeal by Respondent-Appellant Ken Gordon (respondent) of the October 27, 2009 decision of the School Ethics Commission finding him in violation of *N.J.S.A.* 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members and recommending a penalty of reprimand. In its decision, the Commission determined that respondent – at the time a member of the Willingboro Board of Education (Board) – administered the schools contrary to his duty as a Board member, took private action capable of compromising the Board, and failed to support and protect school personnel in the proper performance of their duties by inserting himself into the controversy surrounding the interim

[1] Where a complaint is submitted by more than one person, a lead complainant – in this case, Mr. John – may be designated by the Commission. *N.J.A.C.* 6A:28-6.6; Transcript of Proceedings Before the School Ethics Commission at 4-5 (Appendix to Respondent's Brief at 53-54a).

superintendent's cancellation of a previously scheduled mock student election and asking the high school principal – also the head of the district administrators' association (WEAA) – to inform her colleagues that they should not stand in the way of such election, which was a parent-teachers (PTA/PTO) event that – contrary to apparent widespread belief – had *not* been cancelled by the Board.[2]

On appeal before the Commissioner, respondent characterizes the Commission's decision as arbitrary, irrational, and permeated by procedural and substantive errors.

Procedurally, respondent contends that, contrary to *N.J.S.A.* 18A:12-29(b), the Commission failed to transmit the matter to the Office of Administrative Law (OAL) upon its finding of probable cause and to render its decision within 90 days. According to respondent, the statute is unequivocal in its requirements, and the Commission's "attempt to circumvent [these requirements] through the promulgation of regulations" that permit it to hear matters directly and deem its initial screening of a complaint as satisfying the 90-day requirement is of no moment, since the rule in question – *N.J.A.C.* 6A:28-10.8 – is an *ultra vires* enactment that clearly contravenes the underlying statute. (Respondent's Brief at 21-23)

Respondent further contends that the Commission violated his due process rights by improperly admitting privileged evidence and erroneously crediting the testimony of complainants' principal witness. In respondent's view, the Commission should not have permitted the unredacted confidential investigative report with attachments prepared by Board counsel with reference to the incident underlying this matter (Exhibits C-2 through C-8) to be entered as evidence over respondent's repeated objections, since the report was rendered as "confidential," clearly subject to attorney-client privilege, and *not* released publicly – apart from

[2] Additional allegations were made in the complaint against respondent; these, however, were dismissed by the Commission and are not before the Commissioner on appeal.

a "heavily redacted excerpt" – as untruthfully stated by complainants and testified by complainants' witness Sarah Holley.[3] Had this report been suppressed as it should have been, respondent asserts, witnesses would not have been asked to admit on record to the substance of their statements to Board counsel; the email on which the Commission relied in deciding against respondent would have been precluded from consideration because complainants had no evidentiary foundation for its possession apart from their access as Board members to the confidential report to which it was appended; respondent would not have been compelled to testify at hearing; and the complainants' case would have rested almost entirely on the testimony of a witness (Theresa Lucas) who should not have been deemed credible because, as respondent repeatedly advised the Commission, she had a clear motive to slant her testimony against respondent – specifically, a forthcoming civil suit against the district and several individuals including respondent, actually served the day after the Commission's hearing and claiming harassment and retaliation as a result of her complaints of Board member interference, that would unquestionably be bolstered by a finding that respondent had violated the School Ethics Act. (Respondent's Brief at 12-14, 17-21)

Substantively, respondent first argues that his actions did not constitute "administering" the schools or failing to support school personnel in their duties, as erroneously found by the Commission. According to respondent, his interaction with the head of the WEAA[4] "represented a measured approach to what he reasonably perceived to be either a potential

[3] Respondent opines that "the complainants do not seem to appreciate the irony of breaching the confidences and secrets of the Board in furtherance of a matter in which *they* allege that [respondent] compromised the Board." (Respondent's Brief at 2)

[4] Respondent states that he "did not insist that Ms. Lucas contact the WEAA in his presence, nor did he ever order her to contact her membership. He did not directly order Ms. Lucas to tell her membership to permit the student election to proceed, nor did he ever expressly contradict any directive of Interim Superintendent Kern...or intend for the WEAA to take any action contrary to the [superintendent's] directive." He further states that his email to Interim Superintendent Kern – accepting "an inordinate share of the responsibility for the situation" in an effort to dissuade Kern from taking disclinary action against Lucas – intentionally "overstated the scope of his advice to Lucas." (Respondent's Brief at 9)

lawsuit against the district, or alternatively irreparable harm to the Board's relationship with the WEAA," undertaken in view of his official position as Chair of the Negotiating Committee at a time when Board negotiations with the WEAA were pending and the parties were attempting to overcome their history of negative labor-management relations. Respondent asserts that "the misperception by the WEAA that the Board had cancelled the student election at the last minute, outside of a public session, would leave the membership of the WEAA as the target of convenience to bear the brunt of parental criticism for the decision" and that it "cannot be gainsaid that the WEAA's belief that it had been 'sold out' by the Board, even if mistaken, had the potential to irreparably harm relations between the parties." Respondent further contends that the Commission applied a vague notion of the term "administer," ignoring the fact that complainants – who bear the burden of proof in this matter – never established the delineation between the Interim Superintendent's actual administrative functions and respondent's authority as a liaison to the WEAA so as to demonstrate that respondent's actions were within the scope of the former rather than the latter. (Respondent's Brief at 25-28) Moreover, respondent continues, even if his actions could (erroneously) be construed as violating the Ethics Act, the Commission should not have overlooked the fact that he made every effort to follow the chain of command before concluding he had no choice but to speak to Ms. Lucas, and even then did not instruct her to ignore the Interim Superintendent's instructions, but merely advised her that her membership should not "stand in the way" of the mock election and should let the PTA/PTO deal directly with the higher-level administration – thus supporting building administrators in the proper performance of their duties, in a situation where the chief school administrator was acting in a manner respondent reasonably believed to be illegal and improper so as not to warrant similar support.[5] (*Id.* at 28-31, 33-34)

[5] Respondent states that the Ethics Act cannot be read to require deference to the chief school administrator in all

Respondent also argues that it makes no sense to hold that his actions compromised the Board, since – as correctly found by the Commission – the PTA-sponsored student election was never the subject of official action by the Board, nor did the Board vote to prohibit the event. Respondent further contends that the potential for the annual school election to have been tainted under the facts of this matter are so "attenuated and remote that the [Commission's decision] is stretched to the point of absurdity," noting that no school held a student election as a consequence of respondent's actions, no party or law enforcement or other regulatory authority challenged the results or legitimacy of the Board election, and the County Board of Elections had advised that a student election was permissible so long as incentives were not offered – a restriction made clear to the PTA prior to the election. Thus, according to respondent, petitioner's actions "had no bearing on the Board election, and posed no reasonable likelihood of tainting the election" – which, in fact, "was not, and never has been, tainted." (Respondent's Brief at 31-33)

According to respondent, the Commission's "most fundamental error was that it failed to recognize the distinction between a genuinely and materially unethical act...and the ordinary incidents of a citizen's right to participate in the affairs of his government without fear of liability," and that it consequently interpreted the School Ethics Act in "absolutist terms that elevate form over substance." Respondent contends that he is a "public service minded person" seeking to be a "positive force for change" in a troubled district, but was made the subject of ethics charges by self-interested "holdovers from the time of [the district's] fiscal mismanagement" who sought to discredit him for their own purposes; he asserts that he did nothing more than attempt to bring the parties to the election controversy together in good faith,

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instances or support of all personnel at all times, since situations will arise where supporting one group necessarily excludes supporting another.

yet has now received a decision which will "permanently and irrevocably tarnish [his] integrity" because the Commission '[failed] to recognize that his *de minimis* contact with the head of the WEAA was both unavoidable in these circumstances and not unduly intrusive of the Interim Superintendent's prerogative to administer the district." (Respondent's Brief at 1, 3, 23-24) Respondent opines that the Commission's decision effectively means that "in order to avoid a charge of interference under the Code of Ethics, a board member has a mandatory and unconditional obligation to look the other way if an administrator is discovered to be engaging in conduct that is reasonably believed to be unlawful, or which might cause irreparable harm" – a holding that is "particularly fallacious in the context of a district that is now under the monitorship of the Department of Education because a complacent board allowed a previous superintendent to run up a $10 million deficit." Respondent states that he ran for a seat on the Board precisely because "too many people looked the other way," and that the Commission's implication that the School Ethics Act *requires* board member acquiescence "no matter how much confusion and potential for irreparable harm [exist]" is a result that the Commissioner must reverse. (Respondent's brief at 2, 14)[6]

The complainants did not reply to respondent's brief.

Upon careful review and consideration, the Commissioner is unpersuaded by respondent's arguments on appeal and finds no basis on which to disturb the decision of the School Ethics Commission.

Initially, the Commissioner can find no fault in the Commission's having conducted proceedings in this matter in accordance with regulations duly adopted by the

[6] Within his papers on appeal, respondent additionally sought indemnification for counsel fees and expenses. That claim, however, is proceeding separately, as a petition (*Ken J. Gordon, Jr. v. Board of Education of the Township of Willingboro, Burlington County*, Agency Dkt. No. 347-11/09) before the Commissioner pursuant to *N.J.A.C.* 6A:3.

State Board of Education. Respondent's contention that the Commission violated its authorizing statute by so doing effectively challenges the facial validity of the implementing regulations – a challenge which lies within the sole purview of the Appellate Division of the Supreme Court and is not properly raised before the Commissioner. R. 2:2-3(a); *see also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n,* 279 *N.J. Super.* 477, 485 (App. Div. 1995).

Moreover, the Commissioner cannot agree that respondent's due process rights were violated by the Commission's acceptance into evidence of Board counsel's confidential report on the mock election. Respondent's own submission shows that the r eport and all attachments on which the Commission materially relied, including respondent's email (Exhibit C-6), were released as public documents on July 14, 2008 – over three months prior to the filing of the October 21, 2008 complaint in this matter – in response to an Open Public Records Act (OPRA) request, and that the documents so released were redacted only as to the names of certain district staff members – readily identifiable in the context of complainants' allegations and likely recognizable to anyone even slightly acquainted with the underlying events – and personal address, phone and medical information not pertinent to the issues before the Commission.[7] (Appendix to Respondent's Brief at 300a-324a[8])

Nor can the Commissioner agree that the Commission placed undue weight on the hearing testimony of Mrs. Lucas; to the contrary, the Commission's findings of fact on the issues central to its determination of violation (findings 20 through 23) are entirely consistent with respondent's own testimony as set forth below:

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[7] Exhibits C-3 and C-4 do not appear to have been so released, but – even granting respondent's contention, *arguendo* – these were not material to the Commission's determination.

[8] It is noted that the 23-page "public records" package provided to respondent's counsel by the Board contains only 14 pages of actual text, which agrees with the number of pages released in response to the OPRA request.

Q: Okay. Why did you go to the high school that day?

A: I was scheduled – as a Willingboro graduate, I was scheduled to speak at career day, and I went there to speak for career day.

Q: You were invited to speak there?

A: Yes, I was invited.

Q: Was the primary purpose in your going there to speak at the career day event?

A: That was my only purpose.

Q: Okay. When you went to the building what did you do when you got there?

A. When I went to the building I signed in, and I went to the main office to make the building principal aware that I was there [consistent with Board practice]. They did that. They called her wherever she was and she came to the main office.

Q: Was your primary purpose in asking to speak to Mrs. Lucas to talk to her about the mock election?

A. No. It was just to inform her I was in the building.

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Q: How long did you see Mrs. Lucas during that encounter?

A: About five or ten minutes.

Q: So what happened during – what transpired during your encounter with Mrs. Lucas?

A: When I saw Mrs. Lucas, I asked her – she asked me why I was there, I told her about the career day, and I asked her was she aware of all the confusion surrounding the mock election, and she indicated that she had heard about it, she was aware of it. I indicated to her that two of her principals had approached me and had expressed quite a bit of concern. I expressed to her that I was very concerned because we were in the midst of negotiations, and the relations were going very good, which was not common in the past...I told her I did not want this to affect what was going on in the labor and collective bargaining we had. I told her I was very concerned because it had been communicated that the board of education had cancelled this event, and I wanted her to know that the board of

education did not have anything whatsoever [to do] with the canceling of this event, rather it was not a board of education event, it was not within our purview to cancel it at all, so we did not have anything to do with it.

I then indicated to her that because two of her principals had stopped me in the parking lot that I felt it was very important that all the principals were made aware that this is absolutely not a board of education function, this is not something that we cancelled, this is not something we had anything to do with. It was a PTA function. I asked her to "please call your members and let them know that we did not do this, we're not trying to hang them out to dry." The perception was from her two principals that stopped me, that "there we go again having a situation where the heat gets turned up you guys leave us just dangling out there by ourselves," and I wanted her to know that that's not what we were doing, that the board of education had nothing to do with this, and I asked her to call her members and let them know.

***

Q: Did you ever insist that Mrs. Lucas make the phone calls in your presence?

A: No.

Q: Did you issue Mrs. Lucas a direct order to take action to call those principals?

A: I did not issue her a direct order at all. I asked her to do it for clarity's sake and (inaudible) relations of the collective bargaining unit.

Q: Did you ever directly order Mrs. Lucas to tell her membership to permit the mock election to proceed?

A: I did not.

Q: In your mind, did you ever contradict any statement that you had understood the superintendent had made that day?

A: The only contradiction was I had been told the superintendent said the board of education, the nine on the board had cancelled the election, and I wanted it to be very clear that the board of education did not cancel the mock election.

Q: Did you intend for Mrs. Lucas to take action to contradict the superintendent as a result of your statement to her?

A: I did not, and it was my understanding that she made the phone calls and gave them the information, but there was no indication from me – to me that she

had contradicted what the superintendent had said....so, no, that wasn't the intent and it wasn't what I was looking to have happen.

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Q: After your speaking engagement, did you have occasion to see Mrs. Lucas again?

A: Absolutely. Before I exited the building I stopped by her office again to advise her that I was finished and I was leaving the building.

Q: Did you mention the mock election in your second encounter with Mrs. Lucas?

A: I did...I said, "Did you talk to any of your members?" And she said, "Yes, I did talk to them." And I said, "Okay, thank you." And then I left.

(Direct Examination, Transcript of Hearing at 157-163, Appendix to Respondent's Brief at 206a-212a)

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Q: Do you recollect sending in this email, and I'm going to read an excerpt from it. "I proceeded to Willingboro High School where I was scheduled to speak. Once in the building I contacted Ms. Theresa Lucas, building administrator, president of the WEAA. I indicated to Mrs. Lucas that she should contact the principals as the president to the WEAA and inform them that the mock election was not a board of education function. I further indicated that it was unprecedented for a PTA function to be cancelled by the superintendent, therefore she was to instruct them not to interfere or stand in the way of said event." Do you recall that?

A: Yes.

Q: ...[Earlier] you said you had no discussion about that, but clearly in this you did give a directive.

A: No, I did not. I indicated as I said in there...that the board of education is not involved, had nothing to do with that, and that her people should not proceed or not proceed on that basis, and that is what I said too. I did not give her a directive to tell them to countermand anything that the superintendent did. Rather I gave her the facts that the board did not cancel it, and I did not want them proceeding, or not proceeding under the auspices of the board of education having any directive whatsoever, but I did not give her, nor did I say in there that I gave her direction to cancel it.

(Cross Examination, Transcript of Hearing at 197-199, Appendix to Respondent's Brief at 246a-248a)

Thus, it is apparent that where respondent and the Commission actually differ is not in their material accounts of respondent's actions during the exchange in question, but in their views of whether such actions constituted a violation of the Board Member Code of Ethics. In this regard, the Commissioner finds the Commission's reasoning neither arbitrary and capricious nor contrary to law. *N.J.A.C.* 6A:4-4.1(a)

Notwithstanding respondent's attempts to rely on subtle distinctions and nuances in wording – as in denying that he gave Lucas "direct orders" to contact WEAA members in his presence or "expressly contradicted" the superintendent's directive to cancel the mock election – the Commissioner finds that any reasonable person could easily construe respondent's statements to Theresa Lucas as an implied directive to promptly contact fellow administrators and convey the message that the Board had not cancelled the mock election, contrary to what they might have been told – a message that could, under the circumstances, have at best done nothing but cause confusion and create a dilemma for principals uncertain as to how to proceed given the Interim Superintendent's earlier instructions. Moreover, it was respondent who raised the issue of the mock election – a matter wholly unrelated to his purpose for being in the building, which pertained to his private status as a successful Willingboro graduate and not to his Board office – both at the beginning and the end of his stay at the high school, first to provide "clarification" of the Board's role (or lack thereof) in its planning and cancellation and later to inquire whether his message had been conveyed to WEAA members. Clearly, respondent did, as found by the Commission, insert himself into the day-to-day operations of the school district, intervening in a situation which was the responsibility of the administration to address and

failing to support the chief school administrator in the performance of his duties.[9] Moreover, while respondent's actions may not, in fact, have resulted in a challenge to the validity of the annual school election, the Commission is certainly correct that they had the potential to do so – and thus to compromise the Board – since the "mixed message" they inherently conveyed could very well have led to at least some principals moving forward with the mock elections notwithstanding that such activity might have subjected the annual election to allegations of taint due to previously offered and advertised incentives.

In so holding, the Commissioner is not unmindful of respondent's contention that he was acting out of necessity to protect the Board from potential lawsuits and other consequences of what he perceived to be incorrect actions by the Interim Superintendent; nor is he unmindful of respondent's assertions that he is the target of self-interested complainants representing an adversarial faction on the Board and that the Commission's decision is tantamount to a declaration that Board members must "look the other way" in the face of administrative error or risk facing ethics charges. However, the Commissioner finds these arguments unpersuasive: Questionable motivation does not negate a complaint when its underlying facts are found proven by the Commission, nor did the happenstance that the Interim Superintendent was unreachable and the Business Administrator was unfamiliar with the situation give respondent license to overstep his role as a Board member and intervene directly in matters properly within the purview of the administration – in the process additionally failing to support school personnel in the performance of their duties. Moreover, in the situation with which he was confronted, private action by respondent was neither necessary nor appropriate,

[9] The Commissioner would further note that – whatever respondent's intentions – by suggesting that principals had a basis to disregard the directive of the chief school administrator, he additionally placed them in a difficult position in the performance of their own duties.

since, to whatever extent respondent perceived that Board-employee relationships might have been harmed by the misinformation he sought to correct, any misunderstanding could easily have been cleared up by the Board afterward, and any perceived improper actions by the Interim Superintendent could (and should) have been brought to the attention of the Board for due exercise of its powers of supervision and oversight and for any action it deemed necessary to address such objections as may have been raised by the organizers of the mock election.

Finally, having affirmed the Commission's finding of violation, the Commissioner is satisfied that the recommended penalty of reprimand is appropriate in this instance, where the Commission dismissed all other allegations against respondent and recommended its least severe penalty – after having taken into account that the violations it found all arose out of a single incident in which respondent acted out of a well-intentioned but misguided attempt to "straighten out misinformation" rather than any desire to contradict or confront the decisions of the Interim Superintendent. (Commission's Decision at 22-23)

Accordingly, for the reasons set forth therein and above, the decision of the School Ethics Commission finding respondent in violation of the School Ethics Act is affirmed and its recommendation as to penalty is adopted by the Commissioner. Consistent with such determination, respondent Ken Gordon is hereby reprimanded for having violated *N.J.S.A.* 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members.

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: 3/30/10

Date of Mailing: 3/30/10

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

TONY JOHN, MARTIN NOCK, CHRISTOPHER WALKER and EFE OSAGIE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**Docket No. C34-08**
KEN GORDON *WILLINGBORO BOARD OF EDUCATION BURLINGTON COUNTY*	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on October 21, 2008 by Tony John, Martin Nock, Christopher Walker and Efe Osagie alleging that the respondent, then a member of the Willingboro Board of Education ("Board"), violated the School Ethics Act. Specifically, the complainants allege that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members.[1]

The respondent filed an answer on November 13, 2008. The Commission invited the parties to attend its July 28, 2009 meeting for a hearing pursuant to N.J.A.C. 6A:28-6.9. By letter dated July 24, 2009, the Commission was notified that the respondent had obtained counsel, Thomas Abbate, Esq. Mr. Abbate requested an adjournment on behalf of the respondent. The matter was rescheduled for the Commission's meeting on August 25, 2009, at which time the parties appeared and the Commission heard testimony. The Commission tabled the matter, pending further discussion at its meeting on September 22, 2009. At the public portion of the Commission's meeting on September 22, 2009, the Commission voted to find that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members and further determined to recommend a penalty of reprimand.

SUMMARY OF THE RECORD

Complainants Tony John, Christopher Walker and Martin Nock appeared to present their case. The respondent, Ken Gordon also appeared, with counsel.

Mr. Edward Kern, the former Interim Superintendent for the Willingboro School District, testified for the complainants. Mr. Kern testified that the district had discussed having a mock election for its students on the date of the actual school board elections on April 15, 2008. The mock election would be sponsored by the district's PTOs/PTAs as well as the Willingboro

[1] On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed on October 21, 2008, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

Education Association (WEA). Mr. Kern explained that, initially, the mock election was viewed as a positive learning experience for the students, who would be accompanied by their parents to the polls. Thus, the mock election would be a civics lesson for students which could result in increased voter turnout.

However, as the event unfolded, Mr. Kern learned that incentives, like pizza parties and rewards, were being offered for students' attendance. He testified that flyers were sent by the WEA and PTOs. Mr. Kern did not want such flyers to be on district letterhead. He spoke with the "election committee" and was informed that these incentives were not appropriate and could taint the general school board election.[2] Mr. Kern explained that he was increasingly uncomfortable with holding the mock election for students.

Mr. Kern testified that there was an impromptu meeting held on Friday April 11, 2008; some board members were present and they discussed the mock election and the promotional activities. Mr. Kern testified that on April 15, 2008, he was scheduled to attend a county roundtable meeting. He called the principals in the district that morning and informed them that the mock election "was off." He stated that he specifically gave the directive to Mrs. Lucas, principal of Willingboro High School (WHS), not to have the mock election. However, he later received a call from Mrs. Lucas, who told him that the mock election was back on. Mr. Kern acknowledged that there was much confusion surrounding the cancellation of the mock election, but he maintains that it was within his discretion to hold the mock election or not, inasmuch as the event was scheduled to take place on school grounds.

Mr. Kern further acknowledged that the mock election cancellation became a "hot issue." He mentioned at a Board meeting that he was considering taking disciplinary action against Mrs. Lucas since he maintained it was not her place to counter a Superintendent's decision. According to Mr. Kern, Mrs. Lucas "took it upon herself to contact the other principals and counter his directive." Mr. Kern stated that Mrs. Lucas was never actually disciplined for the incident.

Mr. Kern verified that Exhibit C-1 was a memorandum from the Director of Human Resources stating that the matter would be turned over to Board counsel for investigation. Exhibit C-2 is the summary of the Board attorney's investigation, which incorporated documents prepared by Mr. Kern. Specifically, Exhibit C-3 is Mr. Kern's chronology of events; Exhibits C-4 and C-5 are letters sent by Mr. Kern to Mrs. Lucas on May 5, 2008 and May 6, 2008, respectively. Exhibit C-6 is an email addressed to Mr. Kern and "signed" by Mr. Gordon, which Mr. Kern stated that he received. Mr. Kern affirmed that he did not read the email from the respondent as a threat, although he stated it was "a strong statement by Gordon to back off" (*i.e.*, not take any disciplinary action against Lucas). Mr. Kern testified that the email did not affect his decision not to discipline Mrs. Lucas.

Mr. Kern confirmed that at the time of this incident, the Board was in the midst of negotiations with the [administrators'] union. Mr. Gordon was a Board member and chair of Negotiations Committee. Mrs. Lucas was the principal of the WHS and the President of the Willingboro Educational Administrators' Association (WEAA).

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[2] It is presumed that the witness was referring to the County Board of Elections.

On cross-examination, Mr. Kern acknowledged that the Board had never taken formal action with respect to the mock election. Nevertheless, the activity was to take place on District property. He testified that concerns first arose when he was approached in late March or early April about flyers that were circulating; however, he did not discuss concerns with the Board at a meeting. Mr. Kern testified that about two weeks before the scheduled mock election, he "let it be known that it was heading in wrong direction." However, he did not "pull the plug" until the election date.

Mr. Kern further testified on cross-examination that he believed on the morning of April 15, 2008, he contacted the Board president, but did not call Mr. Gordon. He stated that he spoke with Mrs. Lucas on the way to his meeting, around "8:00 ish" and told her that the activity was cancelled. He returned to the district about 1:00 or 1:30 p.m. Mr. Kern stated that on his way to the roundtable meeting, he received calls indicating that there was "activity" in the Levitt Middle School, notwithstanding that he "pulled the plug on the whole thing." Mr. Kern stated that the Superintendent has the authority to approve every activity in the District. He acknowledged that if there were PTO/PTA events on the school property that were "something routinely scheduled" he may not get involved.

Theresa Anne Lucas testified for the complainants. She was the principal of the WHS at the time that the mock election was scheduled to take place. Mrs. Lucas explained that April 15, 2008 was a scheduled Career Day in her school. That morning, she was in the cafeteria; someone came to get her and told her that Mr. Gordon was in the building. She went to her office to meet him. Mrs. Lucas described Mr. Gordon as "pretty animated." According to Mrs. Lucas, Mr. Gordon was annoyed and stated that "we continuously do things in Willingboro to take opportunities away from children." He spoke about the mock election as an activity to engage the students in voting.

According to Mrs. Lucas, Mr. Gordon informed her that the Interim Superintendent had directed everyone not to hold this activity. Lucas testified that Mr. Gordon was adamant that this was a PTA activity. He further explained that she, as union president, needed to contact her members and tell them that the mock election was not a Board initiative, but rather, a PTA initiative; therefore, the activity should not stop. In this connection, Mrs. Lucas clarified that cancellation of the election did not affect WHS, since it was not a polling station. Nevertheless, Lucas testified that she informed Mr. Gordon: "I will call my colleagues and relay the message." She then began making calls; she talked to some colleagues. Some said they would wait until they received some confirmation; Mrs. Lucas reiterated that she was "just relaying the message."

Mrs. Lucas testified that she was confused and felt she was being put "between a rock and a hard place." She stated that she had a conversation with Mr. Kern around 7:45 a.m. that day and he told her that although it does not affect your school, he was going to be calling the other principals to let them know that we are not going forward with the mock election. Mr. Gordon's "future position," according to Lucas, was pretty clear: "it was almost common knowledge that [Mr. Gordon] would be the next Board president" and she did not want "to tick him off." Lucas stated that Gordon urged her, as the WEAA president, to make the calls to the

other principals. She felt she was in a "damned if you do, damned if you don't" situation that was unsettling; she did not want to see her hard work "go down the tubes."

Later that day, at about 5:00 p.m., Mr. Kern approached her during a Middle States reception and asked, "Since when do you overturn my directive?" The question caught her by surprise. To this, she responded that she did not give anyone a directive contrary to his; rather, Mr. Gordon was there in her office and he made it clear that he needed the message to "get out" from her; she complied. According to Mrs. Lucas, Mr. Kern told her there could be some serious consequences; they would have to notify "the election board." Mrs. Lucas stated that she had no idea it was that serious. Mrs. Lucas felt that a Board member put her in a compromising position.

Mrs. Lucas identified Exhibit C-7 as a letter which she wrote to Mr. Kern on April 28, 2008 because she was concerned she could be subject to disciplinary action. Mrs. Lucas also identified Exhibit C-8 as a letter that she wrote to Mr. Kern on April 30, 2008. She testified that it was written a day after she had surgery. The letter recounts that she received a phone call in the morning from Gordon who stated that he was aware of her April 28th letter to Kern. Lucas stated that the letter had been given to her secretary to deliver. According to Lucas, Gordon said he would write a letter to Mr. Kern, but Lucas needed to "pull" the letter she had already written to him. Mrs. Lucas replied that she was home recovering from surgery. Gordon requested her email address. Thereafter, she received a draft email from Gordon addressed to Mr. Kern explaining what had happened (Exhibit C-6) Mrs. Lucas said she forwarded the email to the Board's attorney and to her attorney.

On cross-examination, Mrs. Lucas testified that although Mr. Gordon was Chair of the Negotiations Committee and she was the president of the WEAA, she was not participating regularly in negotiations because she was out on disability in December 2007 and returned for work on March 30, 2008. She worked through April 27, 2008, and then had a second surgery on April 28, 2008. Mrs. Lucas stated that Keith Ellerbe, the vice president of WEAA, was involved in the negotiations that year.

Mrs. Lucas denied that she made frequent calls to Mr. Gordon seeking advice. Instead, she said she returned his calls "and maybe on a couple occasions" called him to ask questions about a scheduled meeting. Most of these calls, Mrs. Lucas stated, were before December 2007; Mr. Ellerbe "picked up during the time she was out." Mrs. Lucas stated that while it was not "out of the ordinary" to talk with Mr. Gordon, it was out of the ordinary for Mr. Gordon to make such a request of her. She acknowledged that her letter of April 28th refers to interference from other Board members, not just Mr. Gordon.

Mrs. Lucas reiterated that when Mr. Gordon spoke with her on April 15th, he was annoyed that the mock election had been cancelled because it was not a Board initiative but a PTA initiative. Mrs. Lucas stated that to her knowledge it was not a Board initiative, "but when the schools are giving out flyers and the administrators need to make it work to move forward, it is questionable." She was confused about how to proceed. She restated that Mr. Gordon "was quite animated;" his voice was elevated at times. He appeared annoyed that there was a change, although he did not yell. He was in her office about 10-15 minutes. Mrs. Lucas conceded that

Mr. Gordon had a reason to be in the building that day as he was speaking at Career Day, but he did not have to be in her office. Career Day activities were taking place in the library, which is the opposite end of the building from her office. Moreover, Mrs. Lucas explained that the ROTC students were greeting visitors and directing them to the library, so it was unusual for the respondent to come to her office that day, especially since she was not there, but at the career fair in the library.

Mrs. Lucas acknowledged on cross-examination that she is no longer the principal of the high school. She stated that, subsequent to the events herein, she was asked by Interim Superintendent Dawson to take a central office position, which she declined. Nevertheless, Mrs. Lucas learned that her principal's position was posted on October 8, 2008. After that, however, she was told she was not being transferred; the District restructured mid July [2009]. Mrs. Lucas acknowledged that she sent a letter to her attorney on October 11, 2008 with a detailed chronology. She stated that she retained an attorney "for other reasons" and she did file a suit recently having nothing to do with this matter. She stated that under the new Superintendent, a number of administrators were called and asked to cooperate with a restructuring, and she consented to a transfer.

Former Board member Sarah Holley testified for the complainants. She was a Board member on April 15, 2008 running for reelection. Ms. Holley testified that she had hip replacement surgery on March 16, 2008; while recuperating at home, she received calls from employees and people in the community that efforts were underway to unseat her. She was told that students were promised that if parents came out, students would get pizza. According to Ms. Holley, this was put in place by sitting Board members Gordon, Bouyer and Bolden, as well as the PTA. Ms. Holley testified that she was not informed that there would be a mock election; she heard from the community that it was put in place so the Board could "turn over" and be replaced. Ms. Holley testified that this would give Gordon control of the Board. She stated that the mock election was not a Board function. After the election, she made a request under the Open Public Records Act and learned of the investigation relative to this matter, which took place after she was off the Board.

Complainant Anthony John testified that on May 21, 2008, the Board received a letter from Senator Diane Allen regarding a potential settlement with Alonzo Kittrels, the former Superintendent of the District against whom tenure charges had been filed and were pending. (Exhibit C-9). That letter was copied to all Board members. Mr. Gordon, at that time, was President of the Board. Gordon responded to Senator Allen on the same date and said that he would contact her office to set up a meeting. Mr. John emailed Mr. Gordon stating that the Senator could not be told anything that happened in executive session. Mr. Gordon agreed. (Exhibit C-10) Mr. Gordon met with Senator Allen. By letter dated May 28, 2008, Senator Allen sent follow-up correspondence to Mr. Gordon requesting additional information. (Exhibit C-11)[3] Mr. John testified that Mr. Gordon should not have told the Senator anything about the pending settlement.

[3] It was noted that the letter marked as Exhibit C-11 was not copied to the Board and was addressed solely to Mr. Gordon. Mr. Gordon's counsel did not object to the letter coming into evidence.

Thereafter, on July 3, 2008, an article appeared in the Burlington County Times which recounted an interview with Mr. Gordon. As to the statements made by Gordon in the article, Mr. John stated that he was pretty sure the Board did not discuss the cost of the Kittrels litigation, but even if they did, that information should not have been given to the reporter. Mr. Johns recalled that a member of the public had asked for an update on the Kittrels settlement and the Board attorney said that the Board would not be giving any statements about that. Mr. John stated that at this point in time, no details had been given to the public about the determination to settle the Kittrels matter versus actually going to trial. Yet, Gordon is quoted in the article as providing reasons why the Board should settle and states that the Board was leaning toward settlement because of cost and prior mistakes made. Mr. John stated that the decision to settle was made "soon afterward."

Complainant Christopher Walker testified that he also received a call from the reporter about this article. According to Mr. Walker, the reporter said she understood that we would not be giving a comment, but she had already spoken to Mr. Gordon who provided a comment. He stated that the total cost of the litigation had not been discussed, although "rumors were rampant about proposed settlement."

Complainant Nock testified that the Board, during this time, was still involved in collective bargaining negotiations. He testified that a $10 million loan had been given to the town and that Senator Allen was supportive of Willingboro receiving this money.

Respondent Ken Gordon testified that he was a Board member in Willingboro from 2006 to 2009. He stated that he initially ran for the Board upon the urging of community members who were concerned about the district; he shared their desire to make changes. He served as President in his final term, 2008-2009.

Mr. Gordon testified that it was his understanding that the purpose of the mock election was to encourage the community to get involved in the election. He stated that one of the Board members had attended a seminar and learned about a "Kids Vote" program; the Board member brought the idea back to Willingboro. The purpose of the mock election was to increase voter turnout. Mr. Gordon stated that it was important because, in the past, decisions were not being made by people who had children in the district. The district had a history of low voter turnout. According to Mr. Gordon, the mock election was not intended to favor any candidate or viewpoint. The teachers' union and the PTAs were proponents of the event.

Mr. Gordon stated that the mock election was not the subject of Board action. The Board member who brought the idea to Willingboro was the chairperson of the PTO/PTA committee. There were general discussions, but no formal action taken. According to Mr. Gordon, the mock election was run by the WEA and PTA. The Board did not typically approve or get involved with WEA or PTA events. Mr. Gordon stated that the mock election idea was initially proposed around January or February. He first became aware of concerns with the event when Sarah Holley submitted a letter to the Interim Superintendent that was copied to the Board. Gordon testified that Holley felt this event was a conspiracy to get her off the Board. Gordon affirmed that this was not the purpose based on what he knew; he had no knowledge that the mock election was designed to favor one candidate over the other.

Mr. Gordon testified that he did not learn of other concerns with the mock election until the night before the election. He heard from his wife, who was a PTA president at the time, that there were concerns about the incentives being offered to students. Gordon stated that, as a result of these concerns, according to his wife, the PTA was informed that no incentives were to be offered and all agreed to this requirement. Thus, it was Gordon's understanding that it was not an issue and they were moving forward with the mock election.

Mr. Gordon testified that on the morning of April 15, he received a call from a PTA president informing him that the mock election had been cancelled. The caller stated that it was her understanding that the mock election had been cancelled by the Board, and she wanted to know why. Gordon initially thought that the caller had been given the wrong information; however, subsequent calls from the PTA seemed to reflect the same story: that the Board cancelled the mock election. Gordon testified that the PTA was beginning to talk about action that could be taken. He then called Board member called Bolden, who was Chair of the PTO/PTA committee and asked if she knew it was cancelled; she did not. He called Board member Bouyer and asked the same question; she did not know anything. Mr. Gordon stated that he then called the Interim Superintendent to find out what was going on. Mr. Gordon said he called Mr. Kern's cell phone number three times. He did not get a return call until later that evening.

Mr. Gordon was invited to speak at the WHS's Career Day on April 15th. First, he stopped to see Mr. Kern in person and his secretary told him Mr. Kern was out for the day; Mr. Gordon asked the secretary to help him get in touch with Mr. Kern. The secretary tried to call Mr. Kern, but could not reach him. Mr. Gordon then stopped to see the Business Administrator, who was not aware of the cancellation of the mock election. Mr. Gordon did not ask the Business Administrator to overrule the Interim Superintendent or take any action. Mr. Gordon stated that he had never known the Superintendent to get involved with cancellation of PTA/PTO events.

Mr. Gordon testified that he then left the central building and was approached by two principals. They told him that they had been called by a number of parents and they were confused by the cancellation. Mr. Gordon stated that he told the principals that the Board did not cancel the event. When he went to the High School for Career Day, Mr. Gordon affirmed that he signed in and went to the main office to let Mrs. Lucas know he was in the building. He said that he asked to see Mrs. Lucas just to inform her he was in the building.

According to Mr. Gordon, he asked Mrs. Lucas if she was aware of the confusion surrounding the cancellation of the mock election. She said that she was. Mr. Gordon said he was concerned because the district was in the midst of negotiations, that things were going well and he did not want this to affect labor discussions. He informed her that the Board did not cancel the mock election. Gordon explained that because "her principals" stopped him in parking lot, he asked her to please call her members to let them know the cancellation did not come from the Board. He was there for about 5-10 minutes. Mr. Gordon testified that he did not insist that she call the principals; he did not issue a direct order; he asked her for reasons of clarity and negotiation goals. He did not ask her to tell her membership to proceed with the mock

election. He had been told that the Interim Superintendent attributed the cancellation to the Board and Mr. Gordon wanted to be clear that this was not the case. Mr. Gordon did not intend for Mrs. Lucas to take any action to contradict the Interim Superintendent's directive. He did not raise his voice; he stated it would be out of character for him to yell. Mr. Gordon stated that he and Mrs. Lucas were merely standing in her office talking. After this exchange, Mr. Gordon left Mrs. Lucas' office and was escorted to Career Day. Before exiting the building that day, Mr. Gordon returned to tell Mrs. Lucas that he was leaving and he asked her if she had spoken with her members; she said that she had.

Mr. Gordon testified that he felt that it was important that Mrs. Lucas know that the Board was trying to support the union. As the Chair of the Negotiations Committee, Mr. Gordon affirmed that he had frequent interactions with Mrs. Lucas as President of bargaining unit. He explained that although the actual negotiations occurred in a group setting, he nevertheless had a number of occasions to interact with Mrs. Lucas. Mr. Gordon further testified that since he was on the Board, Mrs. Lucas regularly sought him out. He estimated that in the months from September 2007 through December 2007, she called him about 35-40 times on matters not necessarily limited to collective bargaining issues. According to Mr. Gordon, he tried to coach Mrs. Lucas "into using the process," but she felt she was victimized.

Mr. Gordon affirmed that he believed that the way the announcement of cancellation was made, the Board would have to deal with the brunt of the discontent. In speaking to the PTA presidents, they believed it was illegal for the Interim Superintendent to bar a PTA event. According to Mr. Gordon, the Board's policy provides that the Business Administrator determines who can use the District's facilities. Mr. Gordon testified that he believed that the public needs to be accommodated and, with the Interim Superintendent out of the District that day, there was potential for legal conflict. According to Mr. Gordon, "we were in the line of fire based on our policies and the PTA was upset."

Mr. Gordon testified that after April 15, 2008, his relationship with Lucas changed. About a week later, he received a call from Mrs. Lucas who stated that Board members were telling her that he "had thrown her under the bus." Mr. Gordon staid he spoke with Mr. Kern on the evening of April 15, 2008 and "his demeanor very different from today [when he testified]." Mr. Gordon said that Mr. Kern apologized for what happened. Gordon said that Kern "appeared to have an axe to grind with Mrs. Lucas." According to Mr. Gordon, there were ongoing efforts to discipline Mrs. Lucas and Mr. Kern wanted her to be removed as a principal. Mr. Gordon stated that Mrs. Lucas's attorney had served the Board with intent to sue on harassment claims.

With respect to the Kittrels litigation, Mr. Gordon stated that there had been a budgetary shortfall. The initial tenure charges that were brought against Kittrels by the Board were "thrown out" because the Board had done improper things. Gordon stated that he was on the Board when the initial tenure charges were dismissed. The Board had to recertify the charges. According to Gordon, the Board questioned the potential of a settlement. Gordon stated that, "we did not think they would go for it but we floated it out there." This discussion, according to Gordon, took place about four months before the meeting with Senator Allen.

Mr. Gordon stated that prior to the meeting with Senator Allen, there was a verbal agreement to pursue a settlement. According to Gordon, the Board was told it was a binding agreement as long as it was approved by the Commissioner of Education. The State Monitor reported the proposed settlement to the Commissioner and they were awaiting the approval. When the Commissioner had more questions that needed to be answered, they "were in limbo" while waiting for approval. According to Gordon, the next step was to sign and execute the documents and it was a "done deal." The Board would approve the settlement, then the Commissioner would review it.

Mr. Gordon testified that people came to a Board meeting and asked about the letter from Senator Allen. According to Gordon, they were angry and upset about it. Gordon testified that in public session, he made the public aware that he would meet with Senator Allen. Before that public session, Gordon stated that he had not talked to anyone about it. Gordon said that the Board did not confirm or deny what Senator Allen stated but merely stated that the information "was out there."

Mr. Gordon testified that upon receiving the letter from Senator Allen, the Board talked about whether he should meet with her and what he should say. Mr. John was present at that meeting. Mr. Gordon stated that the majority of the Board believed that "we needed to meet with her and give her general information, not specifics." He said that the Board authorized his meeting with Senator Allen, although there was no formal vote. As the President of the Board, he would handle external communications. Additionally, Mr. Gordon testified that he conferred with the Board attorney about what he could say. He was told that he could meet with the Senator as long as he provided no specifics. He was also advised to discuss the matter with the State Monitor. The meeting was with Mr. Gordon, Senator Allen and her aide. Mr. Gordon said that he discussed the initial tenure charges that were brought by the Board and dismissed. Gordon testified that he did not provide any details about pending matters and specifics about what the Board would do. According to Mr. Gordon, Senator Allen was key in getting the $10 million loan for the district and it was his understanding that that Sarah Holley informed the Senator about a potential settlement.

After the meeting, Mr. Gordon received a confirming letter from Senator Allen (Exhibit C-11). Mr. Gordon testified he believed that the "mistakes" to which the Senator referred in her letter were those mistakes made in bringing the initial tenure charges against Kittrels, and she was not asking for information about pending legal matters. Mr. Gordon stated that it was not up to him to provide her with such information since she could have obtained it for herself.

Mr. Gordon testified that when the reporter for the Burlington County Times called him about a potential settlement, he asked if he could call her back. He then called the Board attorney and made him aware of the reporter's phone call. Mr. Gordon returned the reporter's call; she wanted a statement. Mr. Gordon does not dispute that he stated what was printed in the article on July 3, 2008. He stated that she quoted him accurately. He merely stated that the Board was bound to explore all possibilities and that legal bills associated with litigating the matter could result in a cost of $1 million. Mr. Gordon explained how he arrived at that figure. A member of the public once asked the Board in a public session how much it spent for litigation

on an annual basis; according to Mr. Gordon, the annual legal budget was $300,000. Thus, Gordon reasoned that if the case went on for three years, the costs could be $1 million.

On cross-examination, Mr. Gordon acknowledged that his sister was running for the Board in 2008 and was endorsed by the WEA. He had no way of knowing whether increased voter turnout would benefit her. He stated that he was not aware that the Board's policy with respect to usage of its facilities provided for final approval by the Superintendent. The mock election issues for the students were about Field Day and dress down days.

With respect to the email that Gordon sent to Kern (Exhibit C-6), Mr. Gordon stated that although the email indicates that he called Mr. Kern in his office on April 15th, he called him both on his cell phone and at his office. Gordon addressed the language that he used in the email to Kern. Specifically, the email states that he told Mrs. Lucas that "she was to instruct the principals...." To this, Gordon stated that the Board was not involved with the mock election and he did not give Mrs. Lucas a directive to countermand what the Superintendent said or did. Mr. Gordon felt it was necessary to clarify this with the principals because he did not want the principals "to feel that they were left out to dry." It was not his intent to speak on behalf of the entire Board. According to Mr. Gordon, Mrs. Lucas made no objection and she expressed no reservations to him. Gordon stated, "I believe as a board member I have a right to straighten out misinformation that could have been injurious to the board." Gordon insisted that he did not tell Mrs. Lucas to countermand the Interim Superintendent.

With respect to the letter from Senator Allen, Mr. Gordon stated that the majority of the Board agreed to the settlement and had given the "OK" to the attorneys; Senator Allen "heard" about it, but the board had never told the public.

Complainants' Exhibits

C-1	Memorandum from the Director of Human Resources to Kern; Complaint attachment A-1
C-2	Investigation Summary; Complaint attachment A-2
C-3	Kern's summary of events; Complaint attachment A-4
C-4	Kern letter to Lucas, May 5, 2008; Complaint attachment A-5
C-5	Kern letter to Lucas, May 6, 2008; Complaint attachment A-6
C-6	Email from Gordon to Kern; Complaint attachment 3
C-7	Lucas letter to Kern, April 28, 2008
C-8	Lucas letter to Kern, April 30, 2008
C-9	Senator Allen's Letter to Gordon, May 21, 2008
C-10	Emails regarding Senator Allen's request
C-11	Senator Allen's letter to Gordon, May 28, 2008
C-12	July 3, 2008 article in Burlington County Times

FINDINGS OF FACT

Both parties in their testimony referred to tenure charges that were brought against the former Superintendent, Alonzo Kittrels. However, neither party brought any related document to the record. Accordingly, the Commission informed the parties at the hearing on August 25, 2008 that, pursuant to N.J.A.C. 1:1-15.2, it would take official notice of the decisions issued relative to this litigation. Neither party objected. Thus, the Commission takes official notice of the following facts:

1. On November 28, 2005, the Willingboro Board of Education filed tenure charges against Alonzo Kittrels, then Superintendent of Schools. The Board voted to certify the charges to the Commissioner of Education on December 5, 2005. Thereafter, Mr. Kittrels filed suit in Superior Court alleging that the Board violated the Open Public Meetings Act at the November 25 and December 22, 2005 meetings. On May 11, 2007, Judge Sweeney entered an Order granting summary judgment to Kittrels. The Board of Education agreed to a voluntary dismissal of the tenure charges based on Judge Sweeney's Order. The agreement to dismiss the charges was approved by the Administrative Law Judge on November 14, 2007 and by the Commissioner of Education on December 24, 2007. In the Matter of the Tenure Hearing of Alonzo Kittrels, School District of the Township of Willingboro, Burlington County, OAL Dkt. No. EDU 00099-06, Agency Dkt. No. 387-12/05. ("Kittrels I")

2. The Board brought tenure charges against Kittrels a second time. On or about March 31, 2008, these charges were certified to the Commissioner of Education and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. An initial decision in the form of a settlement was issued by the ALJ on July 10, 2008 and referred to the Commissioner for final determination. A certification from Board Counsel therein states that on June 23, 2008 during Executive Session, the Board discussed the settlement agreement and approved the terms, contingent upon approval by the Commissioner of Education." By decision dated August 26, 2008, the Commissioner remanded the matter to the OAL for further proceedings finding that the proposed settlement did not meet the legal standard necessary for the settlement of tenure matters. In the Matter of the Tenure Hearing of Alonzo Kittrels, School District of the Township of Willingboro, Burlington County, OAL Dkt. No. EDU 2820-08, Agency Dkt. No. 102-4/08 ("Kittrels II")

3. The Commissioner approved the settlement in Kittrels II on May 27, 2009. In the Matter of the Tenure Hearing of Alonzo Kittrels, School District of the Township of Willingboro, Burlington County, OAL Dkt. No. EDU 8566-08, Agency Dkt. No. 102-4/08

The Commission was able to discern the following facts based on the testimony, pleadings and all documents submitted.

4. At all times relevant to this complaint, the complainants and the respondent were members of the Board.

5. The respondent was a Board member from 2006 through 2009. He was the President of the Board for the 2008-2009 term.

6. In the Spring of 2008, the District had been considering holding a mock election for students to be held on April 15, 2008. The purpose of the election was to increase voter turnout. The students would vote on student-related issues.

7. The mock election was sponsored by the PTO/PTA along with the WEA. Although Board members were aware of the mock election, the Board never took action to formally authorize the activity.

8. As election day approached, Interim Superintendent Kern became increasingly concerned about holding the mock election when he became aware that incentives were being offered to the students.

9. A meeting was held on April 11, 2008 to discuss the concerns with the mock election.

10. On the morning of April 15, 2008, Interim Superintendent Kern made the decision to cancel the mock election.

11. Mr. Kern attended a county superintendents' roundtable meeting on April 15, 2008.

12. Phone calls were made to all principals that morning to advise them that the mock election was cancelled.

13. Mrs. Teresa Ann Lucas, then principal of the Willingboro High School, received a call from Mr. Kern regarding cancellation of the mock election at approximately 8:00 a.m. on April 15, 2008.

14. Respondent Ken Gordon received calls at home that morning from PTO members who were questioning the cancellation. They believed that the Board of Education cancelled the event and they wanted to know why. Mr. Gordon called Board members Bolden and Bouyer to find out what they knew; they did not know anything about the cancellation that day.

15. Mr. Gordon tried to reach Mr. Kern by telephone that morning, but could not.

16. Mr. Gordon was scheduled to participate in the Career Day that was being held on April 15, 2008 at Willingboro High School.

17. Before going to the High School, Mr. Gordon stopped by the central office to see Mr. Kern, who was not in the building. Mr. Kern's secretary tried to call Mr. Kern, but could not reach him.

18. Mr. Gordon then stopped to see the Business Administrator, who was not aware of the cancellation of the mock election. Mr. Gordon did not ask the Business Administrator to overrule the Interim Superintendent or take any action.

19. Mr. Gordon left the central building and was approached by two principals who informed him that they had been called by a number of parents and they were confused by the cancellation. Mr. Gordon told the principals that the Board did not cancel the event.

20. Mr. Gordon went to the High School for Career Day; he signed in and went to the main office. He asked to see Mrs. Lucas.

21. At the time, Mrs. Lucas was the President of the WEAA and Mr. Gordon was the Chair of the Negotiations Committee. The Board was involved in negotiations with the administrators' bargaining unit.

22. Mr. Gordon was upset about the cancellation; he felt that it was important that Mrs. Lucas know that the Board was trying to support the union. Mr. Gordon informed Mrs. Lucas that the Board did not cancel the mock election.

23. Mr. Gordon asked Mrs. Lucas to call the other principals to let them know the cancellation did not come from the Board and, therefore, they were not to stand in the way of the event. He was there for about 5-10 minutes. After this exchange, Mr. Gordon left Mrs. Lucas' office and was escorted to Career Day. Before exiting the building that day, Mr. Gordon returned to tell Lucas that he was leaving and he asked her if she had spoken with her members; she said that she had.

24. The Levitt Middle School conducted a mock election. (Exhibit C-3)

25. At a Board meeting on April 21, 2008, Mr. Kern mentioned the possibility of disciplining Mrs. Lucas.

26. By letter dated April 28, 2008, Mrs. Lucas wrote to Mr. Kern regarding his statements at the public meeting. Mrs. Lucas stated therein stated, in pertinent part:

> As we discussed on Tuesday, April 15, 2008, I was given a clear directive from Ken Gordon, Board President, as WEAA President, to contact WEAA members.[4]
>
> The message clearly stated that the mock election was not a Board Function, but a PTA Activity. Therefore, we had no involvement should the activity take place. Please note that when you contacted me at 8:30 a.m. that morning you only indicated that you would be calling principals to inform them that the Board would not be holding mock elections.

[4] Mr. Gordon was not the Board president at this time. Testimony from Mrs. Lucas, as set forth above, indicates that she was aware of that fact.

> At no point did you indicate that this was a directive for PTA or WEA not to hold mock elections. More importantly, principals received no written notification, nor did they receive information that the event would be cancelled prior to Election Day." (Exhibit C-7)

27. On April 29, 2008, Mr. Gordon called Mrs. Lucas. Thereafter, on the same date, Mr. Gordon forwarded to Mrs. Lucas a draft of an email addressed to Mr. Kern. Mr. Kern received the email, although it is not clear when he received it. Addressing the events of April 15, 2008, Mr. Gordon stated, in pertinent part:

> I indicated to Mrs. Lucas that she should contact the Principals, as the President of the WEAA and inform them that the Mock Election was not a Board of Education Function. I further indicated that it was unprecedented for a PTA function to be canceled by the Superintendent. Therefore, she was to instruct them not to interfere or stand in the way of said event.
>
> As the presumptive Board President, clearly this placed Mrs. Lucas in an awkward position. However, this position was no more awkward than the position in which the other Principals were placed when they were asked to cancel a non-Board of Education function sponsored by the PTA. As I indicated to you in person, the organizers of the event were well aware of the need to ensure incentives were not provided. When a report came to you indicating that incentives were promised, it should have been dealt with on a case by case basis and not by canceling the entire event.
>
> Mr. Kern, the bottom line is that many of us responded in a manner which, if we could do it all over again, we would likely do differently. If we are to mete out discipline or counsel those involved that did not respond in a matter [sic] you or I would have liked, as the leaders of this School District, then the line would be quite long. Therefore, it is unfair to single out Mrs. Lucas and counsel her. Further, it would be inadvisable to mete out discipline in any form to the President of the Union, who was advising the unit members on direction given from the presumptive Board president.
>
> Mr. Kern, again, this was a learning situation for everyone involved. As I would not condone Board Members to take action against you for your handling of the situation, I will not condone any action against Mrs. Lucas. Any action towards or against her would be unwarranted and unfair. The course of action we should all take is to reflect, learn and move forward. It is my sincere

desire that this is the course of action you will choose in this case. (Exhibit C-6)

28. By letter dated April 30, 2008, Mrs. Lucas wrote to Mr. Kern stating that she had received a call from Mr. Gordon on April 29, 2009. Mrs. Lucas states in the letter:

> At that time he stated that I should contact someone to have them pull the letter dated April 28, 2008 that I had addressed to you, the Interim Superintendent; and all related copies. He further stated that I should give him an opportunity to forward his letter to you on my behalf indicating that you should refrain from any disciplinary actions toward me in regards to the mock elections. Subsequently, the Board President emailed a copy of his letter to my address requesting that I review its' content and respond with comments. (Exhibit C-8)

29. By letter dated May 5, 2008, Mr. Kern wrote to Mrs. Lucas responding to her letter of April 28, 2008. Mr. Kern stated, in relevant part:

> You stated in your letter that Mr. Gordon was the Board President. This is incorrect. The phone calls occurred when Rita Owens was Board President and Mr. Gordon was a Board member. In either situation, neither a Board Member nor a Board President can give a directive to a staff member.

Mr. Kern therein reminded Mrs. Lucas of the line of authority in the District and added:

> The message I relayed to all Principals was that the 'mock election' would be cancelled. Again, it is irrelevant who or what group sponsored the event. This call was made by me and my Administrative Assistant to all Principals on the morning of and prior to the Elections taking place. A written memo was sent via e-mail on April 15, 2008 to all Principals. (Exhibit C-4)

30. By letter dated May 6, 2008, Mr. Kern wrote to Mrs. Lucas responding to her letter of April 30, 2008. (Exhibit C-5)

31. By letter or email dated May 21, 2008, Senator Diane Allen wrote to Mr. Gordon, as the President of the Board. Senator Allen's letter stated, in full:

> I have heard that the Willingboro School District is considering giving Willingboro Superintendent Alonzo Kittrels a lump sum bonus to buy out his contract. I understand his contract ends on June 30, 2008 so I am confused about the need to take this action. I feel very strongly that this is not a good way to spend the district funds, funds that I helped secure to get the District out of a terrible

financial situation brought about by a number of people, possibly including Mr. Kittrels.

I would like to meet with you prior to you taking any action on this issue. Please contact my office with your availability as soon as possible. (Exhibit C-9)

The letter was copied to all Board members.

32. Mr. Gordon responded to the Senator's letter indicating that he would contact her "first thing tomorrow morning (Thursday May 22) to arrange a meeting whereby, to the extent possible, I can clarify and provide information into the situation, as well as straighten out the misinformation currently circulating through the community." (Exhibit C-10)

33. Complainant Tony John wrote in an email to Mr. Gordon: "While I understand Senator Allen feels she should know what is going on with the Kittrels issue, I don't think the Willingboro Board of Education should give her anything but a 'no comment.' Everything discussed so far is supposed to be confidential and unless there is a leak on the board, it doesn't matter what is out there. There will always be rumors and misinformation...." (Exhibit C-10)

34. Mr. Gordon responded to Mr. John's email, agreeing with his assessment. He stated, "However, I will give her the respect of telling her 'no comment' and 'we cannot discuss executive session material' in person." Gordon added, "Again, I am in complete agreement that it is paramount we not breach Executive Session confidentiality to anyone, including our Honorable Senator. You have my commitment that this will not occur from the Vice President or me." (Exhibit C-10)

35. Prior to meeting with the Senator, Mr. Gordon discussed with both the Board attorney and the State Monitor what information could be shared with her.

36. Mr. Gordon met with the Senator and her aide on May 28, 2008.

37. By letter dated May 28, 2008, Senator Allen wrote to Mr. Gordon as a "follow-up" to their meeting. Senator Allen stated, in relevant part: "You will recall that at the May 28, 2008 meeting, you indicated that you felt you had to settle with Mr. Kittrels as a result of mistakes that were made by various attorneys and Board members. You explained that a lawsuit could result in substantially more than a settlement." The Senator therein requested that Mr. Gordon "forward the information pertaining to the mistakes that was previously requested to my office as soon as possible." (Exhibit C-11)

38. On July 3, 2008, the Burlington County Times published an article entitled, " W'boro board eying settlement with Kittrels." The reporter contacted Mr. Gordon for comment. He is therein quoted as saying, "What we are looking at now is, is there a way for us to settle all the (legal) cases across the board –the ones he has filed against us and the ones we filed against him ---that allows us to move on as a district and to allow the taxpayers

to stop spending good money on the bad." According to the article, which Mr. Gordon did not deny was an accurate representation of his statement, the charges pending in the Kittrels litigation could result in two years of hearing and legal bills costing the district $1 million. (Exhibit C-12)

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29b, the complainants bear the burden of factually proving any violations of the Code of Ethics for School Board Members. The complainant asserts that the respondent's conduct violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members.

Count One:

The complainants allege that on April 15, 2008, the respondent instructed the principal to ignore a decision by the Interim Superintendent not to hold PTA/WEA sponsored mock elections. The complainants contend that the respondent told the principal to contact each of the district's principals and inform them that the mock election could proceed. (Complaint at Count 1, paragraph 1) The complainants assert this was a violation of N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j). N.J.S.A. 18A:12-24.1(c) states:

> 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.

The evidence on this record shows that the Board never took action to formally support or authorize the mock election. The complainants have not demonstrated that the respondent's actions, as set forth in the Findings of Fact 15-23 were "board action" so as to implicate N.J.S.A. 18A:12-24.1(c). Accordingly, the Commission finds that the complainants have not established that the respondent violated N.J.S.A. 18A:12-24.1(c).

The Commission next considers whether Mr. Gordon violated N.J.S.A. 18A:12-24.1(d), which states:

> 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.

In order to establish a violation of N.J.S.A. 18A:12-24.1(d), the complainants must show that the respondent "administered" the schools, contrary to his duty as a board member. To administer the schools means that a board member 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. N.J.A.C. 6A:28-7.1.

Here, the Commission finds that Mr. Gordon improperly administered the schools in three ways: (1) by directing Mrs. Lucas, a school administrator, to contact the other principals and tell them that the mock election was not a Board event; (2) by directing Mrs. Lucas to tell

the principals not to stand in the way of the mock election (Exhibit C-6), notwithstanding that the Interim Superintendent had already informed the principals that the mock election was cancelled; and (3) by insisting that the Interim Superintendent refrain from disciplining Mrs. Lucas (Exhibit C-6).

With respect to Mr. Gordon's directives to Mrs. Lucas, the Commission finds his writing to be most persuasive:

> I indicated to Mrs. Lucas that she should contact the Principals, as the President of the WEAA and inform them that the Mock Election was not a Board of Education Function. I further indicated that it was unprecedented for a PTA function to be canceled by the Superintendent. **Therefore, she was to instruct them not to interfere or stand in the way of said event.**
>
> As the presumptive Board President, clearly this placed Mrs. Lucas in an awkward position. However, this position was no more awkward than the position in which the other Principals were placed when they were asked to cancel a non-Board of Education function sponsored by the PTA. As I indicated to you in person, the organizers of the event were well aware of the need to ensure incentives were not provided. **When a report came to you indicating that incentives were promised, it should have been dealt with on a case by case basis and not by canceling the entire event.**
>
> Mr. Kern, the bottom line is that many of us responded in a manner which, if we could do it all over again, we would likely do differently. **If we are to mete out discipline or counsel those involved that did not respond in a matter [sic] you or I would have liked, as the leaders of this School District, then the line would be quite long. Therefore, it is unfair to single out Mrs. Lucas and counsel her. Further, it would be inadvisable to mete out discipline in any form to the President of the Union, who was advising the unit members on direction given from the presumptive Board president.**
>
> Mr. Kern, again, this was a learning situation for everyone involved. As I would not condone Board Members to take action against you for your handling of the situation, **I will not condone any action against Mrs. Lucas. Any action towards or against her would be unwarranted and unfair.** The course of action we should all take is to reflect, learn and move forward. It is my sincere desire that this is the course of action you will choose in this case. (Exhibit C-6, emphasis added)

The Commission finds that Mr. Gordon took it upon himself to intervene in a situation which was the responsibility of the Interim Superintendent. As Mr. Kern noted in his letter to Mrs. Lucas (Exhibit C-4), it is irrelevant who or what organization sponsored the mock election. The activity was to take place on school grounds and the Interim Superintendent had the right to cancel the mock election if he felt uncomfortable with the activity.[5] When the mock election was canceled by the Interim Superintendent, no matter how confusing the circumstances may have been, it was not Mr. Gordon's place to remedy the confusion or insert himself into the situation. The fact that Mr. Kern was out of the district for a portion of the day on April 15, 2008 is of no moment. Whatever uncertainty ensued as a result of the last-minute cancellation was Mr. Kern's problem to address. Moreover, the decision to discipline an employee is made by the administration, not a Board member. Accordingly, the Commission finds that the complainants have demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(d).

The complainants next contend 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.

"Private action" means any action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities of the member. N.J.A.C. 6A:28-7.1.[6] For the reasons set forth above, the Commission finds that the respondent took private action: (1) by directing Mrs. Lucas, a school administrator, to contact the other principals and tell them that the mock election was not a Board event; and (2) by directing Mrs. Lucas to tell the principals not to stand in the way of the mock election (Exhibit C-6), notwithstanding that the Interim Superintendent had already informed the principals that the mock election was cancelled. In this connection, the Commission finds that the respondent's explanation of his reasons for seeking out Mrs. Lucas (*i.e.*, to let her know that he was in the building) were not persuasive, particularly in light of his repeated statement of concern that he needed to address the confusion that ensued following the cancellation. Indeed, that was his reason for talking to Mrs. Lucas on April 15, 2008.

Further, it is not necessary that the Commission find that such action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it may have compromised the Board. The Commission finds that it was. Specifically, the respondent's private action on April 15, 2008, as set forth above, resulted in the principals receiving mixed messages about the mock election. Mr. Kern's testimony fairly established that that incentives that had already been offered and advertised might have tainted the school board election that was being held on the same date. To the extent any mock elections were held on that date, the

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[5] To the extent the respondent asserted that the Board's policy does not allow for such discretion, it is noted that the Commission does not have jurisdiction to consider allegations of violations of local Board policy.

[6] It is noted, however, that in Marc Sovelove v. Paul Breda, Mine Hill Twp. Bd. of Ed., C49-05 (September 26, 2006), the Commission found that a Board member's action cannot be both board action *and* private action. Conversely, if a board member's action is found to be private action it cannot constitute board action.

Board may have been compromised. Accordingly, the Commission finds that the complainants have established that the respondent violated N.J.S.A. 18A:12-24.1(e).

Recently, in the matter entitled Dericks et. al. v. Schiavoni, Sparta Board of Education, C41-07, the Commission found that when the then-Board President rushed to submit a letter to the editor in response to an article that he believed was injurious to the Board without first obtaining the Board's consent, he failed to recognize that the authority to address any perceived problems as a result of the first article rested with the Board. Because the Board President's letter to the editor clearly addressed Board business and was intended to speak for the Board of Education, the Commission found that there was a reasonable likelihood that the public would perceive this letter to be an official statement of the Board's position. Thus, the Commission found, and the Commissioner of Education affirmed, that the Board President's private action could have compromised the Board if, indeed, the Board did not subscribe, as whole, to the statements he made in the letter to the editor, particular since these statements concerned the administration of the schools. Jennifer Dericks et al., v. Michael Schiavoni, Sparta Township Board of Education, Sussex County, C41-07 (February 24, 2009), Commissioner of Education Decision No. 260-09SEC, decided August 18, 2009.

The complainants next contend that the respondent violated N.J.S.A. 18A:12-24.1(i), which provides:

> I will support and protect school personnel in proper performance of their duties.

The Commission herein finds that the Interim Superintendent was acting within the proper performance of his duty as the chief school administrator when, on April 15, 2008, he cancelled the mock election. To the extent that the respondent nevertheless directed Mrs. Lucas to contact the other principals and tell them that the mock election was not a Board event, and further instruct them not to stand in the way of the mock election (Exhibit C-6), notwithstanding that the Interim Superintendent had already informed the principals that the mock election was cancelled, the respondent failed to support the Interim Superintendent in the proper performance of his duties. Accordingly, the Commission finds that the complainants have established that the respondent failed to support and protect school personnel in the proper performance of their duties, in violation of N.J.S.A. 18A:12-24.1(i).

The Commission next considers whether Mr. Gordon violated N.J.S.A. 18A:12-24.1(j), which states:

> I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

As used in this provision, "complaint" means a concern, issue or dissatisfaction that a member of the public or a member of the school personnel has brought to the attention of a member of the district board of education. N.J.A.C. 6A:28-7.1. On this record, the Commission finds that the complainants did not establish that the respondent was acting on a "complaint," but, rather, that

he was acting to straighten out what he believed to be misinformation about the cancellation of the mock election. Accordingly, the Commission finds that the complainants have not established that the respondent violated N.J.S.A. 18A:12-24.1(j).

Count Two

In the second count, the complainants allege that the respondent met with Senator Diane Allen and made statements about topics discussed by the Board in executive session concerning the litigation which the Board was involved in with its prior superintendent, Alonzo Kitrels. (Complaint at Count 2) The complainants assert that, "By Mr. Gordon disclosing his own interpretation of what was discussed at executive session meetings whether factual or not put the Board at a disadvantage concerning the Kittrels litigation." (Complaint at Count 2, paragraph 8). The complainants assert that these actions constitute a violation of N.J.S.A. 18A:12-24.1(e) and (g).

In order to establish a violation of N.J.S.A. 18A:12-24.1(e), as set forth above, the complainants must demonstrate that the respondent failed to recognize that authority rests with the board of education and made personal promises or took private action that was of such a nature that it could have compromised the board. Based on the factual findings, the respondent met with Senator Allen with both the knowledge and the consent of the Board. Thus, the Commission cannot find that, in so doing, that Mr. Gordon took private action or failed to recognize that authority rests with the board of education.

Further, the complainants assert that Mr. Gordon violated N.J.S.A. 18A:12-24.1(g) which states:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.[7]

None of the complainants attended the meeting with Senator Allen. This charge rests solely on the Senator's letter dated May 28, 2008 which refers to "mistakes that were made by various attorneys and Board members." (C-11) The respondent testified that he believed that the Senator's letter referred to the Kittrels I litigation, not the Kittrels II litigation and the complainants did not offer any proofs to the contrary. Indeed, by May 2008, the facts associated with the Kittrels I matter, including the mistakes that were made in bringing the original tenure charges, were a matter of public record. (See, Factual Finding #1) Accordingly, the Commission finds that the complainants failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e) or (g) in connection with Count Two.

[7] Complainants do not appear to allege that the respondent violated the "inaccurate information" provision of the statute, so the Commission does not address this portion of N.J.S.A. 18A:12-24.1(g).

Count Three

In the third count, the complainants allege that in a July 3, 2008 newspaper article in the Burlington County Times, the respondent commented on current litigation offering "his interpretation of information that might or might not have been discussed in executive session." (Complaint at Count 3, paragraph 13) The complainants assert that this action constituted a violation of N.J.S.A. 18A:12-24.1(e) and (g).

As noted, in order to establish a violation of N.J.S.A. 18A:12-24.1(e), the complainants must demonstrate that the respondent failed to recognize that authority rests with the board of education and made personal promises or took private action that was of such a nature that it could have compromised the board. In this connection, the respondent testified that he was the Board President at the time and he was authorized to speak to the press. He also stated that he conferred with the Board attorney before speaking to the reporter. Thus, the Commission does not find that, in this instance, the complainants established that the respondent took "private action" in speaking with the reporter.

With respect to the alleged violation of N.J.S.A. 18A:12-24.1(g), as set forth above, the complainants seem to argue that Mr. Gordon: 1) released confidential information pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools; and 2) provided inaccurate information with his statement to the reporter.

On this count, the Commission finds that the complainants failed to establish what information regarding the Kittrels II litigation remained confidential as of July 3, 2008. Indeed, Senator Allen's letter of May 21, 2008 started with: "I have heard that the Willingboro School District is considering giving Willingboro Superintendent Alonzo Kittrels a lump sum bonus to buy out his contract." (Exhibit C-11) Complainant Walker stated in his testimony that "rumors were rampant about a proposed settlement." As to the alleged inaccuracy of the statement made by Gordon about the potential costs of litigation, Mr. Gordon testified that he arrived at the $1 million figure based on a question that a member of the public once asked the Board in a public session how much it budgeted for litigation on an annual basis. The complainants offer no persuasive testimony or documentary evidence to the contrary, as is their burden. Accordingly, the Commission finds that the complainants have failed to prove that the respondent violated N.J.S.A. 18A:12-24.1(e) or (g) in connection with Count Three.

DECISION

The Commission finds that respondent Ken Gordon violated N.J.S.A. 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members and the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(c), (g) and (j).

PENALTY

The Commission recommends that the respondent be reprimanded. Initially, it is noted that the respondent no longer serves as a Board member. The Commission further notes that the

violations found herein evolved from a single date, notwithstanding that Mr. Gordon's own writing on April 29, 2008 summarizing such events, in fact, contributed to the findings of violation. On balance, the Commission is persuaded by the documentary and testimonial evidence on this record that the respondent's actions on April 15, 2008 were motivated by his misguided attempt to "straighten out misinformation" (see Gordon's testimony at page 10), rather any desire to contradict or confront the decisions of the Interim Superintendent. Nevertheless, in so doing, he undoubtedly overstepped his role as a Board member, which cannot be overlooked or excused by the Commission.[8]

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.

Robert Bender/jb
Robert Bender
Chairperson

Mailing Date: October 28, 2009

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[8] Contrast, the Board member's actions in Jennifer Dericks et al., v. Michael Schiavoni, Sparta Township Board of Education, Sussex County, C45-07 (April 28, 2009), Commissioner of Education Decision No. 294-09SEC, decided September 15, 2009, where, on appeal, the Commissioner agreed that censure was an appropriate penalty for a former Board member found to be in violation of N.J.S.A. 18A:12-24.1(c) and (d). The Commissioner therein noted that the Board member's actions evidenced far more than a disagreement with the Superintendent and, instead, "are tantamount to a willful, full-scale usurpation of the role and responsibilities of the district administration." Dericks at slip. op. page 6.

Resolution Adopting Decision – C34-08

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 from its hearing on August 25, 2009; and

Whereas, at it meeting of September 22, 2009, the Commission found that the respondent, Ken Gordon, violated N.J.S.A. 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members and the Commission dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(c), (g) and (j); and

Whereas, at its meeting on October 27, 2009 agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on October 27, 2009.

Joanne Boyle, Executive Director

105-10E

OAL DKT. NO. EDU 807-10
AGENCY DKT. NO. 54-3/10

L.W., on behalf of minor child, C.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter, the audio recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In so doing, however, the Commissioner modifies the ALJ's analysis as set forth below.

Initially, contrary to the conclusion of the ALJ, the Commissioner finds that petitioner *has* met the threshold criterion of irreparable harm. The Commissioner so holds notwithstanding that participation in extracurricular activities such as the Spanish Exchange program is a privilege rather than a right, since the opportunity to participate in these activities cannot be regained once lost, and were the Commissioner to permit emergent applications to be dismissed for failure to demonstrate irreparable harm on the grounds here relied upon by the

Board and set forth in the OAL order, school district actions in matters of this type would be effectively insulated from any meaningful review on appeal.[1]

However, as properly recognized by the ALJ, applicants seeking extraordinary relief must also demonstrate that the legal right underlying their claim is settled, that they have a likelihood of success on the merits of their underlying appeal and that the balance of interests and equities under the circumstances rests in their favor. In the Commissioner's view, it is here that petitioner's application fails.

With respect to applicable law, it is – as the ALJ has stated – well settled that students do not have an absolute entitlement to participate in extracurricular activities, and that discretionary actions of a local district board of education are entitled to a presumption of correctness and may not be disturbed on appeal unless they are shown to have been unlawful, arbitrary and unreasonable or contrary to district policy. Moreover, petitioner cannot be found to

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[1] The Commissioner is fully cognizant of the well-established principle that a prohibition from extracurricular activities does not, in and of itself, rise to the level of irreparable harm necessary 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 activity 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. The Commissioner has consistently recognized this distinction in more recent rulings on emergent applications seeking restoration of privilege; see, for example, *S.L., on behalf of minor child, D.L. v. Board of Education of the Township of Verona, Essex County,* decided by the Commissioner September 7, 2007; *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; *M.R., on behalf of minor child, J.R. v. Board of Education of the Town of Kearny, Hudson County*, decided by the Commissioner May 30, 2008; *Samantha Walsh v. Board of Education of the Monmouth Regional High School District, Monmouth County*, decided by the Commissioner June 20, 2008; *M.L., on behalf of minor son v. Board of Education of the Township of Ewing, Mercer County*, decided by the Commissioner June 15, 2009; *M.N., on behalf of minor child, R.N., v. State-Operated School District of the City of Newark, Essex County*, decided by the Commissioner June 16, 2009; *Michael Buonasorte, Jr. v. Board of Education of the Mainland Regional High School District, Atlantic County*, decided by the Commissioner June 19, 2009; *David Doll v. Board of Education of the Borough of Pitman, Gloucester County,* decided by the Commissioner June 22, 2009; *Steven E. Tomlin, Jr. and Diane Hogan v. Board of Education of the Lower Cape May Regional School District, Cape May County*, decided by the Commissioner June 22, 2009; *Robert Nabel v. Board of Education of the Township of Hazlet*, decided by the Commissioner June 24, 2009; *William Nash v. Board of Education of the Town of Kearny, Hudson County*, decided by the Commissioner March 23, 2010.

clearly prevail on the balancing of equities, since – although petitioner certainly has a valid interest in ensuring that her child, notwithstanding his admitted infraction, is not unfairly deprived of a unique opportunity for educational and personal enrichment, enhancement of college applications, and furtherance of career interests – the Board of Education has, at the very least, an equally significant interest in maintaining student discipline, enforcing school rules, and dissuading students from participation in illegal activities and consumption of alcohol.

The success of petitioner's application, then, must rest on her ability to demonstrate that she is likely to prevail on the merits of her claim when settled law is applied to the operative facts. Here, the Commissioner agrees with the ALJ that the requisite standard has not been met, but substantially for reasons other than those expressed in the OAL order (at 9-11).

On review of the record of this matter, the Commissioner finds it evident – regardless of the parties' (and hence the ALJ's) focus on the district's general substance abuse and discipline policies and the written parental agreement governing Spanish Exchange student conduct while traveling abroad – that students participating in the Spanish Exchange program were held to additional standards and consequences unique to that activity, and that it was by virtue of these standards and consequences that C.G. came to be disciplined; no other conclusion is possible in light of Principal Daher's November 16, 2009 letter to petitioner, his March 23, 2010 affidavit setting forth his actions once he was advised of what had allegedly transpired on October 31, 2009, the particular sanction imposed on C.G., and limitation of the school's post-party investigation to Spanish Exchange students, notwithstanding that there were undisputedly other students present who were fully subject to the same general district policies and prohibitions under which the Board later claimed to have disciplined C.G.[2] Consequently,

[2] In this regard, see *F.B. and M.B., on behalf of minor children, J.B. and L.B. v. Board of Education of the Township of Moorestown, Burlington County*, decided by the Commissioner February 15, 2000, requiring that similarly situated students be treated in a similar fashion.

the Commissioner finds central to determination of the merits of this matter the Board's representation that, notwithstanding the absence of any writing to this effect, students participating in the Spanish Exchange program (and their parents) were clearly told, and fully understood, that violation of specified standards of behavior at any time during the course of the program – not merely on the culminating trip – would result in loss of trip participation.

That representation, however, is vigorously disputed between the parties. The initial (March 23, 2010) affidavit of program advisor Kristen Kincaid generally attests (at ¶ 9) that she clearly explained the prohibition against alcohol use and its consequences and that students clearly understood that such prohibition was a year-long commitment, but does not state how or when this was accomplished, leaving to inference that it must have occurred through a series of meetings – described in the preceding paragraph (¶ 8) – held for purposes of reviewing procedures, expectations and conditions for program participation, and for obtaining student and parent signatures on the written agreement referenced above. Petitioner and C.G. responded – in affidavits submitted at the invitation of the Department of Education in light of counsel's statement to the ALJ at the close of the OAL hearing that petitioner was not conceding the statements in Ms. Kincaid's affidavit – with categorical assertions that no such prohibition was presented at the March 18, 2009 meeting they attended, or at any other time to their knowledge, and that the agreement they signed pertained on its face to students' conduct while on the actual trip. In a further affidavit submitted in response to those of petitioner and C.G., Ms. Kincaid amplified her prior statements and, equally categorically, denied each of petitioner's and C.G.'s assertions. As a result, no findings on this point can ensue in the absence of a plenary hearing, and – it being well established (*Crowe, supra*) that extraordinary remedy cannot be granted where material facts are in dispute – no likelihood of success on the merits can be found.

In so holding, the Commissioner is not unaware that the circumstances of this matter may unfortunately have led to the punishment of a student who told the truth about his alcohol consumption while fellow program members possibly escaped similar consequences through untruthful denials. However, the Commissioner cannot grant relief where petitioner is unable to demonstrate a likelihood that the Board will be found to have acted arbitrarily, unreasonably or unlawfully in concluding – once it had knowledge of C.G.'s undisputed infraction and was satisfied that participants in the exchange program were informed of the prohibition against alcohol consumption and its consequences[3] – that it could not meet its own obligation to maintain discipline and discourage substance abuse and unlawful activity without requiring C.G. to suffer the consequences of his behavior.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons set forth therein as modified above. This matter shall proceed to hearing on the merits as the ALJ and parties deem appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 3-30-10

Date of ~~Mailing~~: 3-30-10 Mailed 3|31|10

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[3] The Commissioner is aware of petitioner's objection to the manner in which the Board hearing was conducted, but observes that the parties' factual dispute regarding notice to participants would surely have remained even if petitioner and her counsel had been allowed to hear and question school officials during their presentation to the Board.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF
OAL DKT. NO. EDU 0807-10
AGENCY DKT. NO. 3/19/10

L.W., ON BEHALF OF MINOR CHILD C.G.,
Petitioners,
v.
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Kevin H. Main, Esq., for petitioners (Spadaccini Main, LLC, attorneys)

Carl Tanksley, Esq., for respondent (Parker McCay, attorneys)

Record Closed: March 24, 2010 Decided: March 25, 2010

BEFORE **EDWARD J. DELANOY, JR.,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, L.W. o/b/o minor child C.G., filed an application for emergent relief with the New Jersey Department of Education, Bureau of Controversies and Disputes. The application requested that C.G. be permitted to attend the Hopewell Valley Central

High School ("HVCHS") spring trip to Spain leaving on April 1, 2010. Respondent Hopewell Valley Regional Board of Education ("Board" or "HVRBOE") denied C.G. permission to attend the spring trip for behavior it deemed as not adhering to the behavioral expectations for students participating in the program. At issue is the propriety of the discipline imposed by HVRBOE, given the behavior of C.G.

The case was filed at the Office of Administrative Law (OAL) on March 22, 2010, for a hearing on the requested emergent relief. This Administrative Law Judge held an emergent hearing on March 24, 2010, at the Office of Administrative Law, Quakerbridge Plaza, Building 9, Quakerbridge Road, Mercerville, New Jersey, and on that day the record closed.

FACTUAL DISCUSSION

This matter involves a challenge to the Board's policies on substance abuse and student conduct, which, in essence, outlines the efforts of the district to assist its students academically as well as protecting the welfare of the entire school community. As a result, the parties agree that the Board validly adopted substance abuse and code of conduct policies, and that those policies were in place as of September 2009. Also in September 2009, students enrolled in the HVCHS received copies of the student code of conduct which contained behavioral expectations and established disciplinary measures for various infractions of the code.

C.G. is an eleventh grade student at HVCHS which is part of HVRBOE. C.G. has an interest in pursuing studies related to the Spanish language and culture. He applied for and was accepted to participate in the HVCHS spring trip to Spain as part of the HVCHS/Floridablanca Spanish/American Exchange ("Exchange"). This program has been in existence for many years at HVCHS, and is an extracurricular activity designed to enhance the educational experience of students by initiating encounters with students of their own age from the country of Spain. The conditions for student participation in the exchange program were agreed to and signed by petitioner on March 18, 2009. Participating students were also advised by Kristin Kincaid, the advisor to the Exchange, that participation in the Exchange was a year-long commitment spanning the duration of the school year, and that consumption of alcohol

during the Exchange program would not be tolerated. Kincaid reviewed with the students the consequences if the students engaged in such behavior.

In planning for Exchange activities, Kincaid met with parents and solicited families interested in hosting a welcoming and closing party. Two different families were selected and arrangements were made for the parties. Subsequently, another parent approached Kincaid about hosting a private party, and was advised that she was welcome to host a separate party for the students. This separate party took place on the evening of October 31, 2009, and Kincaid did not attend. Students from outside the Spanish Exchange also attended the party. On the morning after, Kincaid was advised that alcohol was present, and that certain members of the Exchange had consumed alcohol at the party.

HVCHS principal Michael Daher was advised of the alcohol consumption, and he investigated the allegations by interviewing the Exchange students who attended the party. Under questioning, the majority of the students denied any consumption of alcohol. During his interview, C.G. admitted to consuming alcohol at the party. One other student also admitted to consuming alcohol at the party. Both C.G. and the other student were notified by letter of Daher dated November 16, 2009, that as a result of the use of alcohol, they would not be permitted to attend the Spanish Exchange trip to Spain in the spring of 2010. The students participating in the Exchange leave the U.S. for Spain on April 1, 2010.

The Board argues that this decision is consistent with the conditions for student participation in the exchange program, agreed to and signed by petitioner on March 18, 2009, as well as HVRBOE Policy 5530 entitled "Substance Abuse" which defines a "substance" as an alcoholic beverage. "Substance abuse" is defined as "the consumption or use of any substance for purposes other than for the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings." The policy goes on to set forth that "a pupil who uses, possesses, or distributes a substance, on or off school premises, will be subject to discipline. Discipline will be graded to the severity of the offenses, the nature of the problems and the pupil's needs. Discipline may include suspension or expulsion." In addition, HVRBOE Policy 5600 entitled "Pupil Discipline/Code of Conduct" sets forth that, "School authorities also have the right to impose a consequence on a pupil for conduct away from school grounds . . . This authority shall be exercised only when it is

reasonably necessary or the pupil's physical or emotional safety, security, and well-being or for reasons relating to the safety, security, and well being of other pupils . . . "

Petitioners asked for, and were given, a hearing before the Board, but the matter was considered over objection, and by only three members of the Board. Petitioners were not thereby allowed to question or otherwise challenge the witnesses and/or other evidence presented by the district to the three Board members. Petitioners argue that this procedure violated HVRBOE Policy 5710, entitled "Pupil Grievance."

LEGAL ANALYSIS AND CONCLUSION OF LAW

Petitioners claim that respondent's actions in this matter are arbitrary, unreasonable and capricious, and that respondent's actions violated their son's due process rights because of the proceedings before the Board. They also contend that the consequences of enforcing the Substance Abuse policy are punitive in nature and disciplinary.

The Board maintains that its substance abuse and code of conduct policies are in accordance with all acceptable standards of the Department of Education, that its policies have a beneficial impact on defining positive student behavior and encouraging students to resist peer pressure regarding the negative impact of drugs and alcohol, and that the policies create a positive educational opportunity for the affected student. Participation in extracurricular activities is not a right, but a privilege. Thus, the Board contends that, after having signed the conditions for participation in the Spain trip in March 2009, and being subject to the school policies, neither the student nor the parents can now argue that the policies have no application to them. The child agreed to the terms of the conditions when he signed the participation form, and implicitly agreed to the Board's policies, but now disavows because he admitted an infraction which is the direct subject of the Board's policies.

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. In such

circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted

should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

When this standard was applied to the facts to this case, it was apparent that petitioners have failed to meet the criteria for such relief.

Irreparable harm

Having carefully considered the parties' respective arguments, I agree that C.G. will not suffer irreparable harm by not participating in the trip to Spain. Even though attending this trip to Spain means a great deal to C.G., and he has been looking forward to it, I **CONCLUDE** that petitioner has not shown any cognizable educational harm which would occur as a result of missing the trip. Petitioner has not proven an actual adverse impact will result to C.G. as a result of missing this trip other than a loss of the experience. On its face, such an event is in the nature of an extracurricular activity, similar to a class trip. Therefore, proceeding on the trip is a privilege to the Exchange students of HVCHS, and not a right. While the trip may have some educational component to it, and may enhance the educational experience of the students, the primary purpose of the trip is to allow C.G. to travel with friends to a foreign country and experience the foreign culture. I further **CONCLUDE** that the trip to Spain, although important in one's young life, will not result in dire consequences if it is missed. If anything, if the stay were to be granted, it could have a great adverse impact upon the ability of the Board to maintain good order and discipline in the high school for the benefit of every one in light of its policies relative to its efforts to dissuade students from participating in drug and/or alcohol activities. Thus, I **CONCLUDE** the greater harm would be to the HVRBOE if the stay were to be granted at this time. Thus, petitioners' request fails as to this element. There is no showing of irreparable harm under the circumstances. Consequently, I **CONCLUDE** that C.G. will not suffer irreparable harm if he is not permitted to participate in attending the trip to Spain.

Right to underlying claim must be settled

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), Art. VIII, 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1c. and d. to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In the present matter, counsel for respondent has represented that the respondent Board has duly adopted policies which have been announced and disseminated over time for the benefit of children within the school district. Petitioner concedes to the lawful promulgation of those policies. Further, the petitioners signed the participation agreement to participate in the Spanish Exchange. The affidavit of Kincaid also makes it clear that at various times and during various meetings, the rules of conduct were explained to each student, an explanation was given to the students that the consumption of alcohol during the year-long Exchange program would not be tolerated, and the students were advised that the consumption of alcohol in either country was expressly prohibited. Despite all of the foregoing, petitioners now claim the school policies were incorrectly applied, or not properly adhered to, by the Board.

Board policies are entitled to a presumption of correctness, and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In assessing this, the local school board's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). The policies of the Board provide a reasonable opportunity for compliance by all affected parties/families who wish to participate in extracurricular activities conducted by the Board.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R. 2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL Dkt. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of the Boro. of Bergenfield, 1965 S.L.D. 84, 85. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "The well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." See also G.M. v. Roselle Park Boro. Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109 (where the Commissioner adopted

the decision of the ALJ when in a challenge to board action, the ALJ stated, "It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action shall be upheld. In the G.M. case, supra, the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority.

Based upon the foregoing and after having considered all the arguments advanced as well as the proofs offered by both sides, I **CONCLUDE** that the right underlying petitioner's claim is settled against the petitioners' position. Students do not possess an absolute right to participate in extracurricular activities such as the trip abroad. The determination whether or not they may attend is within the sole discretion of the board of education. This is particularly true where, as here, there are written substance abuse and code of conduct policies that permit the board to suspend the student and prohibit him from attending extracurricular activities. C.G. does not possess a well settled right to participate in the exchange trip abroad. No authority has been set forth by petitioner guaranteeing his right to attend the Exchange trip. Therefore, I **CONCLUDE** that petitioners have failed to establish the right to relief and have failed to show that the action of respondent is arbitrary, capricious and unreasonable, this having occurred after having given them all due deference and a full and complete opportunity to present such arguments at the emergent relief hearing. In addition, petitioners failed to submit any proofs to show the actual adverse consequences which will attend the implementation of the policies against C.G. at this time.

Requirement to show reasonable probability of prevailing on the merits

The most difficult requirement for the moving party to establish or in order to show entitlement to emergency relief is the third factor. In order to prevail on one's

application for emergency relief, the party requesting the relief (the parents in this matter) must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving party that they will probably win on the merits. It is with respect to this that petitioners have great difficulty. Petitioners must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. Petitioners must show that respondent's actions violated petitioners' due process rights because of its purported failure to provide to petitioners an opportunity for redress from the entire board of education, rather than just a committee thereof. A review of Policy 5710 reveals that a pupil grievance that proceeds to the Board will be determined promptly and the Board will issue a decision in no more than ten calendar days. However, the Policy does not contain a prohibition against a committee hearing the pupil grievance. In this case, the Board delegated the matter to a committee, and no definitive showing has been made that such delegation was improper.

Petitioner argues that Board Policy 5530 applies only to school sponsored functions, and that the two clauses on page two thereof discussing the use of alcohol or other substance therein must be read in pari materia to reach the conclusion that the use of a substance off school premises must be at a school sponsored event in order to subject a student to discipline by the school district. I do not agree. The language specifically states that a pupil who uses a substance off school premises will be subject to discipline. The discipline will be graded to the severity of the offense. Discipline may include suspension or expulsion. Suspension was not imposed herein, because according to respondent's attorney, suspension was considered by respondents to be a more severe penalty than the loss of the trip to Spain. While petitioner argues that the penalty imposed according to this Policy should have been a ten-day suspension according to Policy R5530, a reading of both policies implies that a lesser penalty to the ten day suspension may be imposed by the Board according to the severity of the offense. Petitioner has therefore not shown a reasonable probability of prevailing on this issue.

Petitioner also argues that Board Policy 5600 does not apply here because discipline is not reasonably necessary for a pupil's safety, security and well being. This policy shall be exercised only when the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school. While petitioners' argument that the use of alcohol at an off-site, non-school related activity does not materially and substantially interfere with the requirements of appropriate discipline and the operation of the school may have some merit, it is difficult to agree with petitioner that a disciplinary consequence of the use of alcohol is not necessary for that student's well being. Any discipline imposed by a policy for alcohol use may be considered to promote the well-being of that child. Petitioner has therefore also not shown a reasonable probability of prevailing on this issue.

Finally, the Board has shown that the privilege (and not the right) of participating in extracurricular activities attaches to itself certain distinct requirements for responsible conduct by the student in question. Local boards of education have been expressly charged with protecting the health, safety and welfare of its students and school community, and insuring the orderly conduct of the academic process. Therefore, I **CONCLUDE** that petitioners have failed to show the likelihood of prevailing on the merits. Respondent's actions in applying its policies to prohibit C.G.'s participation in the trip abroad due to his admitted use of alcohol, no matter how regrettable and unfortunate this is for C.G., cannot be disturbed.

Relative hardship to the parties

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. As found hereinabove, there has been no actual showing of extraordinary hardship to C.G. other than his inability to engage in this certain extracurricular activity. While C.G. has a substantial interest in attending the exchange trip to Spain, the Board also has a substantial interest in insuring that its disciplinary policies are applied so as to protect the safety and well-being of the

students, the teachers, the administrators and other employees. Were it not to enforce its disciplinary policies, or treat C.G. differently than other students in the school, the Board would be sending the wrong message and possibly establishing a negative precedent. By contrast, I am concerned that the granting of a stay would promote a negative message regarding the ability of the Board to maintain good order and positive role modeling for its student community instead. Further, it could genuinely compromise the ability of the Board to actively participate as a community member and leader in providing a positive environment for the community youth. Petitioner has therefore not shown a reasonable probability of prevailing on this issue. And I so **CONCLUDE.**

Finally, I **CONCLUDE** that the Board has settled policies that the Board's policies have been properly enforced, and that the Board's policies are reasonable. Consequently, I **CONCLUDE** that the respondent Board will suffer greater harm than the petitioner if the requested relief is granted.

DECISION AND ORDER

Based upon the foregoing, I have **FOUND** that for purposes of deciding this application for emergency relief, petitioners have failed to establish: (1) the existence of irreparable harm, (2) that petitioners' claim is based upon a settled right, (3) that petitioners are likely to prevail on the merits, or that (4) C.G. or his parents will suffer a relative hardship pending a full hearing on the merits. In view of the fact that petitioners have failed to establish any or all of the requirements for emergency relief, I **CONCLUDE** that petitioners' request should be **DENIED**.

Based upon the foregoing, it is hereby **ORDERED** that petitioners' request for emergency relief seeking to stay implementation of the Board's decision to revoke the right of C.G. to attend the trip to Spain 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 (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.

Edward J Delaney Jr

March 25, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

/bdt

106-10 L

State of New Jersey

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BRET SCHUNDLER
Acting Commissioner

April 1, 2010

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Dear Counsel:

I have reviewed the parties' respective submissions with regard to petitioner's motion for reconsideration of my March 30, 2010 decision in the emergent matter of *L.W., on behalf of minor child, C.G. v. Board of Education of the Hopewell Valley Regional School District, Mercer County*, Agency Dkt. No. 54-3/10, OAL Dkt. No. EDU 0807-10, Commissioner's Decision No. 105-10E.

Upon such review, I find that petitioner's motion does not meet the standard set forth in *N.J.A.C.* 6A:3-1.15(b), in that it makes no claim of newly discovered evidence or newly ascertained misconduct and the arguments in support of its claim of mistake are substantially in the nature of disagreement with the outcome of my decision and the analysis on which it is based, contrary to the express provisions of *N.J.A.C.* 6A:3-1.15(b)1.

Accordingly, I find petitioner's concerns to be more appropriately raised on appeal, and hereby I deny the motion for reconsideration.[1]

Sincerely,

Bret Schundler
Commissioner

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

115-10

A.B., on behalf of minor child, B.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's determination that her child, B.B., is not entitled to a free public education in its schools, contending that she is homeless and that her last permanent domicile was within the Township of West Orange. B.B. turned 18 in December 2009, and has been living since July 2009 in West Orange with R.P., who originally filed this petition as a residency appeal. The Board asserted that the petition should be dismissed, as R.P. was not the mother, legal guardian nor affidavit host of B.B., and petitioner does not reside within the district. The Board counterclaimed for tuition for the period of B.B.'s alleged ineligible attendance.

The ALJ found that: A.B. has not had an established residence in any municipality since her eviction from her residence in West Orange in July 2009; prior to becoming homeless, the last residence of A.B. and B.B. was in West Orange; and West Orange was the district of origin and the district of last attendance for B.B., as well as the district in which B.B. has been temporarily living. The ALJ concluded that, by virtue of the foregoing, B.B. should be enrolled in the West Orange School District. Moreover, because B.B. has reached the age of 18 and has established a residence in West Orange, she is entitled to a free public education in the district's schools. Accordingly, the ALJ granted petitioner's appeal, and dismissed the Board's claim for tuition.

Upon full consideration, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision as the final decision in this matter. In so deciding, the Commissioner rejected the respondent Board's exception arguments contending that the ALJ improperly substituted A.B. for the original petitioner, finding that this matter is a homeless situation rather than a residency case, and the ALJ appropriately facilitated amendment of the proceedings, pursuant to *N.J.A.C.* 1:1-6.2(a), replacing petitioner R.P. with A.B. to conform to the particular situation existing in this matter. The Commissioner directed that B.B. receive a free public education in the West Orange School District for the 2009-2010 school year.

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

April 12, 2010

OAL DKT. NO. EDU 13330-09
AGENCY DKT. NO. 297-10/09

A.B., on behalf of minor child, B.B.,[1]	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

The Board excepts to what it alleges was the Administrative Law Judge's (ALJ) improper substitution of A.B. (B.B.'s mother) for the original petitioner, R.P., and her simultaneous denial of the Board's motion for summary decision seeking dismissal of the petition because R.P. lacked standing to bring this action. In so contending, it argues:

> The substitution of parties by the ALJ is without legal authority. Respondent's school residency decision can only be challenged by the student's parent or guardian within 21 days of the decision. *N.J.S.A.* 18A:38-16.(2) While an ALJ has authority to relax rules, they can only be relaxed when they do not reflect a specific statutory requirement. *N.J.A.C.* 6A:3-1.16. The statutory prescription that a residency decision be contested by a proper party within 21 days cannot be amended or adjusted by the ALJ. The substitution of the parent (the proper party) for the original petitioner (some two months late) is not permissible. To hold otherwise would render meaningless the particular filing requirements of the

[1] It is noted that the petition of appeal in this matter was originally brought by R.P.

> statute. Further, once an answer is filed in an action, an amendment to a petition can only be made with the consent of the adverse party or by leave of the Commissioner upon written application. *N.J.A.C.* 6A:3-1.7. The ALJ cannot take it upon herself to simply supplant petitioners without doing violence to the specific demands of the school residency law. (Board's Exceptions at 2)

The Board states that because B.B. is a senior scheduled to graduate in June it will not seek her removal from its schools; however, it strongly urges the Commissioner to reject the Initial Decision and assess tuition for the period of her ineligible attendance in the district. (*Id.* at 3)

Upon his considered review of this matter, the Commissioner concurs with the ALJ, for the reasons clearly presented on pages 6-9 of her decision, that B.B. was entitled to a free public education in the West Orange School District from the beginning of the 2009-10 school year through December 4, 2009 by virtue of the fact that she and her mother, A.B., were homeless. The Commissioner further agrees with the ALJ that as of December 5, 2009 – B.B.'s eighteenth birthday – she possesses entitlement to a free public education in the district by virtue of being a domiciliary of West Orange.

Finding the Board's exception arguments disingenuous at best, the Commissioner concludes that, under the factual underpinnings of this case, the ALJ appropriately facilitated amendment of the pleadings, pursuant to *N.J.A.C.* 1:1-6.2(a), replacing petitioner R.P. with A.B. to conform to the particular situation existing in this matter. Moreover, the necessity for such amendment appears to be directly attributable to actions of the Board. Specifically, based upon her credibility determinations, the ALJ made the following factual findings[2]:

> A.B. credibly testified that she is at work overnight at least two nights, and for the remainder of the week, alternates between the apartments of two friends. She

[2] 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))

> undoubtedly cannot remain in the subsidized apartment on Georgia King Village, and although N.L. has allowed A.B. to stay with her, she is not on the lease, and there is already one adult and five, soon to be six, children living in the apartment. A.B. has no legal right to remain in either Newark apartment, nor is she related to either tenant. She further testified credibly that she lost her full-time job in 2008, and that she has since had only her part-time job. A letter from her employer states that she works 20 hours per week, at a rate of $11 per hour, which would gross approximately $880 per month. Even her gross earnings would be insufficient to pay for an apartment and utilities, not taking into account any other expenses for herself and B.B., including medical insurance or auto insurance. Based on the above, it is clear that A.B. does not have a permanent or regular residence since her eviction from the apartment on High Street in July 2009.
>
> It was undisputed that R.P. is domiciled in West Orange, and that B.B. was living with R.P. (Initial Decision at 6)

The Commissioner has no cause whatsoever to challenge the ALJ's finding as to A.B. and B.B.'s homeless status within the intendment of *N.J.S.A.* 18A:7B-12(c) and *N.J.A.C.* 6A:17-2.3(a)3. Significantly, the ALJ's decision further reports that "A.B. testified that, in July 2009, she made the District aware of her situation, including that she had no place to live, and that B.B. was living with R.P" (Initial Decision at 5), a representation which on this record is not contested by the Board. Notwithstanding that, upon being so informed, the Board was obligated by law to proceed in accordance with *N.J.A.C.* 17-2.1, *et seq.* (Education of Homeless Children) it, rather, proposed to disenroll the student pursuant to *N.J.S.A.* 18A:38-1a., thereby treating this matter as a "residency" rather than a "homeless" case. A.B. sought guidance from the Bureau of Controversies and Disputes with respect to appealing the Board's proposed action and, upon A.B.'s telephonic representation to Bureau staff[3] that she had received a letter from the Board stating that it intended to disenroll B.B. due to lack of residency in the District and A.B.'s further representation that, of necessity, B.B. was living with R.P not A.B, she was correctly advised that, under these circumstances, the appropriate petitioner was R.P. When it was ultimately

[3] It is noted that A.B. did not speak to the Bureau's Director, M. Kathleen Duncan.

discovered at the OAL that this matter was a homeless situation rather than a residency case, A.B.'s substitution for R.P. was mandatory, not discretionary.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. It is hereby directed that B.B. receive a free public education in the West Orange School District for the 2009-10 school year and the Board's counterclaim for tuition is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/10

Date of Mailing: 4/13/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13330-09
AGENCY DKT. NO. 297-10/09

R.P. ON BEHALF OF MINOR CHILD, B.B.[1],
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

A.B., pro se

Stephen J. Christiano, Esq. (Board Attorney), for Respondent

Record Closed: January 25, 2010 Decided: February 26, 2010

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about October 26, 2009, R.P., on behalf of B.B., filed a residency appeal, which stated that B.B. was living with R.P. because B.B.'s mother was temporarily homeless. On November 4, 2009, the West Orange Board of Education (Board) sent a

[1] B.B.'s mother, A.B., appeared on B.B.'s behalf, rather than R.P. (A.B. has been substituted in as Petitioner.)

letter to the New Jersey Department of Education, Bureau of Controversies and Disputes, requesting dismissal of the appeal because R.P. was not the mother, legal guardian nor affidavit host of B.B. On November 5, 2009, the Commissioner transmitted this matter to the Office of Administrative Law (OAL), where it was filed on November 17, 2009 for determination as a contested case.

A hearing was scheduled for January 6, 2010, at which time A.B., mother of B.B. appeared on behalf of B.B. R.P. did not appear. On that morning, the undersigned received in the mail, a motion from the Board, a copy of which had also been mailed to R.P., but had not been mailed to A.B. A.B. made a motion to be substituted as Petitioner, which was granted, and she was provided with a copy of the Board's motion, and two additional letters from the Board, which she had not previously been provided with. In light of the substitution of A.B. as Petitioner, the Board's motion was denied, but considered as the Board's Answer, as no formal answer had been filed by Respondent because the matter had been transmitted by the Commissioner to the OAL. The hearing was adjourned to allow the parties additional time to prepare, and a hearing was held on January 25, 2010, on which date the record closed.

TESTIMONY AND FINDINGS OF FACT

A.B. testified that she had been living with her daughter, B.B., on High Street in West Orange. A.B. had been working one full-time and one part-time job, but lost her full-time job in 2008, and was thereafter unable to afford her rent payments. They were evicted from the High Street apartment in July 2009. A.B. moved their personal belongings into storage, and B.B. went to live with R.P. in West Orange.

A.B. testified that, other than R.P., there is no one else with whom B.B. could have stayed. She further testified that she works Sunday and Monday overnight, from 10 p.m. to 8:00 a.m. in Parsippany, and that the remaining nights she alternates between the Newark apartments of two friends, M.C. and N.L. There is no set schedule as to which, or how many, days she is at either friend's apartment.

A.B. testified that M.C. lives on Georgia King Village, and that the apartment is

subsidized, so she is not permitted to remain with M.C., as she is not on the lease. Additionally, M.C.'s apartment has three bedrooms, but M.C. already has her four children and one grandchild residing with her. While at M.C.'s apartment, A.B. sleeps upstairs with one of the girls.

N.L. lives on Boyd Street in a three bedroom, three bathroom apartment with her five children. She and her five children are the only persons on the lease. She is presently in the process of adopting another foster child, and the Division of Youth and Family Services regularly inspects her apartment for this reason. While at N.L.'s apartment, A.B. sleeps either on the floor in N.L.'s room, or on the couch in the living room. Unlike M.C.'s apartment, N.L.'s apartment is not subsidized and has a private mailbox. As such, N.L. has allowed A.B. to utilize the Boyd Street apartment as her mailing address. N.L. advised that she would continue to help A.B. until she is able to get on her feet.

Presently, A.B. continues to work part-time, 20 hours per week, at Jewish Services for the Developmentally Disabled of MetroWest, Inc. (JSDD), in Parsippany. She is paid $11 per hour, and works two nights per week from 10 p.m. to 8 a.m., though she does try to work extra hours when available. (P-2). She now commutes from Newark to Parsippany. In September 2009, she purchased a vehicle with over 150,000 miles on it for $1,800. She has paid $1,000 toward the vehicle, half of which was borrowed from N.L., and thus still owes $800. She pays approximately $132 per month for insurance for the vehicle. She had previously leased a vehicle, but after losing her full-time job, she was unable to continue making the payments.

A.B. does not receive public assistance, but does have New Jersey FamilyCare medical insurance for herself and B.B., for which she had been paying $51 per month, and now pays $35 per month. B.B. will be covered until she is nineteen. A.B. does not receive unemployment insurance benefits (UIB). She had applied for UIB, but was denied because she was working part-time and able to get extra hours. She intermittently receives some child support from B.B.'s father, who resides in Texas. She usually gives the child support funds to B.B., M.C. or N.L., or spends it on gas. A.B. testified that she contributes approximately $50 to $100 per month to either of the

friends she stays with. A.B. also pays R.P. approximately $200 per month, but is unable to afford more. She does not have any credit cards. She purchased B.B. a coat for approximately $10 and boots for approximately $15 to $20 for the winter. Both A.B. and B.B. have cellular phones, for which the average monthly bill is approximately $120.

A.B. is a high school graduate and has been attending college online at South University in Savannah, Georgia since 2007 in order to obtain a bachelor's degree in Criminal Justice. Her tuition is approximately $5,000 per semester, which she pays through federal loans and grants. The loans do not have to be repaid until after graduation, which is expected to occur in January 2011. She does not own a computer, and uses the computer at the public library.

A.B. and B.B. had lived on High Street in West Orange for approximately one year, and, prior thereto, they had lived on Harrison Avenue in West Orange, except for a period when the apartment was uninhabitable. B.B. has attended school in West Orange since late 2006. B.B. testified that, from grades four through eight, she went to a different school every year, and that she has been in West Orange since 9th grade. She expects to graduate in June 2010 and wants to remain in West Orange for graduation. She turned eighteen on December 5, 2009.

B.B. has been living with R.P. in an apartment in a two-family house since July 2009, and has her own bedroom. She does not have a computer, but R.P. does. She receives free lunch at school. She is going to the high school prom, and testified that she plans to help pay for it, but she does not have a job. The cost of the prom is $100, and the extra costs for a dress and other items will likely cost another $200. N.L. testified that she had discussed the prom with A.B., and will be lending A.B. the money to pay for these items.

B.B. does not have a driver's license yet, but does have a permit, which reflects her previous High Street, West Orange address. She did not know where she would stay if she was unable to stay with R.P., but testified that maybe she could stay with her mother in Newark or move to Texas and stay with her father. A.B. testified that there was no one else B.B. could stay with, and, until July 2009, B.B. had always lived with

her mother. B.B. wants to attend Nyack College in New York, and is planning to live on campus. However, she testified that if she does not go to Nyack College, she may move to Texas to live with her father.

A.B. testified that, in July 2009, she made the District aware of her situation, including that she had no place to live, and that B.B. was living with R.P. She was advised that she would have to wait for a letter to request a hearing. She was given the same school paperwork to complete that she had always completed, and was not provided with any paperwork for "affidavit students" from the District. She received a letter from the Board, dated October 6, 2009, advising her that the Board decided to remove B.B. from the school because she did not reside in West Orange. In response, A.B. contacted the District, who advised her to contact Trenton. Because A.B. had questions, she called the Commissioner's office and spoke to Kathleen Duncan (Duncan). A.B. testified that Duncan informed her that R.P. would have to file the petition because B.B. was residing with R.P., and R.P.'s domicile was in West Orange. A.B. further testified that Duncan was advised that R.P. was not B.B.'s legal guardian.

Frank Guarneri (Guarneri), Registrar for the District, testified on behalf of the Board in support of its counterclaim for tuition. Tuition for the 2009-2010 school year is $18,570, and as of the date of the hearing, B.B. attended 85 days at $103.16 per day, for a total of $8,768.60. Additionally, the tuition calculation to the date B.B. turned eighteen was calculated during the hearing by adding the number of days in September, October and November, without counting December, since it was not clear whether December 1 through December 4 were all school days. That total of 53 days, was multiplied by $103.16, for a total of $5,467.48.

A credibility determination requires an over-all evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or

prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), certif. denied, 10 N.J. 316 (1952).

Accordingly, I make the following **FINDINGS** of critical **FACTS**:

A.B. credibly testified that she is at work overnight at least two nights, and for the remainder of a week, alternates between the apartments of two friends. She undoubtedly cannot remain in the subsidized apartment on Georgia King Village, and although N.L. has allowed A.B. to stay with her, she is not on the lease, and there is already one adult and five, soon to be six, children living in the apartment. A.B. has no legal right to remain in either Newark apartment, nor is she related to either tenant. She further testified credibly that she lost her full-time job in 2008, and that she has since had only her part-time job. A letter from her employer states that she works 20 hours per week, at a rate of $11 per hour, which would gross approximately $880 per month. Even her gross earnings would be insufficient to pay for an apartment and utilities, not taking into account any other expenses for herself and B.B., including medical insurance or auto insurance. Based on the above, it is clear that A.B. does not have a permanent or regular residence since her eviction from the apartment on High Street in July 2009.

It was undisputed that R.P. is domiciled in West Orange, and that B.B. was living with R.P.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is whether B.B. is a domiciled student in the District for the 2009-2010 school year. The Board contends that although A.B. is in a difficult financial situation, she is not "homeless".

A student over five and under 20 years of age pursuant to N.J.S.A. 18A:38-1, is eligible to attend school in a school district if the student is domiciled within the district.

N.J.A.C. 6A:22-3.1. A student is domiciled in the school district when he or she is living 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. A student is also deemed domiciled in the school district when he or she has reached the age of 18 or is emancipated from the care and custody of a parent or legal guardian and has established a permanent home within the district. N.J.A.C. 6A:22-3.1(a)2. A home is permanent when the parent, legal guardian or student intends to return to it when absent and has no present intent of moving from it, notwithstanding the existences of homes or residences elsewhere. N.J.A.C. 6A:22-3.1.

Additionally, a student over five and under 20 years of age pursuant to N.J.S.A. 18A:38-1, is eligible to attend school in the school district if the student's parent or guardian moves to another district as the result of being homeless, subject to the provisions of N.J.A.C. 6A:17-2 (Education of Homeless Children). N.J.A.C. 6A:22-3.2(d). "Homeless child" means a child or youth who lacks a fixed, regular and adequate residence, pursuant to N.J.S.A. 18A:7B-12 and N.J.A.C. 6A:17-2.3. N.J.A.C. 6A:17-2.2. The district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. N.J.S.A. 18A:7B-12. Pursuant to N.J.A.C. 6A:17-2.3, a district board of education shall determine that a child is homeless for purposes of education of homeless children, when he or she resides in 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.B. has not had a permanent or fixed residence since she was evicted from her apartment in July 2009. She is unable to afford an apartment because she no longer has a full-time job. She spends two nights per week at work, and the other nights she alternates between the apartments of friends. She is not related to either friend, nor is she on the lease for their apartment, one of which is a subsidized apartment. Thus, neither apartment can be said to reasonably be a fixed, reasonable or adequate permanent residence, and B.B. has been residing with R.P., a friend, because the family lacks a regular and permanent residence of its own. Accordingly, I **CONCLUDE**

that A.B. and B.B. are homeless.

The district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. Prior to becoming homeless, the last residence of A.B. and B.B. was High Street in West Orange. Accordingly, I **CONCLUDE** that B.B.'s district of origin is West Orange.

The chief school administrator of the school district of origin or designee shall decide in which school district the homeless child shall be enrolled as follows: (1) to the extent feasible, enroll the homeless child in the school of origin except when doing so is contrary to the wishes of the homeless child's parent or guardian; (2) to continue the homeless child's education in the school district of last attendance if the school district of last attendance is not the school district of origin; or (3) to enroll the homeless child in the school district where the child is temporarily living. N.J.A.C. 6A:17-2.6. "School district of origin" means the school district in which the parent last resided prior to becoming homeless. N.J.A.C. 6A:17-2.2. In any of the aforesaid scenarios, West Orange would remain the district in which B.B. should be enrolled, as enrolling B.B. in any other school would be contrary to the wishes of A.B., the school district of last attendance is the school district of origin, and the school district where B.B. is temporarily living is West Orange. Accordingly, I **CONCLUDE** that B.B. should be enrolled in West Orange.

Although A.B. contributes approximately $200 per month to R.P., and she does contribute to her friends in Newark as well, A.B. was not provided with paperwork for B.B. to apply as an "affidavit student" in accordance with N.J.A.C. 6A:22-3.2. Thus, the within matter is not an "affidavit student" case, in which her mother would have filed a sworn statement that 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 R.P. solely for the purpose of receiving a free public education; and in which R.P. would have filed a sworn statement that she is domiciled within the District, is supporting the child without remuneration and intends to do so for a longer time than the school term, and will assume all personal obligations for the student relative to school requirements.

However, even pursuant to these regulations, a student shall not be deemed ineligible 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 receives no payment or other remuneration from the parent for regular maintenance of the student. N.J.A.C. 6A:22-3.2.

There is no dispute that B.B. has attended West Orange schools since 9th grade, and that both A.B. and B.B. want B.B. to finish high school in West Orange. Whether or not B.B. resides with a West Orange domiciliary does not matter. After her eviction, A.B. and B.B. lacked a permanent or regular residence in any municipality, rendering B.B. homeless for education purposes, and West Orange was her district of origin.

If A.B. had permanent residence and B.B. was nevertheless residing with R.P., there would be no doubt it would be for the sole purpose of completing her education in West Orange, or that B.B. would return to living with her mother upon graduation. However, A.B. does not have an established residence in any municipality at this time, and thus, B.B. is living with R.P. out of necessity. Nevertheless, even if A.B. were not homeless, B.B. has reached the age of 18, and has established a permanent home within the District. Although she may have expressed an intention to move upon graduation, not unlike many high school graduates, she has no residence or domicile elsewhere, at college or in Texas, at present. If she had the means to do so, she would be within her rights to move to any municipality and attend school there, so long as she was domiciled within the municipality, and there would be nothing to prevent her from moving out of the municipality upon graduation. B.B. does not have the means, and perhaps does not have the choice, so at present, her residence is with R.P., and the monthly payment from A.B. could arguably be construed as rent for B.B.'s room. She has no alternate residence or domicile, and although she expressed a desire to live away at college or move to Texas with her father if she is unable to attend college, she does not wish to move from Kirk Street in West Orange at the present time.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the appeal of Petitioner is **GRANTED**. It is hereby further **ORDERED** that B.B. receive a free public education in the School District of West Orange for school year 2009-2010, and that the Board's claim for payment of tuition be **DISMISSED**.

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

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

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

February 26, 2010

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: February 26, 2010

Date Mailed to Parties: MAR 1 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Petitioner

A.B.

B.B.

N.L.

For Respondent

Frank Guarneri

EXHIBITS

For Petitioner

P-1 Tenancy Summons & Verified Complaint (4 pages)

P-2 JSDD Letter, dated October 30, 2009

For Respondents

R-1 Board of Education Letter, dated October 6, 2009 (2 pages)

R-2 Photographs (3 pages)

R-3 Tuition Calculation

R-4 Final Agency Decision EDU 7805-92 (4 pages) – Identification Only

OAL DKT. NO. EDU 12069-09
AGENCY DKT. NO. 252-9/09

LISA PISANO-PHILLIPS AND THE HORACE MANN INSURANCE COMPANY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, HUNTERDON COUNTY,	:	
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 2 and 3 of the Agreement make reference to a January 30, 2010 deadline by which respondent was to pay petitioner $6,376.55. 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.

COMMISSIONER OF EDUCATION

Date of Decision: 4|16|10

Date of Mailing: 4|16|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12069-09
AGENCY DKT. NO. 252-10/09

LISA PISANO-PHILLIPS AND THE HORACE MANN INSURANCE COMPANY,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, HUNTERDON COUNTY,
Respondent.

Edward Cridge, Esq., for petitioners (Wills, O'Neill & Mellk, attorneys)

Raquel S. Lesnever, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: February 16, 2010 Decided: February 24, 2010

BEFORE **SUSAN M. SCAROLA**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 23, 2009, 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 the record closed date, an executed Settlement Agreement and Release together with the Board Resolution was received indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 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.

February 24, 2010 — Susan Scarola
DATE — **SUSAN M. SCAROLA**, ALJ

Date Received at Agency: MAR 8 2010

Date Mailed to Parties: MAR 8 2010

RECEIVED
2010 FEB 16 A 10: 56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement"), dated January ___, 2010, is entered into by and between Lisa Pisano-Phillips ("Pisano-Phillips") and The Horace Mann Insurance Company ("Horace Mann") (collectively the "Releasors") and the Franklin Township Board of Education (the "Board") (collectively "the Parties").

WHEREAS, Pisano-Phillips is a former employee of the Board;

WHEREAS, Pisano-Phillips was named as a defendant in two civil lawsuits filed simultaneously in the Superior Court of New Jersey, Hunterdon County vicinage, bearing the following captions and docket numbers: 1) *P.S., an infant by her Guardian Ad Litem v. Franklin Township Board of Education, Franklin Township School, Lisa Pisano, R.N., Robert Agree, School Supervisor, Joseph Stuby, John Does 1-10 (representing unknown individuals)*, bearing docket number HNT-L-593-05; and 2) *N.S., an infant by her Guardian Ad Litem v. Franklin Township Board of Education, Franklin Township School, Lisa Pisano, R.N., Robert Agree, School Supervisor, Joseph Stuby, John Does 1-10 (representing unknown individuals)*, bearing docket number HNT-L-594-05 (hereinafter referred to as the "Superior Court litigations");

WHEREAS, the Board provided Pisano-Phillips with counsel for all claims made against her in the Superior Court litigations with the sole exception of claims seeking an award of punitive damages;

WHEREAS, Horace Mann provided legal counsel for Pisano-Phillips to defend her against claims seeking an award of punitive damages in the Superior Court Litigations;

WHEREAS, the Superior Court Litigations were resolved pursuant to a voluntary settlement agreement;

WHEREAS, Releasors filed a Verified Petition of Appeal before the Commissioner of Education, bearing agency reference number 252-10/09 and Office of Administrative Law docket number EDUOA 12069-2009S (hereinafter referred to as the "Subject Litigation") seeking reimbursement of attorneys' fees pursuant to *N.J.S.A.* 18A: 16-6; and

WHEREAS, the Parties desire to settle all claims and causes of action that were asserted or could have been asserted in the Subject Litigation without incurring further costs of litigation;

NOW THEREFORE, it is hereby stipulated and agreed by and between the Parties upon the following premises and in consideration of the promises, mutual covenants, and agreements set forth herein, and other good and valuable consideration, the sufficiency of which is hereby acknowledged as follows:

1. Scope of Agreement: This Agreement shall be a full and complete settlement of any and all claims, whether alleged, or which could have been alleged, arising out of the Subject Litigation and factual circumstances underlying the Subject Litigation. The Parties further agree that by entering into this Agreement, the Parties specifically waive and relinquish the right to have the Commissioner of Education, the Superior Court, or any agency adjudicate the Subject Litigation.

2. Payment To Releasors: The Board shall pay the total sum of six thousand three hundred seventy-six dollars and fifty-five cents ($6,376.55) to Releasors. This payment shall be made by check payable to "Wills, O'Neill & Mellk Trust Account" and shall be forwarded to the Law Offices of Wills, O'Neill & Mellk at 10 Nassau Street, P.O. Box 614, Princeton, New Jersey 08542, on or before January 30, 2010.

3. Dismissal of Subject Litigation: This Agreement shall dispose of all issues raised in the Subject Litigation and Releasors agree to voluntarily dismiss the Subject Litigation with

prejudice. As such, within ten (10) days of approval of this Settlement Agreement and Release by both Parties, counsel for Releasors shall advise the Commissioner of Education of such dismissal in writing, with copy served on counsel for the Board, Porzio, Bromberg, & Newman, P.C., at 100 Southgate Parkway, Morristown, New Jersey 07920.

4. Release: In exchange for the terms set forth herein, Releasors release and give up any and all claims and rights they may have against the Board, its current or former officials, administrators, employees, agents, servants, or representatives, arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement. As used in this Agreement, the term "Board" means: the Franklin Township Board of Education, and all officials, administrators, employees, attorneys, agents, servants, representatives, predecessors, and successors, insurance carriers, and other persons or entities for whom any of the above have been or may be legally responsible. This release specifically includes any potential claim for attorneys' fees, compensatory damages, punitive damages, by Releasors or their counsel based upon any relevant statute or law.

5. Agreement Not To Sue: Releasors agree not to file any lawsuit or claim against the Board, its officials, administrators, employees, agents, servants, or representatives, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality, for any claims released in this Agreement.

6. Non-Admission of Liability: This Agreement (or the payments hereunder) shall not be construed as an admission by the Board of any of the acts or omissions alleged, or of any acts or omissions which could have been alleged in the Subject Litigation. The Board specifically denies any liability whatsoever for any damages, injuries or other claims by the other party or which could be claimed by the other party.

7. No Precedent: The Parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever involving any one of the parties or the Board and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of this Agreement. This Agreement is a compromise of disputed claims and shall not be construed as an admission by either Party of any of the acts or omissions alleged or those that could have been alleged by either Party against the other Party in this matter.

8. Entire Agreement: This Agreement constitutes the entire understanding and agreement between the Parties respecting the Subject Litigation, bearing agency reference number 252-10/09 and Office of Administrative Law docket number EDUOA 12069-2009S. This Agreement may not be changed or modified, except by a writing signed by both Parties hereto.

9. Who Is Bound: Pisano-Phillips and her agents are bound by this Agreement. Those who succeed to Pisano-Phillips' rights and responsibilities, such as heirs, the executors of her estate, or her personal or legal representatives, are also bound. Horace Mann, its current or former officials, administrators, employees, agents, servants, or representatives, are also bound. The Parties specifically disavow that any benefit shall inure to any third-party by virtue of this Agreement.

10. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.

11. Execution: This Agreement may be executed in counterparts.

12. Interpretation and Construction: The Parties acknowledge that each party has engaged counsel in connection with the negotiation and completion of this Agreement, and,

consequently, agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be used in the interpretation of this Agreement or any amendment or exhibit hereto.

13. Severability: If any of the provisions of this Agreement shall be held by any court to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable this entire Settlement Agreement, but rather this entire Settlement Agreement shall be construed as if not containing the particular invalid or unenforceable provision or provisions, and the rights and obligations of the Parties shall be construed and enforced accordingly.

14. Voluntary and Knowing: The Parties acknowledge that each of them has consulted with, or had the opportunity to consult with, legal counsel of their own selection about this Agreement and its attachments. The Parties understand how this Agreement will affect their legal rights and voluntarily enter into this Agreement with such knowledge and understanding. The Parties warrant that they are fully authorized to execute this Agreement and to give the releases and make the promises contained herein. Each of the Parties warrants and represents that no other consent, approval, authorization, or order of, and no notice to, or order filed with any court, governmental authority, person, or entity is required for the execution, delivery or performance of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year first above written:

By: Lisa Pisano-Phillips
Lisa Pisano-Phillips

Date: Jan. 11, 2010

By: Christopher Piparo
Christopher Piparo, Board President
FRANKLIN TOWNSHIP BOARD OF EDUCATION
Date:

By: _____
THE HORACE MANN INSURANCE COMPANY
Date:

By: Abigail E. Kutz
Abigail E. Kutz, Interim Business Administrator
FRANKLIN TOWNSHIP BOARD OF EDUCATION
Date:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year first above written:

By: _____
Lisa Pisano-Phillips

Date:

By: _____
Christopher Piparo, Board President
FRANKLIN TOWNSHIP BOARD OF EDUCATION
Date:

By: _____
THE HORACE MANN INSURANCE COMPANY
Date: 1/5/2010

By: _____
Abigail E. Kutz, Interim Business Administrator
FRANKLIN TOWNSHIP BOARD OF EDUCATION
Date:

a. **Treasurer's** Report and **Board Secretary's** Reports, (Funds 10, 20, 30, 40 and 50) for September and October 2009.
Moved Mr. Foran Second Mr. Schultz Motion Carried

b. **Motion** to approve the line item transfers dated September 30, 2009.

Moved Mr. Foran Second Mr. Schultz Motion Carried

c. **Motion** to adopt the following resolutions:
Moved Mr. Foran Second by Mrs. Wolak

1. **Pursuant to N.J.A.C. 6A:23-2.11(c)3** the board secretary certifies that no line item account has encumbrances and expenditures, which in total exceed the line item appropriation in violation of N.J.A.C. 6A:23-2.11(a) for September and October 2009.

2. **Pursuant to N.J.A.C. 6A:23-2.11(c)4** the board of education certifies, after review of the board secretary's and treasurer's September and October 2009 financial reports, that no major account or fund has been over expended in violation of N.J.A.C. 6A:23-2.11(b) and that sufficient funds are available to meet the district's financial obligations for the remainder of the fiscal year.

K. Weiss, *V. Pres.*	Yes	A. Burdick	Yes	P. DiGiambattista	Yes
J. Foran	Yes	N. Reed	Yes	T. Schultz	Yes
L. Vail	Yes	T. Wolak	Yes	C. Piparo, *Pres.*	Yes

d. Construction Manager Budget Buyout reconciled with Business Administrator Financial Report for September and October 2009. Noted by the board.

2. Action Items:

a. **Motion** to accept the CAFR Report for the 2008-09 school year which includes no recommendations.
Moved Mr. Foran Second Mr. Weiss

K. Weiss, *V. Pres.*	Yes	A. Burdick	Yes	P. DiGiambattista	Yes
J. Foran	Yes	N. Reed	Yes	T. Schultz	Yes
L. Vail	Yes	T. Wolak	Yes	C. Piparo, *Pres.*	Yes

b. **Motion** to approve the payment of $6,376.55 for reimbursement of attorneys' fees to Lisa Pisano-Phillips in settlement of case number 02981.32524 based on the recommendation of the board attorney.

Moved Mr. Foran Second Mrs. Burdick

Discussion: Mr. Gagliardi said the board is responsible to pay the punitive damages and make her whole.

K. Weiss, *V. Pres.*	Yes	A. Burdick	Yes	P. DiGiambattista	Yes
J. Foran	Yes	N. Reed	Yes	T. Schultz	No
L. Vail	No	T. Wolak	Yes	C. Piparo, *Pres.*	Yes

c. **Motion** to adopt the following resolution:

Whereas, the Franklin Township Board of Education received $14,689 in extraordinary aide and $8,081 in non public transportation aide for the 2008/2009 school year, and

I DO HEREBY CERTIFY THE ABOVE IS A TRUE AND EXACT COPY OF A RESOLUTION ADOPTED BY THE FRANKLIN TOWNSHIP BOARD OF EDUCATION AT THE MEETING OF December 14, 2009
BUSINESS ADMINISTRATOR/ BOARD SECRETARY

#120-10

DAVID MATTHEWS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a former member of the respondent Board of Education, sought indemnification by the Board pursuant to *N.J.S.A.* 18A:12-20 for the costs of his defense against a complaint filed against him with the School Ethics Commission. In the proceeding for which he sought indemnification, the Commission held, and the Commissioner of Education affirmed on appeal, that petitioner had violated three provisions of the Code of Ethics for School Board Members.

The ALJ found that, in order to be eligible for indemnification under the statute, the acts or omissions forming the basis of the charges against petitioner must have arisen out of and in the course of the performance of his duties as a board member, requiring their analysis as to time, place and subject matter in accordance with applicable case law. The ALJ noted that the Commission had dismissed most allegations against petitioner; on the actions that resulted in findings of violation, the ALJ found that two of these arose out of and in the course of the performance of board member duties, while one did not.

The Commissioner adopted the ALJ's analysis and conclusions with respect to general principles of applicable law and petitioner's eligibility for indemnification as to his defense against those allegations resulting in findings of violation by the School Ethics Commission. However, the Commissioner found the record and Initial Decision insufficient to render a complete determination, in that these did not address the full panoply of actions underlying the allegations brought before the Commission and for which petitioner sought indemnification – only those resulting in findings of violation – nor did they address the manner in which the extent of indemnification would be determined where some of the acts or omissions underlying the complaint were found eligible for indemnification while others were not. The Commissioner remanded the matter for further proceedings as necessary to fully resolve the parties' dispute.

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

April 15, 2010

OAL DKT. NO. EDU 1228-08
AGENCY DKT. NO. 333-11/07

DAVID MATTHEWS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, as have the respective exceptions and replies filed by each party in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

In his exceptions, petitioner urges the Commissioner to endorse the conclusion of the Administrative Law Judge (ALJ) that he is entitled to indemnification by the Board of Education (Board) for "nearly all" of the costs of his legal defense against the school ethics allegations brought against him by two other Board members and the Superintendent of Schools;[1] he objects, however, to the conclusion that he is not entitled to indemnification with respect to his violation of *N.J.S.A.* 18A:12-24.1(d). In the latter regard, petitioner contends that the ALJ erred by applying the wrong legal standard – stating that petitioner was found to have violated *N.J.S.A.* 18A:12-24(d) (undertaking of employment or service which might reasonably be expected to prejudice independent judgment in the exercise of official duties),

[1] *Stephen Brown, Carol Lisa and Glenn Garrison v. David Matthews, Board of Education of the City of Englewood, Bergen County*, School Ethics Commission Dkt. No. C13-07, decided October 27, 2008; affirmed on appeal to the Commissioner of Education pursuant to *N.J.A.C.* 6A:4, Decision No. 123-09A, decided April 14, 2009.

when, in fact, he was found to have violated the provision of the Code of Ethics for School Board Members requiring board members not to administer the schools, but to see that they are well run – and by failing to recognize that petitioner's conversation with Deputy Superintendent Susan Mullins was fully within the scope of his duties as a Board member, arising directly from his involvement in that capacity in the ongoing issue of Ms. Mullins' employment status within the district. (Petitioner's Exceptions at 1-10, quotation at 5) In both his exceptions and his reply to the exceptions of the Board, petitioner once again urges – as he did before the ALJ – that any action by a board member relating to the conduct of school affairs *must* be deemed to have arisen out of and in the course of the performance of the board member's duties, since *N.J.S.A.* 18A:11-1(d) expressly provides for boards of education to "perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." (Petitioner's Reply Exceptions at 2)

The Board, in turn, urges rejection of the ALJ's conclusions in all respects save petitioner's violation of *N.J.S.A.* 18A:12-24.1(d), renewing its argument that merely because a board member takes an action having some relationship to school affairs does not mean that such action was taken in the course of the board member's duties as required by *N.J.S.A.* 18A:12-20 in order to qualify for indemnification. According to the Board, actions taken by a board member without board knowledge or approval, in opposition to or defiance of the board, or beyond the reasonable bounds of acceptable behavior cannot possibly be found, as they largely were by the ALJ, to have arisen in the course of performance of legitimate duties; indeed, the Board posits, the ALJ's analysis "turns the statutory intent on its head" by effectively providing that "even if a member does something he is not supposed to

as a member of a school board, his action being linked to school law prohibiting such conduct is enough to support reimbursement." (Board's Exceptions at 5-10, quotation at 10; Board's Reply Exceptions at 1-3)[2]

Upon review, the Deputy Commissioner finds the record and Initial Decision insufficient to render a complete determination, and hence remands the matter to the OAL for further proceedings.

Initially, the Deputy Commissioner notes that the question of indemnification for costs associated with defending against a complaint alleging violation of the Code of Ethics for School Board Members (*N.J.S.A.* 18A:12-24.1) is both one of first impression and one posing unique difficulties, since proceedings arising under this statute frequently – as here – involve a plethora of diverse allegations rather than claims arising from a single act which may be discretely analyzed in terms of the statutory standard for indemnification. Moreover, in that proceedings under the School Ethics Act are administrative proceedings which do not require favorable disposition in order for the charged party to be eligible for indemnification, analysis under the requisite standard cannot be limited solely to those actions found to constitute violations of the Act.

Petitioner has, in effect, addressed this difficulty by arguing from the outset that allegations of violation of the Code of Ethics for School Board Members inherently arise from the performance of board member duties, so that any proceeding to defend against them must necessarily be indemnified in full; the Board, in turn, has countered that behavior evincing defiance, extremism and disregard of board authority is inherently contrary to

[2] The Board also asserts that the ALJ's inadvertent citation to *N.J.S.A.* 18A:12-24(d), rather than *N.J.S.A.* 18A:12-24.1(d), had no effect on the Initial Decision's analysis and conclusions. (Board's Reply Exceptions at 1-2)

legitimate performance of board member duties, so that any complaint arising from such behavior cannot be found eligible for indemnification at all. However, as the ALJ has correctly recognized, in Code of Ethics matters, as in any other, it is the particular actions on which the allegations against a charged party are predicated that must be scrutinized – consistent with prior case law as to time, place and subject matter – in terms of the statutory standard of "arising out of and in the course of the performance of his duties as a member of the board" in order to determine a petitioner's entitlement to indemnification.[3]

As to those actions specifically reviewed by the ALJ pursuant to this standard – that is, those on which the School Ethics Commission based its findings of violation – the Deputy Commissioner is unpersuaded by the parties' respective exceptions and concurs with the ALJ's analysis and conclusions in this regard.[4] However, the Initial Decision does not address – nor does the record contain documentation and argument enabling the Deputy Commissioner to make informed determinations regarding – the full panoply of actions underlying the complaint before the Commission for which petitioner here seeks indemnification, including a substantial number of the allegations dismissed at various points in the Commission's proceedings.[5] Similarly lacking is any consideration of how the

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[3] In this regard, see also *Bower v. Bd. of Ed. of East Orange*, 149 *N.J.* 416 (1997), interpreting analogous language in the statute providing for indemnification of school employees.

[4] In so holding, the Deputy Commissioner additionally notes that, by his own account, petitioner's conversation with Susan Mullins took place during a "chat" when he stopped by her office while in the building on other business, and that petitioner was interviewed during the affirmative action investigation specifically in his capacity as a board member against whom the superintendent had made allegations of creating a hostile work environment. (School Ethics Decision, *supra,* at 6, 12) With respect to petitioner's attendance at the Bergen Tech School meeting – which the Commission found to have constituted "private action" in violation of the School Ethics Act, rejecting the testimony and evidence proffered by petitioner in support of his contention that he was both authorized and entitled to attend (*Id.* at 5, 11-12, 14, 15) – the Deputy Commissioner stresses that it is the action(s) underlying the charge, not the charge itself or its ultimate disposition, that determine whether a party's costs of defense are eligible for indemnification in an administrative matter.

[5] Petitioner's exceptions appear to construe the opening paragraph of the ALJ's conclusion (at 10) as finding him indemnified against all dismissed allegations, which constituted the bulk of the complaint against him. To the

extent of indemnification is appropriately determined in the event that some of the acts or omissions underlying the complaint at issue qualify for indemnification while others do not.

Accordingly, the Deputy Commissioner adopts the analysis and conclusions of the Initial Decision with respect to its statements of applicable law[6] and its findings on petitioner's eligibility for indemnification as to those allegations resulting in findings of violation by the School Ethics Commission. She remands the matter to the OAL, however, for such further proceedings as are necessary to fully resolve the parties' dispute consistent with the parameters set forth above.

IT IS SO ORDERED.[7]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 4/15/10
Date of Mailing: 4/15/10

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extent that such construction may be correct, the Deputy Commissioner observes that no basis is stated for the bald assertion that "the bulk of the overall dispute arose as a result of [petitioner's] participation as a Board member," apart from a reference to the mere fact of the allegations' dismissal – which is, in itself alone, immaterial to eligibility for civil or administrative indemnification under the standard of statute.

[6] The Initial Decision does, in fact, misstate various provisions of *N.J.S.A.* 18A:12-24.1 by quoting the analogous paragraphs of *N.J.S.A.* 18A:12-24; however, this error is not reflected in its subsequent analysis and conclusions, and had no effect on the outcome of the matter. Additionally, *Scirrotto v. Warren Hills Bd. of Educ.* is inadvertently cited as 72 *N.J. Super.* 391 (App. Div. 1994); the correct citation is 272 *N.J. Super.* 391 (App. Div. 1994).

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 01228-08
AGENCY DKT. NO. 33-11/07

DAVID MATTHEWS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Marc H. Zitomer, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

James F. Schwerin, Esq., for respondent (Parker McCay, attorneys)

Record Closed: December 1, 2009 Decided: January 13, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner David Matthews, a member of the Board of Education of the City of Englewood (Board), seeks indemnification for the costs of his defense before the School Ethics Commission (Commission).

On January 15, 2008, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On June 2, 2008, Petitioner moved for summary decision. On June 9, 2008, the Board filed a cross-motion for summary decision. On or about October 27, 2008, the Commission issued a decision on charges filed against Petitioner.

On April 14, 2009, the Commissioner of Education (Commissioner) issued a final decision and affirmed the Commission's finding that Matthews had violated three provisions of N.J.S.A. 18A:12-24.1. The Commissioner imposed the penalty of censure.

The issue is whether Petitioner is entitled to indemnification of attorney fees relating to the costs Ethics Complaint. The parties seek summary decision on the issue.

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision is appropriate

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

[Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).]

I **FIND** the relevant facts have been adjudicated before the School Ethics Commission and the Commissioner of Education. Therefore, and I **CONCLUDE** the matter is appropriate for summary decision.

FACTS

The findings of facts in the decisions of the School Ethics Commission and the Commissioner of Education are incorporated here as **FACT**:

1. Petitioner David Matthews is a former member of the Englewood Board of Education.

2. On March 26, 2007, Board members Stephen Brown and Glenn Garrison, and Carol Lisa, Superintendent of Englewood Public Schools filed a complaint against Matthews before the School Ethics Commission.

3. The complaint contained seventy-four (74) paragraphs and charged Matthews' with violating the School Ethics Act.[1] The gist of the allegations are summarized as follows:
   (a) Matthews did not abstain from discussing and/or voting on resolutions 07-A-17 and 07-A-41. (§6-8).
   (b) The Board selected three members (Brown, Garrison and Smith) to attend a meeting with the Bergen Tech Superintendent on January 4, 2007. On several occasions prior to the meeting, Matthews contacted the Bergen Tech Superintendent and discussed certain matters without Board approval or knowledge. (§9-16).
   (c) On January 4, 2007, Matthews appeared at the Bergen Tech meeting, the other board members present challenged his attendance, Matthews responded with derogatory and demeaning remarks about the Board and its President. (§17-18).

[1] The complainants alleged that Matthews violated N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) (f), (g), (i) and (j) of the code of Ethics for School Board Members.

(d) The board members were forced by the circumstances to allow Matthews to remain at the meeting, in which he then participated. (§19-21).

(e) Matthews openly criticized the Board at numerous public meetings. (§22).

(f) Without Board approval or knowledge Matthews spoke with Board employee Colon, which compromised the Board and caused Colon undue stress. (§23-25)

(g) Without Board approval or knowledge Matthews spoke with former Deputy Superintendent Mullins regarding her position with Bergen Tech; his conduct demonstrated "utter distain and contempt for the Board's decisions" and directives. (§26-34).

(h) At a public meeting on March 8, 2007, Matthews spoke against the Board's 2007/2008 budget and the Budget Committee, criticized Superintendent Lisa and the administration, and refused to yield the floor. (§35-44).

(i) On numerous occasions, Matthews entered the District's schools, discussed Board business with staff, and requested information not otherwise known or available to Board members. (§45).

(j) On March 20, 2007, Matthews acted without authorization or approval from Superintendent Lisa and demanded Assistant Superintendent Richard Segall to compile information regarding student enrollment in advanced placement classes. (§46).

(k) Matthews sought to obtain copies of Superintendent Lisa's expense reimbursements documents. (§47-49).

(l) Matthews refused to cooperate with an investigation regarding charges of harassment and then engaged in conduct that caused Lisa Finn-Bruce, Affirmative Action Officer, to resign. (§50-.58).

(m) Matthews' behavior and dealings with staff compromised the Board and harmed the District. (§58-74).

4. Matthews denied the allegations, filed a Motion to Dismiss and sought sanctions against respondents.

5. Based upon the pleadings and the parties' positions on December 18, 2007, the Commission on granted Mathews' Motion to Dismiss "as to allegations as set forth in paragraphs 22, 35, 36, 37, 38, 39, 40, 41, 43, 44 and 58 of the complaint". The Commission, however, noted that even if the allegations were true, they would not constitute violations of the Code of ethics for School Board members. The Commission further concluded that the complaint was not frivolous and denied petitioner's request to impose sanctions against respondents.

6. On June 24 and August 26, 2008, the Commission held hearings on the merits of the complaint. The Commission evaluated testimony presented by Carol Lisa, Stephen Brown, Glenn Garrison, Lisa Finn-Bruce and David Matthews.

7 On August 26, 2008, the Commission granted Matthews' Motion to Dismiss paragraphs 6, 7, 8, 33, 34, 45, 42, 47, 48, and 49 of the complaint.

8. The School Ethics Commission evaluated the evidence concerning Matthews' interaction with Ellen Conlon, Susan Mullins, and Richard Segall. On October 27, 2008, the Commission issued a decision that Matthews violated N.J.S.A. 18A:12-24.1(d), (e), and (i

9. Based upon its findings the Commission concluded Matthews violated N.J.S.A. 18A:12-24(d),[2] as summarized:

[2]N.J.S.A. 18A:12-24(d), "No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties".

a. Matthews' action with Mullins constituted direct involvement in activities or functions that were the responsibility of school personnel.

b. The Board charged Superintendent Lisa with delegating special assignments to Mullins, who would work from home and communicate directly with the Superintendent; the Commission noted "It is irrelevant what [Matthews] personally thought about this arrangement".

c. Further, the Commission found that Matthews' conduct in February 2007, "Matthews, (by telling Mullins that if he were her, he would... not go through the humiliation associated with the Interlocal Services Agreement and he would simply return to Bergen Tech, and that he believed it was embarrassing that the Board had three assistant superintendents) overstepped his duties as a board member and encroached on the oversight and management functions that were specifically assigned to the Superintendent";

d. The Commission concluded, Matthews violated N.J.S.A. 18A:12-24(d) of the Code of Ethics for School Board Members.

10. The School Ethics Commission made credibility findings and concluded Matthews violated N.J.S.A. 18A:12-24(e)[3] as summarized:

a. Matthews was not authorized or selected by the Board to attend the meeting at Bergen Tech on January 4, 2007.

b. Matthews' attendance at the meeting with Bergen Tech School over a disputed interlocal services agreement "constituted private action" under N.J.A.C. 7A:28-7.1. (Action which is "beyond the scope of the

[3] N.J.S.A. 18A:12-24(e) No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties

duties and responsibilities of a member of a district board of education").

c. Matthews' conduct of attending the meeting constituted "in this context, reckless behavior that could have compromised the Board's position."

d. The Commission concluded Matthews violated N.J.S.A. 18A:12-24(e) of the Code of Ethics for School Board members.

11. The School Ethics Commission concluded Matthews engaged in combative and insulting dialogue with the District's Affirmative Action Officer during an investigation in violation of N.J.S.A. 18A:12-241(i)[4].

12. The Commission recommended that Commissioner of Education impose a penalty of censure.

13. On April 14, 2009, the Commissioner of Education affirmed the decision of the Commission that Matthews violated N.J.S.A. 18A:12-24.1(d), (e), and (i) Code of Ethics for School Board members by attending the January 4, 2007 meeting with Bergen Tech without Board authorization, as a consequence of his interactions regarding Mullins; and as a result of his refusal to cooperate with the Affirmative Action Officer's investigation and making statement to her of an offensive nature.

LEGAL ANALYSIS AND CONCLUSION

Petitioner contends the alleged unethical acts arose in the performance of his duties as a Board member. Specifically, he was acting "under color" of his position when he engaged in the conduct that underlies the ethics complaint. Consequently, the Board must indemnify him based on "the undeniable fact that the conditions of the

[4] No elected member shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the member or a member of his immediate family, whether directly or indirectly, in return therefor.

statue are met for mandatory indemnification, both by virtue of the complained-of conduct and by the inherent fact that violations of the Code of Ethics can arise only by way of one's board membership." (Petitioner's Brief at 1).

Petitioner acknowledges all school board members must abide by the Code of Ethics. However, petitioner asserts that conduct, even behavior that violates the Code, constitutes action that is inherently related to the duties of a school board member. Therefore, the alleged wrongful conduct is automatically within the purview of the statute and ripe for indemnification. (Petitioner's Brief at 9-11).

Respondent argues Petitioner erroneously equates actions that simply relate to the duties of a school board member and actions that arise from the course of performance of duties as a school board member.

A board member may be entitled to indemnification of his or her legal fees. Pursuant to N.J.S.A. 18A:12-20 reimbursement of legal fees for a board member is recoverable:

> Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting there from.
>
> [N.J.S.A. 18A:12-20.]

Under N.J.S.A. 18A:12-20 the alleged violations must arise out of and in the course of the performance of one's duties as a member of a board of education. Montagna v. Board of Education. of Township. of Belleville, 97 N.J.A.R.2d (EDU) 46.

In Errington v. Mansfield Board of Education, 42 N.J. 320, 322 (1964) plaintiff alleged that the board had no authority to expend public funds to defend a libel suit.[5] On remand the court determined the President of Board of Education was not eligible for indemnification for a libelous statement. Further, the court determined that the board members, intervenors in the libel suit, were acting as individuals in adopting a resolution to provide legal fees to the board president. However, indemnification was awarded to the board members who were then subjected to suit because their involvement in the suit was wholly an outgrowth of their role as board members. Errington v. Mansfield Board of Education, 100 N.J. Super. 130 (1968).

In the context of a criminal complaint, the issue is whether the critical acts took place when and where the individual performed his duties and while he was fulfilling the duties of a board member. Powers v. Union City Board of Education, 124 N.J. Super. 590 (1973), aff'd o.b., 127 N.J.Super. 294 (App. Div.), certif. denied, 65 N.J. 575 (1974). Although the alleged criminal acts were beyond the prescribed duties of a board member does not immunize the board from the statutory liability. Such a construction would exclude all criminal conduct and frustrate the express intent of the legislature." Id. at 595. The critical factor with regard to the extortion charge, even though the board member voted on contracts, was that the actions were carried outside his activity as a board member as to time, place, and subject matter. Examples of criminal conduct that would require indemnification under the statute include a violation of N.J.S.A. 18A:38-5.1, (board member votes to exclude a child from a public school because of race, creed, or color; creating a religious test for employment in a public school; neglecting to perform any duty required by law) and N.J.S.A. 2A:135-5, (board member willfully and knowingly votes for the disbursement of public money or the creation of an obligation in excess of appropriations). The court explained that although the acts would be illegal, the successful defense of them would invoke indemnity under the statute because the gravamen of the litigation took place when and where the individual performed his duties and while he was fulfilling the duties of a board member. Criminal extortion, on

[5] The New Jersey Supreme Court refused to consider the issue absent a full record. "The record before us is meager and the issue presented is of public importance. It appears to us that the sound course would have been to permit the libel actions to proceed to trial, and thereafter the issue could have been fairly determined on the basis of a full record."

the other hand, fell outside because it was carried on outside the course or scope of powers' duties as a board member.

In the civil context, courts have generally held that litigation arising out of situations involving the strong public policy favoring open debate and discourse, fall within the duty to indemnify. For example, where the Board President allegedly made defamatory remarks to a public citizen during a television show, the Court found that the Board President was entitled to indemnification for legal fees resulting from the action. Montagna v. Bd. of Educ. of Twp. of Belleville, 97 N.J.A.R.2d (EDU) 46. The sole reason for the president's appearance on the show was to disseminate information about the Board and its decisions to the public. Further, at least a portion of "the utterance was directed at the Petitioner's past and present disagreements with the BOE." Id. at 15-16.

Similarly, in Quick v. Board of Education. of the Township. of Old Bridge, 308 N.J. Super. 338, 342 (App. Div. 1998), plaintiff sought expenses incurred in a dispute over her attendance at a meeting to discuss a lawsuit she and other citizens had initiated before her election to the Board. The court held Quick was within her duty to attend a board meeting, despite board action barring her attendance. Quick, 308 N.J. Super. at 342. Quick had agreed to refrain from participating in the decision, and believed it was her duty as a school board member to attend meetings. Id. at 342.

On the other hand, the Courts have held that the conduct does not arise in the course of one duties where a member attends the board meeting to advance a personal agenda or a teacher's effort to pressure administration officials into tenure, Scirrotto v. Warren Hills Bd. of Educ., 72 N.J. Super. 391 (App. Div. 1994)

CONCLUSIONS

Here, the bulk of the overall dispute arose as a result of Matthews' participation as a board member. The Commission dismissed most of the paragraphs listed in the complaint, leaving three that were adjudicated. I have carefully considered whether the

conduct in the remaining three charges was carried on outside the course of scope of Petitioner's duties as a Board member as to time, place, and subject matter. The conversation with Mullins was a private conversation, which occurred outside of a board or committee meeting, breached board policy and defied a court order limiting interaction with Mullins.

Therefore, I **CONCLUDE** that Petitioner's conversation with Mullins was not within the course of duties as regards time and place. I further **CONCLUDE** that defense of the charge is not eligible for indemnification.

The second violation concerned a breach of board policy. The Commission found that Matthews ran afoul of the statutory prohibition against taking "any private action that may compromise the board" and the duty to recognize that the authority belongs to the board of education as a whole. Further, the Commission noted that N.J.A.C. 7A:28-7.1 defines the term private action, as that which is "beyond the scope of the duties and responsibilities of a member of a district board of education". The Board did not select Matthews to attend the meeting with Bergen Tech School. Therefore, the Commission concluded that his attendance at a meeting "constituted private action". The Commission further commented that Matthews' decision to attend the meeting, "[W]as in this context, reckless behavior that could have compromised the Board's position." Although petitioner's conduct might have went beyond acceptable, the issue is whether the conduct was carried on outside the scope of his duties as to time, place, and subject matter. The subject matter and the meeting were within the purview of all Board members. Although the other participants were unhappy about his appearance at the meeting they included and accepted his attendance. Therefore, I **CONCLUDE** that indemnification is available.

Lastly, the Commission concluded that Petitioner engaged in combative and insulting dialogue with a district employee assigned to conduct an Affirmative Action investigation. The Commission observed that Petitioner raised valid issues about the authority of the employee to conduct the investigation. However, he violated the Ethics Code requirement that board members "support and protect school personnel in proper

performance of their duties," N.J.S.A. 18A:12-241(i). Since boards of education have the authority to hire and fire personnel, this requirement is intended to prevent board members from using that authority to improperly intimidate district employees – a circumstance peculiar to board members.

Thus, I **CONCLUDE** this charge arises out of Petitioner's role as a board member, since it is that authority which makes any inappropriate conduct destructive in the school environment. Moreover, the conversation, although unfortunate, arose as part of an official school investigation. Therefore, I **CONCLUDE** that indemnification is available.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 13, 2010
DATE

MUMTA BARI-BROWN, ALJ

Date Received at Agency: 1-13-10

Date Mailed to Parties: 1-13-10

dr

#121-10M

AGENCY DKT. NO. 48-3/10

MOHAMED EL-HEWIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY, *ET AL.*	:	DECISION ON MOTION

Petitioner asks for reconsideration of a decision issued by the Commissioner on April 10, 2008. The decision upheld respondent Board's non-renewal of petitioner's employment as an alternate route provisional teacher.

N.J.A.C. 6A:3-1.15(b) allows applications for reconsideration of Commissioner decisions, providing that they are filed within ten days of the issuance of said decision. The instant application is clearly out of time. Moreover, the motion fails to meet the standards outlined in *N.J.A.C.* 6A:3-1.15(b)(2). Rather than presenting specific new facts which could not have been previously discovered by due diligence, mistakes directly related to the treatment of petitioner, and/or new developments in legal precedent, petitioner's motion generally relies on 1) papers submitted and already considered by the Commissioner and other adjudicators in previous, unsuccessful proceedings brought by the petitioner in various forums and 2) a Department of Education report which described improprieties in some of the respondent district's business practices and compensation packages for upper level staff, but included

nothing specifically related to respondent's determination that petitioner's employment should not be renewed. [1]

Petitioner was advised by letter dated March 4, 2010, from Deputy Commissioner Willa Spicer, that the "Commissioner is unable to consider your submission, which pertains to matters that are either on appeal or in litigation in the State and federal courts and into which the Commissioner may not insert himself in the manner you seek." For those reasons and the reasons articulated in this decision, respondents' motion to dismiss the petition is granted.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/10

Date of Mailing: 4/19/10

[1] The Commissioner also notes that petitioner alleges in a March 11, 2010 letter that his employment actions are on appeal in both state and federal court. Should this be the case, the Commissioner is without jurisdiction to hear same.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

122-10

OAL DKT. NO. EDU 11103-09
AGENCY DKT. NO. 163-7/09

JOHN F. MAIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC 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: 4/19/10

Date of Mailing: 4/19/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11103-09

JOHN MAIELLO,

Petitioner,

v.

THE WAYNE TOWNSHIP BOARD OF EDUCATION,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Robert H. Greenwood, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Zitomer, LLC, attorneys)

Record Closed: March 19, 2010 Decided: March 19, 2010

BEFORE **J. HOWARD SOLOMON**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 16, 2009 for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

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.

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.

3-19-10
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency:

Date Mailed to Parties: MAR 2 3 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE OFFICE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831
(609) 860-9100
ATTORNEY FOR PETITIONER, JOHN F. MAIELLO

JOHN MAIELLO	)	
	)	BEFORE THE COMMISSIONER
	)	OF EDUCATION, THE STATE OF
v.	)	NEW JERSEY
	)	
	)	OAL Docket # EDU 11103-2009N
	)	Agency Docket # 163-7/09
THE WAYNE TOWNSHIP BOARD	)	
OF EDUCATION	)	
	)	
	)	STIPULATION OF SETTLEMENT

WHEREAS, the petitioner, JOHN MAIELLO, filed a Petition of Appeal asserting that he had tenure as a "director," having previously served as a director of human resources, a position which had required an administrator certificate and a principal endorsement, and,

WHEREAS, petitioner asserted a tenure claim to existing director titles now held by non-tenured staff members, and

WHEREAS, the Wayne Township Board of Education opposed petitioner's claim, and

WHEREAS, the parties engaged in settlement discussions to avoid the need for further litigation and associated costs, and

WHEREAS, while reserving all the rights related to their respective claims and defenses, the parties have arrived at an agreement which they believe is in their mutual interest in that it will end this

litigation and any further expense associated with it, and will avoid displacing any existing staff member employed in the district,

NOW, be it resolved that the parties agree to the following stipulation of settlement:

1) The petitioner waives and releases all claims he has asserted in the within petition to any existing director titles.

2) In consideration therefore, the respondent, Wayne Township Board of Education, while not acknowledging any wrongdoing or violation of law or contract, agrees to compensate petitioner the difference between his current salary of $126,230.00 and the salary of $132,583.00 which he received in his prior position during the 2008-2009 school term, a sum of $6,353.00, less the payment of $2,337.00 he would have had to have made towards his health insurance premium if he were reassigned to a director title, representing a net payment of $4,016.00. Said payment will be made only for the current 2009-2010 school term.

3) Petitioner does not waive any tenure claim he may have towards any director position to be created in the future or any director title which may become vacant for which he will be qualified.

4) This settlement constitutes the full agreement of the parties.

5) This settlement is subject to approval of both the Wayne Township Board of Education and the Commissioner of Education.

Robert M. Schwartz, Esq.
Attorney for Petitioner
John Maiello

Robert Greenwood, Esq.
Attorney for Respondent
Wayne Township Board of Education

John Maiello

Wayne Township Board of Education
By: ROBERT CEBERIO
BOARD PRESIDENT

PUBLIC SCHOOLS
Wayne
50 Nellis Drive Wayne, New Jersey 07470

Administrative Offices
www.wayneschools.com
Phone: 973.633.3000

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey, convened in a Regular Meeting on February 18, 2010 in the Council Chambers of the Municipal Building, 475 Valley Road, Wayne, New Jersey and the Executive Meeting in the Wayne Board of Education Conference Room, 50 Nellis Drive, Wayne, New Jersey 07470. This meeting was scheduled to begin at 6:00 p.m. pursuant to the terms of the Sunshine Law.

The following members of the Wayne Board of Education were present: R. Ceberio, C.Simon, D. Pavlak, Jr., J. Hutchison, D. Del Sardo, F. Mazzei, M. Polinik, and J. Walsh.

Late Arrival: J. Jimenez (8:10 p.m.)

H-146-10- BE IT RESOLVED, upon the recommendation of the Chief Administrator in Charge, that the Board hereby approves the Settlement Agreement in the litigation of John Maiello v. Wayne Township Board of Education and hereby authorizes its President to execute the said agreement on behalf of the Board in a final form approved by Board Counsel.

MOTION: M. Polinik
SECOND: D. Pavlak, Jr.
VOTE: 8-0
Abstain: J. Jimenez

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:

I, Juanita A. Petty, School Business Administrator/Board Secretary, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby verify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on February 18, 2010 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne 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 the Wayne Board of Education this 22nd day of February 2010.

SEAL

Juanita A. Petty, RSBA
School Business Administrator/Board Secretary

JRA:plc

IN THE MATTER OF THE TENURE	:	
HEARING OF FABIO JIMENEZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF WOODBRIDGE,	:	
MIDDLESEX COUNTY.	:	

SYNOPSIS

The Woodbridge Township School District brought tenure charges of conduct unbecoming, insubordination and other just cause against respondent, a tenured custodian. Respondent denied all charges.

The ALJ concluded that the Board proved by a preponderance of the credible and legally competent evidence that respondent, *inter alia*: engaged in a pattern of belligerent conduct towards his co-workers and supervisors, behaved in an objectionable and offensive manner toward a female co-worker, left his assigned post without permission, failed to abide by procedures regarding absences, failed to clean as directed, and flagrantly disregarded workplace rules. The ALJ found that respondent's conduct warranted dismissal from tenured employment.

The Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. Respondent was dismissed from 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.

April 22, 2010

OAL DKT. NO. EDU 9298-09
AGENCY DKT. NO. 156-7/09

IN THE MATTER OF THE TENURE HEARING OF FABIO JIMENEZ, SCHOOL DISTRICT OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX 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 the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent and the Board of Education (Board), and the Board's reply to respondent's exceptions.[1]

In its exceptions, the Board substantially reiterates its post-hearing submission at the OAL, urging adoption of the Initial Decision to the extent that the Board's arguments were accepted by the Administrative Law Judge (ALJ), and expansion of the ALJ's findings and conclusions to the extent that these do not reflect the Board's position in full detail.[2] (Board's Exceptions at 1-54)

[1] By letter dated March 22, 2010, respondent objected to the Board's exceptions on grounds that applicable rule makes no provision for exceptions "in support of" an Initial Decision; by reply dated March 23, 2010, the Board countered that its submission was fully in compliance with law, in that it proposed substantive additions and administrative clarifications to the Initial Decision as well as noting those areas with which the Board agreed. By letter dated March 25, 2010, the Department of Education advised the parties that the Board's exceptions fell within the permissible scope of *N.J.A.C.* 1:1-18.4 and, hence, would be considered by the Commissioner in rendering his decision. Respondent did not reply to the Board's exceptions, although afforded the opportunity to do so by both the referenced rule and the Department's March 25, 2010 letter.

[2] The Board notes seven instances of hostility toward supervisors in addition to those specifically found by the ALJ (Board's Exceptions at 12-13); three additional instances of berating and embarrassing co-workers (*Id.* at 15); three additional instances of other unbecoming conduct (*Id.* at 16); two additional instances of insubordination (*Id.* at 17-18); seven additional instances of violating attendance procedures (*Id.* at 20-21); and five additional instances of sexual harassment (*Id.* at 22-23).

Respondent's exceptions similarly reiterate the substance of his post-hearing submission, recasting the arguments therein to support the contention that the ALJ erroneously sustained the Board's charges. (Respondent's Exceptions at 1-27) During the course of such reiteration, respondent particularly asserts that the ALJ: 1) failed to explain, for each charge, why she upheld some specifications and rejected others and further failed to specify the evidence on which she relied in making her determinations (*Id.* at 1-2); 2) failed to deal with inconsistencies in testimony (*Id.* at 8, 13); 3) made findings of fact that do not relate back to the Board's charges as stated (*Id.* at 10), including some on allegations not contained within such charges (*Id.* at 26); and 4) pronounced respondent's leaving of a note in response to removal of his personal items from a locker inappropriate without indicating the basis for so doing (*Id.* at 13-19).

In reply, the Board contends that respondent's exceptions have: 1) mischaracterized the Initial Decision in stating that the ALJ "rejected" some of the tenure charge specifications, when, in fact, not one of the Board's allegations was found untrue (Board's Reply at 3); 2) wrongly asserted that findings were made outside the scope of the Board's charges, when each of the purportedly extraneous incidents is, in fact, incorporated into the Board's July 1, 2009 Statement of Tenure Charges and Statement of Evidence Under Oath and the Board's charges additionally contain broad allegations encompassing "other actions of the same or similar nature" (*Id.* at 3-4); and 3) attacked the ALJ's well-supported credibility determinations by attempting to simply dismiss Board witnesses as "not credible," take testimony out of context, proffer "some outlandish theory" or claim of prejudice as to why a particular witness would lie under oath, or urge wholesale rejection of hearsay testimony without acknowledging that such testimony is acceptable in administrative proceedings so long as the

residuum rule[3] is satisfied, as it clearly was herein (*Id.* at 4-13; 19-22). The Board further contends that respondent errs in claiming that certain of its allegations "appear" not to have been sustained, when the ALJ's overall discussion and summation of respondent's own testimony makes it clear that they were[4] (*Id.* at 13-17), and that – notwithstanding respondent's attempts to cast blame for the "note" incident elsewhere and characterize the writing in question as angry but not threatening – Board witnesses clearly testified that they did, in fact, feel threatened and intimidated by respondent's note, the language of which speaks for itself (*Id.* at 18-19).

Upon review, the Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by her in weighing the testimony and evidence, and in concluding that the record overall overwhelmingly supported the Board's charges. Notwithstanding respondent's contentions to the contrary, the Commissioner finds no basis in the record, which includes transcripts of all five days of hearing, to reject either the ALJ's recitations of testimony or her determinations of witness credibility;[5] similarly, the Commissioner judges the ALJ's findings of fact to be supported by a voluminous documentary and testimonial record as appropriately summarized in the Initial Decision.[6] Moreover, the Commissioner fully concurs with the ALJ's assessment of respondent's conduct in light of applicable law and prior decisional precedent, and

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[3] *N.J.A.C.* 1:1-5.5(b).

[4] In one instance, the Board attributes respondent's stance to the ALJ's reference (at 18-19) to "September 2003" as the due date of a doctor's note, when it is clear from the context that she is referring to respondent's absence between September 30, 2003 and October 6, 2003 without providing a doctor's note as required upon his return on October 7, 2003. (Board's Reply at 14-15)

[5] It is well established that the Commissioner must defer to the credibility findings of the ALJ unless these prove to be arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record. *N.J.S.A.* 52:14B-10(c).

[6] In this regard, the Commissioner rejects both respondent's contention that the ALJ was required to set out in detail the specific basis for each finding when such basis is evident from the Initial Decision's discussion of testimony and evidence, and the Board's suggestion that each and every allegation supporting its charges should be specifically addressed in the Initial Decision when consideration of the major allegations under each charge was more than sufficient to render a determination as to whether a charge was proven.

agrees that the conduct proven in this proceeding amply warrants respondent's dismissal from tenured employment.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL directing removal of respondent from his position of tenured employment is adopted as the final decision in this matter.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 4|22|10
Date of Mailing: 4|23|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09298-09
AGENCY DKT. NO. 156-7-7/09

IN THE MATTER OF THE TENURE HEARING OF FABIO JIMENEZ, WOODBRIDGE TOWNSHIP SCHOOL DISTRICT, MIDDLESEX COUNTY.

Jonathan Busch, Esq., for petitioner Woodbridge Township School District (Wilentz, Goldman & Spitzer, attorneys)

Nancy I. Oxfeld, Esq., for respondent Fabio Jimenez (Oxfeld Cohen, attorneys)

Record Closed: February 16, 2010 Decided: March 8, 2010

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Woodbridge Township School District (the District/Board), brought tenure charges against Fabio Jimenez, a custodian, pursuant to N.J.S.A. 18A:17-3 on charges of conduct unbecoming (sexual harassment and belligerent conduct) insubordination and other just cause. On July 1, 2009, the Board suspended Jimenez without pay, in accordance with N.J.S.A. 18A:6-14. On July 17, 2009, tenure charges were filed with the superintendent of schools, and served on Jimenez in accordance with N.J.S.A.

18A:6-11 and N.J.A.C. 6A:3-5.1. Through counsel, respondent filed an answer on July 30, 2009, denying the charges and raising certain affirmative defenses.[1] (P-3.)

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 11, 2009. Hearings were held on November 30, and December 1, 14, 16, and 17, 2009. The record remained open for the receipt of transcripts and post-hearing briefs, and closed on February 16, 2010.

STATEMENT OF THE ISSUE

The issue is whether the Board proved the tenure charges against Jimenez by a preponderance of the credible evidence.

TESTIMONY

The following is intended to summarize the testimony of the witnesses relevant to the issues in this matter.[2]

Dr. Jonathan Crowe

Dr. Jonathan Crowe, superintendent of schools, testified on behalf of the District. Jimenez was hired by the Board in 1996 as a custodian. Crowe met Jimenez in the fall of 1996 while teaching sixth grade at Lynn Crest School. Jimenez would clean the classroom and they would informally speak. Crowe was appointed principal of Lynn Crest School in June 2002, and served in that position through December 2007. He was appointed principal of Iselin Middle School on January 1, 2008, and served in that position until July 31, 2008, when he became superintendent of schools.

When Crowe was principal of Iselin Middle School, he met with Jimenez to discuss his job performance. He said that Jimenez was insubordinate and failed to

[1] Prior to hearing, Jimenez withdrew his second affirmative defense of addiction.

[2] For purposes of brevity, the same facts repeated by different witnesses will only be included in the testimony of one of these witnesses.

complete his assigned tasks. Crowe stated that since becoming superintendent he has only spoken to Jimenez on one occasion, addressing an allegation from an employee who accused Jimenez of speaking to her inappropriately, dancing in front of her, and blocking her way.

Crowe also testified that Jimenez failed to report to work without following procedures, by not leaving a recorded message that he would not be at work.[3] (P-2.) Pursuant to the policies and procedures of the District, Crowe must prepare verbal warnings, written warnings, suspensions, salary freezes or dismissals. (P-3; P-4.) Crowe verbally warned Jimenez. On January 7, 2008, Crowe, as principal of Iselin Middle School, forwarded a letter to Jimenez advising him that he had used eleven of his fifteen allotted illness days for the school year. (P-103.)

On February 1, 2008, Dennis DeMarino, District business administrator, forwarded a memo to Crowe (P-108) advising him of four incidents involving Jimenez:

> 1.) Physical education teachers found a half empty bottle of Michelob Ultra on a desk in their locked office. Jimenez had been assigned to clean that office;
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> 2.) Music teacher Mrs. Margaretta Casella reported that Jimenez was disruptive when he stood in front of her classroom doorway during chorus rehearsal and danced;
>
> 3.) Jimenez called his supervisor at 6:00 a.m., on January 31, 2008, advising he had lost a kitten during his evening shift that a family member brought in and he was looking for it; and
>
> 4.) After inspection of Jimenez' designated area on January 31, 2008, his supervisor found only a portion of the area cleaned.

Crowe personally observed the Michelob bottle on the desk and suspected Jimenez of leaving it there, because that was his assigned work area. He also believed that Jimenez was dancing in front of the music teacher's chorus rehearsal. Crowe stated

[3] The Employment Agreement between Woodbridge Township and its Education Association reads in part: G (d): Custodians shall report their absences by means of a tape machine at School #2 & 16 no later than two (2) hours prior to their shift.

that Jimenez confirmed that a kitten, which was brought to school by a family member, was lost in the building.

On February 26, 2008, supervisor Pamela McGlynn forwarded a memo to DeMarino outlining additional incidents involving Jimenez. (P-113.) These incidents included Jimenez "meowing" around the building; singing in Spanish and English during an after-school activity period while listening to his iPod[4]; not cleaning two large soda spills in classroom 603; not removing trash from room 604; and not removing papers from under the desks in rooms 514 and 516.

On May 20, 2008, Crowe forwarded a memo to Jimenez advising him that he was insubordinate by not cleaning bleachers when directed to do so by his supervisor and not changing a light bulb as directed. (P-133.)

On May 29, 2008, Jimenez was given an informal hearing to address the issue of absenteeism and the bleacher incident. (P-134.) Present at the meeting were Crowe, assistant superintendent for personnel services Angela Korodan, Dennis DeMarino, and Brian Geoffroy of the Woodbridge Township Education Association representing Jimenez. At that hearing, Crowe stated that Jimenez did not follow a written directive immediately, as his coworkers did, when ordered to clean the bleachers. Instead, Jimenez gave an excuse that he had been on his way, but the bleachers had already been done, which Crowe found to be an unacceptable excuse.

On June 16, 2008, Jimenez received his year-end performance evaluation. Crowe said it was a very negative evaluation, and that it was rare to see so many "unsatisfactory" ratings for a custodian. (P-137.)

On March 10, 2009, Crowe and Korodan met with a temporarily assigned custodian, Katherine Anthony, to discuss a complaint she had made. Anthony claimed that Jimenez was harassing her by making inappropriate sexual comments, and she wanted the behavior to stop. (P-144.)

[4] Crowe testified that although there is no written policy that iPods and similar devices are not permitted, he felt that it was inappropriate to use such a device during the school day, but less serious if used in the evening.

As a result of Anthony's complaint, Jimenez was suspended with pay from March 10, 2009, through March 16, 2009, pending further action of the Board. (P-149.) On March 30, 2009, DeMarino recommended to Crowe that Jimenez's salary increment be withheld for the 2009–2010 school year, and also sought to have Jimenez terminated from employment effective July 1, 2009. (P-150.) DeMarino based his recommendation to withhold Jimenez's salary increment on his excessive absenteeism, his not following procedure when he failed to call in for a bereavement day and a birthday compensatory day, and his inappropriate behavior as alleged by Anthony.

On May 20, 2009, Crowe sent a letter to Jimenez advising him of his suspension with pay effective May 19, 2009, pending Board action. (P-158.) The Board approved the suspension with pay on May 22, 2009. (P-160.)

On July 1, 2009, Crowe filed tenure charges, which were approved and adopted by the Board on July 16, 2009; thereafter, Jimenez was suspended without pay.

Angela Korodan

Angela Korodan, the District's assistant superintendent for personnel services since 2008, testified on behalf of the District. Korodan had been the director of personnel from July 2002 to September 2008. Her duties included hiring, employee discipline, staffing, budgeting and conferencing. Korodan is also the chief affirmative action officer.

Korodan stated that Jimenez had an informal hearing on April 8, 2004, with regard to his past disciplines, to address why he failed to follow procedure by leaving the building without the permission of his supervisor. (P-35.) The Board approved a five-day suspension without pay. (P-37.)

On January 14, 2005, the Board upheld a two-day suspension for Jimenez's again leaving the building without permission and taking a half-day sick day an hour earlier than policy dictated. (R-53.)

An informal hearing was held on October 27, 2006 (discussed in DeMarino's testimony), and the Board imposed a suspension of ten days without pay. (P-77.)

On February 7, 2008, Jimenez had an informal hearing to address why he was taking sick days when he was not ill, and the fact that he had a family member bring a kitten to school and leave it with him. Korodan had concerns not only for the safety of the animal that was left in the building all night, but also for the health and safety of the students, in case the animal carried disease. (P-110.) On March 13, 2008, the Board approved a thirty-day suspension without pay for the period March 31, 2008, through May 9, 2008. (P-121.)

On April 24, 2008, the Board approved the increment withholding for Jimenez for the 2008–2009 school year for being excessively absent during the 2007–2008 school year; for engaging in disruptive behavior on January 31, 2008, by standing in the doorway of a classroom and dancing while a chorus rehearsal was being conducted; by allowing a cat into the school building and leaving it there overnight; and for repeatedly failing to complete assigned tasks and engaging in hostile and disrespectful conduct towards his supervisor. (P-125.)

On May 29, 2008, Jimenez had another informal hearing to address why he did not follow procedure when he called to take off work for legal reasons when he did not have any available leave days left. Jimenez also failed to follow the directive to clean the bleachers in the gym after a basketball game, when he did not help his coworkers. (P-134.)

Korodan testified that she received a telephone call on March 9, 2009, from Crowe advising that a substitute custodian, Katherine Anthony, was accusing Jimenez of sexual harassment. After interviewing Anthony and Jimenez, Korodan prepared an Affirmative Action Grievance Report.[5] (P-143; P-144.) Korodan found that there was evidence to support Anthony's claim against Jimenez of sexually inappropriate behavior

[5] Korodan's testimony as to the sexual-harassment grievance corroborated that of the alleged victim, Ms. Anthony, and will therefore not be reiterated here.

in the workplace. (P-147.) Jimenez was suspended with pay pending action by the Board. (P-146; P-148.)

On October 13, 2008, Jimenez attended the affirmative action "Diversity Awareness and Sexual Harassment" training. (P-141.) Pursuant to the handout distributed during the training session, examples of sexual harassment included hugging, kissing, patting, stroking, blocking a person's path, following a person and/or giving a personal gift, turning work discussions to sexual topics, telling sexual jokes or asking personal questions about someone's social or sexual life. (P-142.)

On April 29, 2009, the superintendent recommended withholding Jimenez's salary increment for the 2009–2010 school year for being excessively absent; for not following procedure by failing to call and leave a recorded message when absent for a bereavement day and a birthday compensatory day; and for the harassment of Anthony. (P-154.)

On May 21, 2009, the Board approved a suspension with pay retroactive to May 19, 2009, pending further action. (P-164.)

Dennis DeMarino

Dennis DeMarino, the District's business administrator and board secretary since June 2003, testified on behalf of the Board. Both Jimenez's supervisor, Pam McGlynn, and supervisor of buildings and grounds Anthony D'Orsi contacted him on many occasions with complaints about Jimenez's behavior issues. Many informal hearings were conducted in his office. The first hearing that addressed behavior issues was held on April 8, 2004. During that meeting they discussed Jimenez leaving the building during working hours without permission from a supervisor, and his being argumentative towards his supervisor. (P-35.) A five-day suspension was imposed.

On May 25, 2004, another informal hearing was held because Jimenez was having personal conflicts with his supervisor, and he had lost his temper when addressing his supervisor. (P-44.) No disciplinary action was taken.

On December 20, 2004, another informal hearing was held to discuss Jimenez's leaving work earlier than permitted (twenty minutes) and failure to call and leave a recorded message to report that he was leaving. (P-48.) A two-day suspension was imposed.[6]

DeMarino testified that he told Jimenez that he was constantly being written up, yet never saw himself as doing anything wrong. He met with Jimenez on many occasions to discuss his personality conflicts. DeMarino even requested that Jimenez send him a letter requesting a transfer, and said that he would present it to the Board as soon as possible. Jimenez refused.

On October 27, 2006, another informal hearing took place in DeMarino's office to address a directive issued by Ms. Miller not to use the cooking room during the evening or on weekends and to keep the room locked. While Jimenez did not use the room, DeMarino felt that he made an inappropriate and disrespectful comment to his supervisor McGlynn in responding to the directive by saying, "I'm going to use the damn room tonight and every night."

DeMarino testified that there was also an incident involving a Board member who was running a girls' basketball league and asked Jimenez to let him use a side room to conference with the basketball team. Jimenez refused, and used inappropriate language towards the Board member. (P-71.)

On November 15, 2006, DeMarino prepared a synopsis for the Personnel and Grievance Committee of the many informal hearings, disciplines and evaluations of Jimenez. (P-76.)

An informal hearing was conducted on March 22, 2007, in DeMarino's office to address a note written by Jimenez that stated, "If you have a problem with me, come and see me, man to whatever you are," which had been directed at the physical

[6] The remainder of the informal hearings have been testified to by either Crowe or Korodan and will not be repeated as testified to by DeMarino.

education staff when his personal belongings were thrown in the trash. On April 13, 2007, DeMarino recommended that Jimenez's increment be withheld for the 2007–2008 school year. (P-86.)

On April 18, 2007, DeMarino directed Jimenez to attend the Employee Assistance Program, and, if recommended, attend anger-management therapy. He also told Jimenez of bimonthly meetings he needed to attend with his supervisor to monitor his performance and his willingness to accept suggestions and directions while controlling his temper, and to work an entire shift timely. Jimenez was also directed to have monthly meetings with the principal to ensure compliance with any recommendations. (P-87.)

On April 18, 2007, then superintendent Vincent Smith forwarded a letter to Jimenez advising him that he was recommending that his increment be withheld for the 2007–008 school year for repeatedly engaging in insubordinate conduct, failing to complete assigned tasks, and repeatedly engaging in hostile and disrespectful conduct towards coworkers and supervisors. (P-88.) On May 1, 2007, the Board approved the recommendation. (P-92.)

Jimenez attended anger-management therapy in the months of April and May 2007, and his supervisor sent DeMarino updates on his performance bimonthly. (P-93; P-94.)

DeMarino received a memo from supervisor McGlynn on February 26, 2008, advising him that Jimenez was making a meowing sound in the building; singing loudly in English and Spanish while listening to an iPod; and failing to clean soda spills in a classroom. Although DeMarino recommended a ten-day suspension, the Board imposed a thirty-day suspension. DeMarino also recommended an increment withholding for the 2008–2009 and 2009–2010 school years for excessive absenteeism, not completing tasks, and allowing a cat into the building. (P-123; P-150.)

On July 17, 2009, the Board suspended Jimenez without pay and found probable cause to credit the evidence in support of filing tenure charges.

Pamela McGlynn

Pamela McGlynn, supervisor of custodians for Iselin Middle School, testified on behalf of the Board. She has been Jimenez's supervisor since 1996. She found him to be a hard-working employee until sometime in 2000 or 2001. Since then she has thought that his personal life and another job were interfering with his performance. She said that he was becoming a "liar, throwing temper tantrums," and being, in general, "completely obnoxious." He would say to her, "don't talk to me" or "don't bother me." On November 14, 2001, Jimenez left the school building at 8:15 p.m., during his shift, without obtaining permission from her or from the building administrator or even signing the "sign-out sheet." Jimenez did inform and obtain permission from the vice principal, but that was not the proper procedure. (P-19.)

In another instance, on December 28, 2001, Jimenez wrote a note to McGlynn advising of a change in his vacation plans. District procedure required the employee to give the supervisor forty-eight hours' notice of a change in plans. Jimenez advised McGlynn on December 28, 2001, that he was taking a vacation from December 24 to December 29, 2001, thereby violating the procedure. (P-20.) He also did not advise in advance whether he was planning on taking a vacation around Easter. Jimenez advised that he did not have reservations yet. (P-23.) McGlynn did not recall if he took any days off during that time.

McGlynn also testified that Jimenez did not turn on the boilers on two consecutive Saturdays in February 2002, as instructed by her in writing. Jimenez told her that he had forgotten. (P-21.)

On June 18, 2002, McGlynn completed a year-end evaluation wherein she rated Jimenez's performance as "satisfactory," except for mood swings and his poor attitude when things did not go his way. (P-26.)

She further testified that Jimenez failed to call the tape recorder to report that he would not be at work on August 11, 14, and 15, 2003, and also failed to provide a

doctor's note in September 2003 when he was absent for five consecutive days, in violation of District procedure that you must submit a note if absent five or more consecutive days.

On April 2, 2004, McGlynn asked Jimenez to help unload tables from a truck during his supper break, and he responded, "What the fuck do you want? I'm fucking sick and tired of doing this extra shit," telling her that he was in a bad mood and tired.

McGlynn, who rarely gave an "unsatisfactory" rating on year-end evaluations, did so for Jimenez on May 26, 2004, because he was not accepting suggestions and was disrespectful to her by becoming "belligerent." (P-45.)

On December 8, 2004, Jimenez left the building and fell asleep in his car, not following the procedure to let someone know he was leaving the building. McGlynn completed an evaluation form on December 10, 2004,[7] reflecting an "unsatisfactory" performance rating for leaving the building. (P-46.)

McGlynn formally met with Jimenez on two occasions in April 2007 pertaining to his work performance. She met informally with him thereafter. The meetings were supposed to end upon his completion of anger-management therapy. (P-93.)

On March 10, 2009, McGlynn filled out an affirmative action grievance report, indicating that she had observed a substitute custodian, Kathy Anthony, get a cup of coffee and Jimenez then get a cup of coffee. She heard Anthony yell, "Pam, tell him to leave me alone. Tell him to leave me alone." She heard Jimenez mention the word "sex." Two other custodians were also in the room. Soon thereafter, when McGlynn and Anthony walked into the cafeteria, Jimenez blocked Anthony's way.

[7] Incidents occurring after this date have been outlined in prior witnesses' testimony and were corroborated by McGlynn.

Anthony D'Orsi

Anthony D'Orsi, supervisor of buildings and grounds for the entire school district, testified on behalf of the Board. One of his primary duties was to be responsible for the tape recorder used by employees to leave messages if they were going to be absent. (P-28.) The employees were instructed to call D'Orsi's cell phone in the event of an emergency.

On November 14, 2001, Jimenez left the building at approximately 8:15 p.m., during his shift, and did not contact D'Orsi or sign out, in violation of procedure. D'Orsi stated that Jimenez had "more excuses than names that are in the Essex County telephone book." He felt that Jimenez was "just not a good worker."

David Johnson

David Johnson, a custodian at Iselin Middle School since 2001, testified on behalf of the Board. He has worked with Jimenez for eight years. Johnson recalled an incident in April 2004 when both he and Jimenez were instructed to put up tables for a craft show. Jimenez came to the area late, and Johnson recalled Jimenez yelling at McGlynn. He stated that Jimenez would have outbursts towards him and then apologize.

Johnson further testified that he was surprised when Jimenez showed him a cat in the building. They both looked for the cat during their shift when it went missing. Johnson also confirmed that Jimenez did not clean the bleachers as directed to by their supervisor.

He also recalled another incident, which took place in March 2009 at the school, when he heard the substitute custodian say "stop" and Jimenez saying the word "sex." Johnson told Jimenez that he should not be saying that. He also saw Jimenez dance on the stage on one occasion, but not lift his shirt. Johnson was not specific as to all of the allegations pertaining to March 9, 2009, because his brother was terminally ill at that time and his recollection of events was not clear.

Katherine Anthony

Katherine Anthony was a substitute custodian from May 2004 until her layoff in July 2009. She worked with Jimenez from September 2008 to March 2009, from 4:00 p.m. to 8:00 p.m. She talked with Jimenez about his personal problems. On two occasions, Jimenez asked Anthony in front of another coworker, "Do we do ourselves when we're home alone?" and "does anyone have a sex toy?" She began to feel uncomfortable with their conversations.

Anthony testified that in early March 2009, Jimenez danced on stage while at the school and lifted his shirt, played with his nipples, and said they would do a striptease act. David Johnson was also present at the time.

Anthony stated that on March 9, 2009, in the boiler room, Jimenez put his hand on her shoulder and started rubbing her back. He then cornered her, not letting her go around him, saying, "You never had sex until you had sex with me." She yelled to her supervisor for help. Jimenez left the area. When she and McGlynn walked into the cafeteria to clean, Jimenez was sitting on the railing, blocking her way. She felt very uncomfortable working with Jimenez.

Margaretta Casella

Margaretta Casella, a music teacher, testified on behalf of the Board. She stated that on January 31, 2008, while having chorus rehearsal with her music students after school, she heard a voice outside the door of the classroom. She saw Jimenez singing and dancing. She found this not only very disruptive to her class, but bizarre.

Franco Caruso

Franco Caruso testified on behalf of the Board. He has been a physical education teacher at the Iselin Middle School since 2002. He shared an office in the

boys' locker room with two other teachers. There were six lockers in the hallway connected to the office which were used by the physical education teachers.

Jimenez was asked to remove his personal belongings from one of the lockers because the locker was needed for a student teacher. When Jimenez did not remove his items, physical education teacher Richard Canto removed them and placed them in a clear plastic bag. He then put the bag on top of the locker with a note that said, "Fabio, here's your stuff." When the bag was not retrieved for approximately one week, Canto put it in the trash. The next morning a threatening note from Jimenez was found on Canto's chair, which Caruso brought to the attention of the principal.

Richard Canto

Richard Canto testified on behalf of the Board. He has been a physical education teacher since 2003 at the Iselin Middle School. In March 2007 he removed personal belongings from one of the lockers that appeared to have been there for a long time, and placed the items in a plastic bag on top of the lockers with a note attached that read, "if these are your belongings and you need them, take them." After five to seven days of seeing the bag on top of the lockers, Canto thought no one was claiming it and he threw it in the trash. Caruso told him of a note that was left on his chair, and told him that he should see the principal. When he read the note he felt threatened because it said "come see me" with exclamation points, which he felt meant "somebody wants to call you out or, you know, fight." Canto also took offense to the part of the note that said "man to whatever you are," which implied that he was not a man. He filed a police report.

Fabio Jimenez

Fabio Jimenez testified in his own behalf. He worked for the District as a custodian for approximately fourteen years. He began his 3:00-p.m.-to-11:00-p.m. shift by going to the boiler room, where the custodian's office was located, about fifteen minutes before work started, to meet with his supervisor, Pam McGlynn, about any

extra work assignments that needed to be completed. Those assignments were usually in writing.

Jimenez testified that on one occasion in 2001 when he needed to leave work early to take his wife to an appointment, he obtained permission to do so from the vice principal. He penciled in the time he left on the time sheet and then he erased it when he returned to the building that evening to finish his shift and secure the building. That was the procedure. He felt that to be appropriate because he advised an administrator that he would be leaving early. The following day, Jimenez was told by McGlynn that there had been a fire in a garbage bin. He stated he knew nothing about a fire.

Jimenez claimed that he was not aware of any complaint in 2002 about his not turning on the boilers over the weekend, since he was not written up and had no knowledge of an incident on the date in question. He stated that it was warm that day.

In March 2002, Jimenez advised McGlynn that he did not have any reservations yet for Easter break because he did not intend on taking vacation time.

Jimenez denied any incident of not calling and leaving a message on the tape recorder when he was not coming to work, failure to bring in doctors' notes for absences, or failing to sign the sign-in or sign-out sheet. He stated that he was not absent for five consecutive days because it was his understanding that the five days had to be consecutive, and that a weekend in between the days meant they were no longer considered consecutive.

Jimenez recalled an occasion in April 2004 when he was called over the loud speaker to report to the main area. He could not recall if he cursed McGlynn when he went to the main area to get his instructions to move tables. He could not recall whether he was calm. Jimenez did recall a conversation with McGlynn in May 2004 when he was annoyed at her for not giving him overtime and he said, "oh big deal, supervisor, blah, blah, blah."

In December 2004 Jimenez received permission to take one-half day sick time, which would be from 7:00 p.m. to 11:00 p.m. He testified that he went out to his car at about 6:45 p.m. and fell asleep until 7:10 p.m., and came into the building to sign out. He was then suspended for two days.

Jimenez testified that after he was told he could no longer use the cooking room he did not do so. When questioned about a missing spoon, he asked, "Are we still dealing with the damn cooking room?" He did not recall saying anything else. He stated that prior to the no-cooking direction from D'Orsi in approximately 2002, custodians cooked pizza, steak, kielbasa or whatever else they wanted.

Jimenez stated that when he refused a Board member access to a classroom, he did say "I don't care who you are," and denied saying anything else. He also confirmed that he was angry when his belongings were thrown in the trash in the men's locker room, but he did not consider the note he wrote as threatening. He stated that he went to anger-management sessions in 2007.

Jimenez denied dancing in front of Casella's classroom door or not cleaning up a soda spill in one of the classrooms. Although he had been directed to clean bleachers after a basketball game, the other custodians completed the task before he was able to get to the gym.

Jimenez testified that one evening his daughter brought him a kitten while he was working in order to make him feel better after a close relative had passed away. He stated that he thought nothing of keeping the kitten in the building. He lost the kitten, but he found it the next morning. He was suspended for forty-five days. He denied "meowing."

Jimenez denied ever saying anything about sex to Anthony or blocking her way. He claimed that on March 9, 2009, Anthony seemed "down" because she was concerned about finances. He put his hand on her shoulder and asked her if she was okay. Jimenez stated that he never said the word "sex." He also denied mentioning sex toys or asking Anthony, "do you do yourself when you're alone?"

Jimenez had no recollection of meeting with principal Jacqueline Miller to discuss his counseling sessions to deal with stress. He also had no recollection of meeting with McGlynn or Crowe to discuss job performance or disciplinary concerns. He claimed that these meetings never happened.

In evaluating the evidence, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of 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. U.S., 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Based upon these principles, I **FIND** that the witnesses for the Board were credible and forthright. Each was convincing, compelling and straightforward.

Jimenez, on the other hand, was lacking in credibility. During his testimony he rambled, was often unresponsive and frequently answered "I don't remember" or "I don't recall." He stated that all of the District's witnesses lied, but he was not able to adequately explain how the testimony was lies, and he demonstrated a complete lack of remorse for or understanding of the legitimacy of his employer's concerns.

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. Jimenez is a tenured janitor at Woodbridge Township School District and has been employed by the District since July 1, 1996.

2. On November 14, 2001, Jimenez left the school building during his shift at 8:15 p.m. without obtaining permission from McGlynn or the building administrator, nor did he sign the "sign-out sheet." Rather, he advised the Vice Principal. He was charged with a half-day's absence.

3. Custodians must report their absences by leaving a recorded message no later than two hours prior to their shift.

4. On December 28, 2001, Jimenez wrote a note to McGlynn advising of a change in his vacation plans, effective December 24, 2001, in violation of the procedure requiring that the employee give the supervisor forty-eight hours' notice of a change in plans. He received a verbal warning.

5. Jimenez did not turn on the boilers on two consecutive Saturdays in February 2002, as instructed by McGlynn in writing.

6. On June 18, 2002, McGlynn completed a year-end evaluation and found Jimenez's performance basically satisfactory, except for problems with mood swings and his attitude when things did not go his way.

7. Jimenez was absent on August 11, 14, and 15, 2003, and failed to leave a message on the recorder notifying the District of his absence. He further failed to provide a doctor's note in September 2003 when absent for five consecutive

days, in violation of the procedure requiring that a note must be submitted if the employee is absent five or more consecutive days.

8. On April 2, 2004, McGlynn asked Jimenez to help unload tables from a truck during his supper break, and his response was, "What the fuck do you want? I'm fucking sick and tired of doing this extra shit," and he told her that he was in a bad mood and tired.

9. On April 8, 2004, Jimenez left the building during work hours without permission from a supervisor. He was argumentative towards his supervisor. A five-day suspension was imposed.

10. McGlynn rated Jimenez as "unsatisfactory" on the year-end evaluation dated May 26, 2004, because he was not accepting suggestions and was disrespectful to her by becoming "belligerent" and saying he "did not need this shit."

11. On December 8, 2004, Jimenez left the building and fell asleep in his car, not following the procedure requiring that he advise someone when he was leaving the building. A two-day unpaid suspension was imposed.

12. On October 27, 2006, Jimenez had an informal hearing to address his response to a directive by Miller to not use the cooking room during the evening or on weekends, and to keep the room locked. His response was, "I'm going to use the damn room tonight and every night." A ten-day unpaid suspension was imposed.

13. On March 15, 2007, Jimenez wrote a note directed at the physical education staff that stated, "If you have a problem with me, come and see me, man to whatever you are," when his personal belongings went unclaimed and thrown in the trash.

14. On April 18, 2007, DeMarino instructed Jimenez to attend the Employee Assistance Program, and, if recommended, attend anger-management therapy. He also advised that bimonthly meetings would be held with Jimenez and his supervisor to monitor his performance and willingness to accept suggestions and directions while controlling his temper, and to work an entire shift timely. Jimenez was also directed to have monthly meetings with the principal to ensure compliance with any recommendations.

15. On May 1, 2007, the Board approved the increment withholding for Jimenez for the 2007–2008 school year for repeatedly engaging in insubordinate conduct, failing to complete assigned tasks, and repeatedly engaging in hostile and disrespectful conduct towards his coworkers and supervisors.

16. On March 23, 2008, a thirty-day unpaid suspension was imposed by the Board for leaving a half-filled bottle of beer in the teachers' room, for dancing in front of the music teacher's classroom door during chorus practice, for having a cat in the school building overnight, for repeatedly failing to complete assigned tasks, and for engaging in hostile and disrespectful conduct towards his supervisor.

17. On April 24, 2008, the Board voted to withhold Jimenez's employment and adjustment increments for the 2008–2009 school year.

18. On May 29, 2008, Jimenez had an informal hearing to address procedural deficiencies that involved calling to take off from work for legal reasons without having any leave days available. The discipline imposed was loss of one day's pay. Jimenez also failed to follow the directive to clean the bleachers in the gym after a basketball game. A written warning was issued.

19. On October 13, 2008, Jimenez attended a custodian affirmative action seminar on "Diversity Awareness and Sexual Harassment."

20. In March 2009, Jimenez sexually harassed another custodian, Katherine Anthony, by blocking her way, rubbing her shoulder, lifting his shirt while dancing on a stage, and making inappropriate remarks such as "do you ever do yourself when no one's around" and "you haven't had sex like I can give you, like no other man can" and "who has a sex toy?"

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

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 such employees from dismissal for political or unfounded reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982).

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 or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div.), certif. denied, 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).

Charges must be dismissed if the weight of the evidence neither supports them nor demonstrates unfitness. In re Tenure Hearing of Nies, 1963 S.L.D. 172. When the evidence is in equipoise, the party with the burden has failed. Hudson County Area Vocational Technical Sch. v. Smith, 96 N.J.A.R.2d (EDU) 229.

The Board urges that Jimenez's conduct warrants his dismissal from his tenured position of employment. I concur. Custodians in the public schools perform a crucial function, and they have been held by the Commissioner of Education to a high standard. The role of the custodian has been described as follows:

> A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties.
>
> [In re Tenure Hearing of McDougall, 1974 S.L.D. 170, 178.]

The Commissioner has recognized that the failure of a custodian to properly attend to his duties could jeopardize the safe and efficient functioning of a building's educational program. State-Operated Sch. Dist. of Paterson v. Watson, 93 N.J.A.R.2d (EDU) 362. The Commissioner has not hesitated to order the dismissal of tenured custodians who have failed to faithfully perform their duties. See In re Tenure Hearing of Riddick, 93 N.J.A.R.2d (EDU) 345; Jimenez v. New Jersey State-Operated Sch. Dist. of Paterson, 96 N.J.A.R.2d (EDU) 600; In re Tenure Charges Against Purnell, 96 N.J.A.R.2d (EDU) 364.

Jimenez was charged with a pattern of belligerent conduct towards his coworkers and supervisors. I **CONCLUDE** that there was sufficient credible and legally competent evidence that Jimenez made inappropriate verbal outbursts towards his supervisor on more than one occasion, and therefore engaged in conduct unbecoming a staff member, warranting disciplinary action.

Regarding the incident involving Jimenez's coworker Katherine Anthony, I am persuaded that Jimenez's behavior towards Anthony was objectionable and offensive, and created a work environment intimidating enough to compel her to discuss the incident with supervisory personnel and change her hours in order to have minimal or no contact with him. Jimenez had attended the training on sexual harassment and knew, or should have known, that his conduct was inappropriate and offensive, and that a violation of that policy could result in termination. Jimenez made unwanted and unwelcome physical contact in the form of touching Anthony, made unwanted sexual comments to Anthony, and blocked her way. Accordingly, I **CONCLUDE** that Jimenez's behavior towards Katherine Anthony in March 2009 constituted unbecoming conduct.

Jimenez was also insubordinate, which has 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, 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>. This definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. In re Loria, January 26, 1988, slip op. at 69, aff'd, State Bd. of Educ. (August 7, 1988). Insubordination is always a serious matter. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Jimenez was absent from his assigned post without permission despite being previously warned. He had previously been admonished that his assigned area was not satisfactorily cleaned. He flagrantly disregarded the rules of his workplace, as confirmed by the testimony at hearing. Credible evidence showed that Jimenez left the building while on duty without following procedure, did not call the recorder to report absences, altered vacation days in December 2001 after the start of his vacation, did not follow a directive when asked to turn on the school's boiler on two weekends, did not clean bleachers as directed, and did not complete cleaning his work area as directed by his supervisor. With regard to the charge of insubordination, I **CONCLUDE** that the Board has established by a preponderance of the credible evidence that Jimenez was insubordinate.

The record makes it plain that allowing Jimenez to continue in the employ of the Board would place the unwarranted burden on his supervisors of "continually monitoring a subordinate [who has been] demonstrated to be lax" in performing his assigned duties and who has a record of leaving his assigned post without permission. See State-Operated Sch. Dist. of Paterson v. Cox, 93 N.J.A.R.2d (EDU) 748.

With his vast disciplinary history, I am satisfied that removal is appropriate and warranted under the circumstances. Under the principle of progressive discipline fashioned from West New York v. Bock, 38 N.J. 500 (1962), a person entrusted with public duties who subverts the discipline of his employer evidences an indifference to his obligations and to his position. Such an indifference to his obligation to follow legitimate directives or orders by his employer, as well as his inappropriate behavior towards a substitute custodian, serves to adversely impact morale and efficiency of the middle school.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that the Board has met its burden of proof by a preponderance of the credible evidence and that the tenure charges are sustained.

ORDER

It is hereby **ORDERED** that Jimenez be removed from employment with the Board.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 8, 2010
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: March 8, 2010

Date Mailed to Parties: MAR 9 2010
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Jimenez:

Fabio Jimenez

For the Board:

Dr. Jonathan Crowe

Angela Korodan

Dennis DeMarino

Pamela McGlynn

Anthony D'Orsi

David Johnson

Katherine Anthony

Margaretta Casella

Franco Caruso

Richard Canto

Exhibits

For Petitioner:

Exhibit P-Number	DATE AND DESCRIPTION OF DOCUMENT
2	Cover Sheet of Collective Negotiations Agreement, July 1, 2006 through June 30, 2009. Attachment: Page 1-18
3	Board Policy #408-Disciplinary Actions, dated September 23, 1993
4	Board Regulation #4080-1 Disciplinary Actions for Janitors, dated September 1993
6	Policy #426-Drug Free Work Place/Employee Assistance Program, June 15, 1995
8	Job Description – Janitor, dated September, 1995
9	Board Resolution, Page 7, dated January 18, 1996

10	Memorandum to Non-Certified Personnel re: Janitor Vacancies dated May 30, 1996. Attachments: (1) list of applicants, and (2) handwritten list of janitors
19	Memorandum from A. D'Orsi to K. Kuchtyak dated November 20, 2001. Attachments: (1) P.McGlynn's notes re: incidents of November 14 and November 15, 2001, and (2) Weekly Attendance chart of November 1 and November 2, 2001.
20	Handwritten note from P. McGlynn to W. Uszenski, undated. Attachment: Memorandum from F. Jimenez to V. Smith dated December 28, 2001
21	Evaluation Form dated February 11, 2002. Attachment: Handwritten Notes to F. Jimenez
22	Handwritten note from P. McGlynn to F. Jimenez dated March 7, 2002
23	Handwritten memorandum from P. McGlynn to A. D'Orsi dated March 8, 2002
24	Memorandum from A. D'Orsi to V. Smith dated June 12, 2002. Attachment: Handwritten memorandum from P. McGlynn to A. D'Orsi dated June 12, 2002
25	Memorandum from V. Smith to A. D'Orsi, dated June 13, 2002
26	Evaluation Form dated June 18, 2002
28	Evaluation form dated June 3, 2003. Attachments: (1) Memorandum from A. D'Orsi to All Principals, dated November 12, 2002, and (2) Memorandum from A. D'Orsi to All Principals re: janitorial absenteeism dated November 1, 2002
29	Evaluation form dated August 18, 2003
30	Evaluation Form dated October 9, 2003. Attachments: (1) Memorandum from P. McGlynn dated October 8, 2003 and (2) Response to Evaluation from F. Jimenez to P. McGlynn, dated October 15, 2003
32	Evaluation Form dated April 7, 2004. Attachment: Memorandum from P. McGlynn to A. D'Orsi dated April 6, 2004
33	Letter from D. DeMarino to F. Jimenez dated April 7, 2004
35	Informal Hearing Transcript dated April 8, 2004
36	Letter from A. Korodan to F. Jimenez dated April 19, 2004. Attachment: Receipt for Hand Delivered Mail to F. Jimenez stamped received April 20, 2004.
37	Board Agenda Item dated April 29, 2004 (page 7)
38	Policy #104--Affirmative Action dated April 29, 2004
39	Policy #1040 – Affirmative Action Complaint Procedure, dated April,

	2004
40	Letter from A. Korodan to F. Jimenez dated April 30, 2004. Attachment: Certified receipt
41	Evaluation Form dated May 14, 2004. Attachments: (1) Memorandum from P. McGlynn to A. D'Orsi dated May 14, 2004, and (2) Note from P. McGlynn to A. D'Orsi dated May 19, 2004
42	Letter from D. DeMarino to F. Jimenez dated May 24, 2004
43	Informal Hearing Transcript dated May 25, 2004
44	Memorandum dated May 25, 2004
45	Evaluation Form dated May 26, 2004
46	Evaluation Form dated December 10, 2004
47	Letter from D. DeMarino to F. Jimenez dated December 16, 2004
48	Informal Hearing Transcript dated December 20, 2004
49	Memorandum from D. DeMarino to A. Korodan dated January 14, 2005
50	Memorandum from D. DeMarino to A. Korodan dated January 14, 2005
51	Letter from A. Korodan to F. Jimenez dated January 14, 2005. Attachment: Receipt for Hand Delivered Mail to F. Jimenez dated January 18, 2005
52	Board Agenda dated January 20, 2005 (page 10)
53	Letter from A. Korodan to F. Jimenez dated January 21, 2005. Attachment: Certified receipt
54	Memorandum from B. Derollo to A. D'Orsi dated January 26, 2005
57	Letter from J. Rumage, Principal, undated. Attachment: Evaluation Form dated January 26, 2006.
58	Evaluation Form dated January 26, 2006. Attachment: Memorandum from P. McGlynn dated January 25, 2006
59	Police Investigation Report dated January 27, 2006
63	Affirmative Action Viewing sign-in sheet, March 27, 2006

64	Policy #426, dated April 27, 2006.
67	Appendix C- signed receipt for Policy #426, Alcohol and Drug-Free Workplace, dated May 16, 2006
68	Memorandum from A. D'Orsi to Supervising Custodian dated August 25, 2006. Attachment: Code 5:70-4.7-re Hood Suppression Systems
69	Memorandum from Ms. McGlynn to All Custodians dated October 12, 2006.
70	Evaluation Form dated October 19, 2006. Attachments: (1) Notes from P. McGlynn regarding incidents occurring on October 12, 13 and 18, 2006, undated, (2) Memorandum from P. McGlynn to A. D'Orsi dated October 18, 2006, and (3) Response to Evaluation from F. Jimenez to P. McGlynn dated November 1, 2006
71	Informal Hearing Transcript dated October 27, 2006
72	Letter from B. Small to D. DeMarino dated October 30, 2006
73	Memorandum from D. DeMarino to A. Korodan dated November 13, 2006
74	Letter from A. Korodan to F. Jimenez dated November 13, 2006
75	Memorandum from D. DeMarino to A. Korodan dated November 14, 2006
76	Memorandum from D. DeMarino to Personnel & Grievance Committee dated November 15, 2006
77	Board Resolution dated November 16, 2006
78	Letter form A. Korodan to F. Jimenez dated November 17, 2006. Attachment: Returned Certified Mail Envelope postmarked November 17, 2006
79	Letter from F. Jimenez to Woodbridge Township School District dated December 5, 2006
81	Letter from A. Korodan to F. Jimenez dated December 12, 2006
83	Letter from D. DeMarino to F. Jimenez dated March 19, 2007
84	Evaluation Form dated March 19, 2007. Attachment: Handwritten Letter from F. Jimenez, undated
85	Informal Hearing Transcript dated March 22, 2007

86	Memorandum from D. DeMarino to V. Smith dated April 13, 2007
87	Letter from D. DeMarino to F. Jimenez dated April 18, 2007
88	Letter from V. Smith to F. Jimenez dated April 18, 2007
90	Letter from A. Korodan to F. Jimenez dated April 26, 2007. Attachment: Receipt for Hand Delivered Mail to F. Jimenez dated April 26, 2007
91	Board Resolution dated April 30, 2007
92	Letter from V. Smith to F. Jimenez, dated January 1, 2007. Attachments: (1) Regulation #3240, Withholding an Increment; (2) Board Minutes of April 30, 2007, and (3) Copy of returned certified letter.
93	Memorandum from P. McGlynn to D. DeMarino dated May 4, 2007
94	Memorandum from P. McGlynn to D. DeMarino dated May 22, 2007
96	Memorandum from J. Miller to D. DeMarino dated June 4, 2007
99	Memorandum from D. DeMarino to A. D'Orsi, dated October 19, 2007
101	Policy #104-Equal Opportunity/Non-Discrimination/Sexual Harassment, dated December 13, 2007
102	Regulation #1040-Equal Opportunity/Non-Discrimination/Sexual Harassment Complaint Procedure, dated December 2007
103	Memorandum from J. Crowe to F. Jimenez re: attendance, dated January 7, 2008. Attachment: (1)Regulation #3150-1, Employee Attendance and (2) Regulation 3150-2 Employee Attendance
104	Affirmative Action Policy/Regulation sign-in sheet, January 10, 2008
105	Letter from D. DeMarino to F. Jimenez, with certified attached, dated January 18, 2008
106	Receipt of Attendance Policy #423, Regulation #4230-1 and Regulation #4230-2, signed by F. Jimenez dated January 23, 2008
108	E-mail from J. Crowe to D. DeMarino dated February 1, 2008
109	Letter from D. DeMarino to F. Jimenez dated February 4, 2008
110	Informal Hearing Transcript dated February 7, 2008

111	Letter from A. Korodan to F. Jimenez dated February 11, 2008. Attachment: Receipt for Hand Delivered Mail to F. Jimenez dated February 11, 2008
113	Memorandum from P. McGlynn to D. DeMarino dated February 26, 2008
116	Memorandum from D. DeMarino to A. Korodan dated March 3, 2008
117	Letter from A. Korodan to F. Jimenez, dated March 7, 2008
119	Letter from A. Korodan to F. Jimenez dated March 11, 2008
120	Board Resolution dated March 13, 2008
121	Letter from A. Korodan to F. Jimenez dated March 14, 2008
122	Memorandum from D. DeMarino to V. Smith dated April 4, 2008
123	Letter from V. Smith to F. Jimenez dated April 17, 2008
124	Letter from A. Korodan to F. Jimenez dated April 18, 2008. Attachment: Unclaimed Certified Mail Receipt dated April 18, 2008, April 24, 2008 and May 3, 2008
125	Board Resolution dated April 24, 2008
126	Letter from V. Smith to F. Jimenez dated April 25, 2008
130	Memorandum from A. D'Orsi to D. DeMarino dated May 16, 2008. Attachment: Letter from Brigid Farley, Esq to F. Jimenez dated April 4, 2008, with enclosure; Page 1-20 of the Collective Negotiations Agreement Between the Board and the Woodbridge Township Education Association for the Period of July 1, 2006 through June 30, 2009 ("CNA")
132	Letter from D. DeMarino to F. Jimenez dated May 20, 2008
133	Memorandum from J. Crowe to F. Jimenez dated May 20, 2008
134	Informal Hearing Transcript dated May 29, 2008
137	Evaluation Form dated June 16, 2008
139	District-wide Affirmative Action Presentations 08-09 list dated August 27, 2008-August 28, 2008
140	Evaluation from dated September 19, 2008. Attachment: Memorandum from A. D'Orsi to All Principals dated September 3,

	2008
141	Custodian Affirmative Action "Diversity Awareness and Sexual Harassment" sign-in sheet, dated October 13, 2008
142	Wilentz Goldman & Spitzer, P.A. Sexual Harassment and Retaliation Prevention Training handout, and Diversity Awareness and Anti-Harassment/Anti-Retaliation Training Materials handout, dated October 13, 2008
143	Affirmative Action Grievance Report dated March 9, 2009
144	Affirmative Action Investigation Report, undated
145	Letter from A. Korodan to F. Jimenez dated March 13, 2009. Attachment: Certified envelope to F. Jimenez, postmarked March 13, 2009
146	Hand Delivered letter form J. Crowe to F. Jimenez dated March 13, 2009
147	Letter form A. Korodan to K. Anthony dated March 17, 2009
148	Board Resolution dated March 19, 2009
149	Certified letter from A. Korodan to F. Jimenez dated March 20, 2009
150	Memorandum from D. DeMarino to J. Crowe dated March 30, 2009
151	Memorandum from D. DeMarino to J. Crowe dated April 6, 2009
152	Letter from J. Crowe to F. Jimenez dated April 7, 2009
153	Letter from A. Korodan to F. Jimenez dated April 24, 2009
154	Board Resolution dated April 29, 2009 (page 7)
155	Letter from J. Crowe to F. Jimenez dated April 30, 2009
156	Letter from A. Korodan to F. Jimenez, dated May 15, 2009
157	List of Incidents Involving F. Jimenez, undated
158	Letter from D. Crowe to F. Jimenez dated May 20, 2009. Attachment: Hand delivered mail receipt
159	Personnel Committee motion to adopt suspension, dated May 21, 2009
160	Certified letter from A. Korodan to F. Jimenez, w/certified receipt,

	dated May 22, 2009
162	Certified letter from A. Korodan to F. Jimenez, dated June 23, 2009
163	Certified letter from A. Korodan to F. Jimenez, dated July 9, 2009. Attachment: Certified envelope to F. Jimenez, received July 15, 2009
164	Letter from D. DeMarino to F. Jimenez, dated July 17, 2009. Attachments: (1) Certificate of Determination, dated July 17, 2009, and (2) Resolution of the Board of Education dated July 17, 2009

For Jimenez:

None

125-10

OAL DKT. NO. EDU 2007-09 AND 8637-09 (CONSOLIDATED)
AGENCY DKT. NO. 221-7/08 AND 176-7/09

DEBRA BUTLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
AND		
IN THE MATTER OF THE TENURE HEARING OF DEBRA BUTLER, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

The records of these consolidated matters, the proposed Settlement Agreement (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 said review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observations.

First, settlements of tenure matters require analysis pursuant to *N.J.A.C.* 6A:3-5.6(a), which articulates the standards set forth in *In re Cardonick*, 1990 *S.L.D.* 842, 846 (State Board, April 6, 1983). The Commissioner finds that those standards have been met in this case.

The record contains the statement of charges, satisfying standard *N.J.A.C.* 6A:3-5.6(a)(1). The terms of the Agreement indicate that standards *N.J.A.C.* 6A:3-5.6(a)(3)

and (4) – concerning the parties' understanding of the settlement and their consent to same – are satisfied. Finally, *N.J.A.C.* 6A:3-5.6(a)(2) and (5), the standards requiring explication of how the settlement is justified and in the public interest are also satisfied, insofar as the respondent's resignation from her secretarial position and the expeditious resolution of the litigation will have no detrimental effect on the district's students, and will allow the minimization of legal fees and a prompt search for a qualified employee.[1]

The Commisssioner also notes that Section 1 of the Agreement makes reference to a December 1, 2009 date of termination of petitioner's employment. 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.

In light of the foregoing, 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 same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/10

Date of Mailing: 4/23/10

[1] In this case, since Ms. Butler is not a teacher, standard *N.J.A.C.* 6A:3-5.6(a)(6) does not apply.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
(CONSOLIDATED)

DEBRA BUTLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent,

OAL DKT. NO. EDU 2007-09
AGENCY DKT. NO. 221-7/08

AND

IN THE MATTER OF THE TENURE HEARING OF DEBRA BUTLER, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

OAL DKT. NO. EDU 8637-09
AGENCY DKT. NO. 176-7/09

Robert M. Schwartz, Esq., for petitioner-respondent Debra Butler

Rocky L. Peterson, Esq., for respondent-petitioner Board of Education of the City of Trenton (Hill Wallack, attorneys)

Record Closed: January 13, 2010 Decided: January 19, 2010

BEFORE **SUSAN M. SCAROLA**, ALJ:

These matters were transmitted to the Office of Administrative Law on January 5, 2009 and August 11, 2009, respectively, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Debra Butler v. Board of Education of the City of Trenton, Mercer County, OAL Dkt. No. EDU 2007-09 was assigned to the Honorable Ronald W. Reba, and In the Matter of the Tenure Hearing of Debra Butler, School District of the City of Trenton, Mercer County, OAL Dkt. No. EDU 8637-09, was assigned to the undersigned. The parties moved for consolidation and on September 28, 2009, Judge Reba entered an Order of Consolidation and both matters were scheduled for hearing for November 9, 10 and 12, 2009.

Prior to November 9, 2009, the parties requested an adjournment of the November 9 hearing date as they were actively pursuing settlement of both matters. On November 10, 2009, the parties appeared and further adjournment was requested due to ongoing settlement negotiations. On November 12, 2009, the parties appeared, placed the settlement on the record and executed a handwritten settlement agreement. The matter was rescheduled for hearing of December 1, 2009, awaiting Board approval.

On November 13, 2009, Board counsel advised that the Board had approved the settlement and an executed settlement agreement would be filed.

On the record closed date, an executed Settlement Agreement together with the Board Resolution was received indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 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.

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 19, 2010
DATE

MAR 10 2010
SUSAN M. SCAROLA, ALJ

Date Received at Agency:

MAR 10 2010

Date Mailed to Parties:

mph

HILL WALLACK LLP
202 Carnegie Center
Princeton, New Jersey 08543-5226
(609) 924-0808
Attorneys for Petitioner Trenton Board of Education

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE CHARGES AGAINST DEBRA BUTLER BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION, THE STATE OF NEW JERSEY OAL Docket No. EDU 2007-2009S Agency Docket No. 176-7/09 OAL Docket No. EDU 08637-2009S Agency Docket No. 221-07/08

SETTLEMENT AGREEMENT

WHEREAS, The Trenton Board of Education (hereinafter referred to as "petitioner") brought tenure charges against the respondent, Debra Butler (hereinafter referred to as "respondent"), having Docket No. 08637-2009S; and

WHEREAS, the petitioner also withheld both the employment and adjustment increment for the respondent for both the 2008-2009 and 2009-2010 school terms; and

WHEREAS, the respondent was prepared to litigate both issues; and

WHEREAS, both the tenure and incremental withholding matters were consolidated for purposes of this litigation having respective OAL Docket No. 8637-09, Agency Docket No. 176-7/09, and OAL Docket No. 2007-2009S and Agency Docket No. 221-07/08; and

WHEREAS, a hearing was scheduled to take place before the Hon. Judge Scarola on November 6, 2009; and

WHEREAS, the parties entered into settlement discussions regarding both the increment withholding action and the tenure matter; and

WHEREAS, both the respondent and the petitioner were able to reach an agreement that would serve the best interest of both parties; and

WHEREAS, the agreement shall serve the public interest in that it will remove the uncertainty caused by both cases and reduce the potential legal fees that would have been incurred;

NOW, THEREFORE, the respondent and the petitioner agree to settle this matter on the following basis:

1. The respondent agrees not to contest her termination of employment as a Confidential Secretary which shall become effective December 1, 2009.

2. In consideration therefore, the petitioner agrees to compensate the respondent for the 120 days during which she was suspended without pay, said compensation to be at her per diem rate of $249.17 predicated on her 12-month employment status (240 days) at an annual salary of $59,800.00. The amount of compensation will therefore be $29,900.00.

3. In addition, the respondent shall compensate petitioner for all unused vacation days she incurred both in the 2008-2009 and 2009-2010 school terms, payment to be made based on her per diem rate of $249.17.

4. The petitioner shall not oppose any application made by respondent for unemployment benefits.

5. With this agreement, the respondent gives a full and final release to the petitioner regarding any and all claims she may have had, potential or otherwise, with regard to either the withholding of increment action under OAL Docket No. EDUOA 02007-2009S and the tenure action under OAL Docket No. EDUTH 08637-2009S both of which were consolidated under OAL Docket No. EDUTH 08637-2009S.

6. Respondent agrees that she will not seek future employment with the Trenton Board of Education.

7. This agreement does not constitute an admission of any kind by either party. It does not speak to the merits or the case brought by the petitioner or the defenses raised by the respondent.

8. By this agreement, both actions, the one having to do with the increment withholding action and the one having to do with the tenure charges, will be dismissed with prejudice subject to the approval of the Commissioner of Education.

12/29/09
Robert M. Schwartz, Esq. Date
Attorney for Respondent Debra Butler

1/11/2010
Rocky L. Peterson, Esq. Date
Attorney for Petitioner Trenton Board of Education

Debra Butler
Debra Butler, Respondent Date

L. Diane Campbell 12/21/09
Dr. L. Diane Campbell, Date
Board President

Jayne S Howard 12/21/09
Jayne S. Howard Date
Business Administrator/Board Secretary

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH DEBRA BUTLER

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement between Debra Butler and the Board of Education in regard to OAL Docket Nos. EDU 2007-2009S and EDU 08637-2009S, and Agency Docket Nos. 176-7/09 and 221-07/08; and

WHEREAS, the Board has voted on this date to approve the Settlement Agreement; now therefore be it

RESOLVED that the Trenton Board of Education approves the Settlement Agreement between Debra Butler and the Board of Education

L. Diane Campbell

Dr. L. Diane Campbell
Board President

Jayne S. Howard

Jayne S. Howard
School Business Administrator/Board Secretary

November 23, 2009
ADOPTED

I certify that this is a true copy of the signed original board resolution.

Jayne S Howard

Jayne S. Howard, School Business Administrator/Board Secretary

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH DEBRA BUTLER

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement between Debra Butler and the Board of Education in regard to OAL Docket Nos. EDU 2007-2009S and EDU 08637-2009S, and Agency Docket Nos. 176-7/09 and 221-07/08; and

WHEREAS, the Board has voted on this date to approve the Settlement Agreement; now therefore be it

RESOLVED that the Trenton Board of Education approves the Settlement Agreement between Debra Butler and the Board of Education

L. Diane Campbell

Dr. L. Diane Campbell
Board President

Jayne S. Howard

Jayne S. Howard
School Business Administrator/Board Secretary

November 23, 2009
ADOPTED

I certify that this is a true copy of the signed original board resolution.

Jayne S Howard

Jayne S. Howard, School Business Administrator/Board Secretary

EDU 2007-09 +
EDU 8637-09

In the Matter of the Tenure Hearing of Debra Butler

The parties have agreed to settle the within matter on the following basis:

1. The Trenton Board of Education hereby agrees to compensate the respondent, Debra Butler, for the 120 days during which she has been suspended at her per diem rate which has been calculated at $249.16 based on an annual salary of $59,800 and a work year of 240 days.

2. In addition, the Trenton Board of Education shall compensate Ms. Butler for her unused vacation days which consist of the days to which she is contractually entitled in 09-10, (12 days) plus any days not used in 08-09.

3. ~~In consideration for the~~ The Trenton ~~Board of Ed~~ shall terminate with prejudice ~~the~~ the within action having OAL Docket ~~#~~ ~~02007-2009S~~ 8637-09, agency reference # ~~227~~ 7-09.

4. The Trenton Bd. of Ed shall terminate Ms. Butler's employment effective Dec. 1, 2009. Ms. Butler does not oppose the termination.

5. Ms. Butler agrees that she shall not reapply for a position of employment with the

Trenton Bd. of Ed.

(6). In the event that Ms. Butler applies for unemployment compensation benefits, the Trenton Bd. of Ed. shall not oppose such an applicant

(7) In consideration of the agreements, Ms. Butler hereby withdraws her pet. of appeal currently the matter within in re: Docket # 2007-20095, 221-7-08.

Robert M. Schwartz 11/12/09
Attorney for Respondent, Debra Butler

11/12/09

Rocky Peterson,
Attorney for Peterson, Trenton Bd. of Ed.

Debra L Butler 11/12/09
Debra Butler, Respondent

#126-10

OAL DKT. NO EDU 1007-10
AGENCY DKT. NO. 350-12/09

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW J. JACKSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
HACKENSACK, BERGEN COUNTY.	:	

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

Upon such review, the Commissioner cannot accept the proposed settlement, as recommended by the OAL.

It is well established that – once tenure charges are certified – such charges may be settled only with the Commissioner's approval, and any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge (ALJ), must address the standards expressly established for this purpose by the State Board of Education. *In re Cardonick*, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). 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 the settlement or withdrawal; 3) evidence the consent of both the charged and the charging parties; 4) indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) 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 instance, the record is clear as to the nature of the charges and includes a Board of Education resolution approving settlement; the final criterion does not apply in respondent's case since he is not a teaching staff member. However, neither the parties nor the ALJ have anywhere on the record set forth the circumstances justifying settlement of this matter, 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 – a principle no less applicable where the charged party is resigning from employment with the charging district. *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. The Commissioner finds this deficit particularly troubling where, as here, the alleged behavior underlying the charges is of a type that may be of concern should respondent once again seek employment in a school district, and the parties have agreed – in the event the district is contacted for a reference – to indicate that respondent resigned for "personal reasons"[1] notwithstanding that the filing of tenure charges, tenure charge documents, and any record of or determination related to these, are a matter of public record. *Williams v. Board of Educ. of the*

[1] The Open Public Records Act states, in pertinent part, 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

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 declining to accept the proposed settlement at this time, the Commissioner stresses that he does not preclude the possibility of settlement in this matter; however, he cannot meet his own obligation to the schools and children of this State without the requisite assurance that a proposed settlement is consistent with established standards for the setting aside of tenure charges.

Accordingly, the Initial Decision of the OAL recommending approval of the proposed settlement is hereby rejected, and this matter is remanded to the OAL for expansion of the record or revision of the parties' Agreement consistent with the concerns expressed above. If the parties are unwilling or unable to agree on such expansion or modification, the tenure charges shall proceed to plenary hearing.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/10
Date of Mailing: 4/23/10

[2] The Commissioner notes that the date of respondent's proposed resignation is not clear, although such resignation was presumably intended to take effect upon or subsequent to approval of the parties' agreement by the Commissioner.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1007-10

AGENCY DKT. NO. 350-12/09

IN THE MATTER OF THE TENURE HEARING OF ANDREW J. JACKSON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY

Richard E. Salkin, Esq., for petitioner, Hackensack Board of Education

Harold N. Springstead, Esq., for respondent, Andrew J. Jackson (Springsted & Maurice, attorneys)

Record Closed: March 5, 2010 Decided: March 10, 2010

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

This matter was transmitted to the Office of Administrative Law January 5, 2010 for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearing on February 16, 2010 but adjourned because the parties agreed to settle the matter. The Settlement Agreement/Resolution was prepared and signed by the parties on February 22, 2010 and executed by the Board Secretary on February 23, 2010. A copy of the Settlement Agreement/Resolution is attached hereto and made part hereof.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 10, 2009

DATE

JEFFREY A. GERSON, ALJ

3-18-10

Date Received at Agency:

MAR 18 2010

Date Mailed to Parties:

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AGREEMENT

This AGREEMENT made this 23 day of February 2010 between the HACKENSACK BOARD OF EDUCATION, which has offices located at 355 State Street, Hackensack, New Jersey 07601 (hereinafter referred to as the "BOARD"), and ANDREW J. JACKSON, who resides at 324 Katherine Street, Englewood, New Jersey 07631 (hereinafter referred to as "JACKSON").

WITNESSETH:

WHEREAS, JACKSON is employed as a tenured grounds person (custodial staff) by the BOARD;

WHEREAS, on November 24, 2009, the BOARD passed a resolution authorizing the filing of tenure charges against JACKSON;

WHEREAS, on December 7, 2009, the BOARD filed the said tenure charges with the Commissioner of Education;

WHEREAS, JACKSON filed an answer on or about December 18, 2009, denying the charges; and

WHEREAS, the parties are desirous of resolving the issues raised by the tenure charges and answer without having to resort to further litigation;

Now, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree to the following as the terms and conditions of settlement:

1. JACKSON agrees to resign from all employment with the BOARD provided that the conditions for the resignation are in accordance with the terms of this Agreement have been complied with by the parties. A copy of JACKSON'S letter of resignation is attached hereto and

made a part hereof. In the event that the Hackensack School District is contacted for a reference, the BOARD agrees that it will provide the starting and ending dates of JACKSON'S employment and indicate that he resigned for personal reasons.

2. The BOARD agrees to restore JACKSON'S medical benefits retroactive to their termination through April 30, 2009.

3. The BOARD agrees to pay JACKSON two (2) month's salary with deduction for taxes and pension.

4. The BOARD agrees to pay JACKSON for 113 unused sick days at the rate of $54.00 per day ($6,102.00).

5. JACKSON knowingly and voluntarily releases, waives and discharges the BOARD, and its members, officers, employees, administrators, agents and servants, from any and all claims which she has or might have against the BOARD from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, court or any other forum, under any federal, state of local constitution, laws or regulations, including but not limited to claims arising under the Americans with Disabilities Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, or any action similar thereto against the BOARD, including any claim for attorneys' fees that JACKSON now has ever had or may hereafter have, based upon any conduct arising out of JACKSON'S employment with the BOARD. This paragraph shall not preclude JACKSON from instituting proceedings seeking to enforce the terms of this Agreement and receive salary and benefits in accordance with the provisions of this Agreement.

6. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not constitute, be interpreted, construed or used as evidence of an admission of responsibility, wrongdoing or liability on the part of the BOARD or JACKSON and shall not be referred to in any subsequent proceeding other than to enforce the express terms of this Agreement.

7. This Agreement resolves all issues between the parties. The BOARD shall withdraw the Tenure Charges filed with the Commissioner of Education bearing agency reference number 350 – 12/09 and OAL docket number EDUTH 01007 – 2010N, with prejudice.

8. Each party has consulted with an attorney of their own choice and acknowledges satisfaction with their independent legal representation and that this Agreement is entered into voluntarily and of their own free will.

9. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of all the parties hereto and all who succeeds to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents and attorneys, successors or assigns.

10. This Agreement may not be changed except by written, signed agreement between the parties.

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

12. This Agreement may be signed by the parties in counterparts on separate copies of the Agreement and all signatures pages shall be incorporated into the parties' Agreement as if all the signatures are affixed on one (1) page.

IN WITNESS WHEREOF, the parties have hereunto set forth hands and seals on the date and year shown below.

WITNESS:

Name:
Title:

Dated: February 23, 2010

HACKENSACK BOARD OF EDUCATION

By:
Name:
Board President

WITNESS:

ANDREW J. JACKSON

Dated: February 22, 2010

ANDREW J. JACKSON
324 Katherine Street
Englewood, New Jersey 07631

Edward A. Kliszus, Ph.D.
Superintendent of Schools
Hackensack Board of Education
355 State Street
Hackensack, New Jersey 07601

Re: Letter of Resignation

Dear Dr. Kliszus:

Please accept my irrevocable resignation from all employment with the Hackensack Board of Education for personal reasons. This resignation is expressly conditioned upon the approval of the attached agreement with the Hackensack Board of Education and compliance with its terms.

Sincerely,

Andrew J. Jackson

#127-10

OAL DKT. NO. EDU 371-10
AGENCY DKT. NO. 6-1/10

T.T. and I.D., ON BEHALF OF MINOR CHILD, D.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement, Default Judgment 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 cannot accept the proposed agreement, which does not dispose of all issues in controversy as required by applicable rule. Specifically, the Commissioner notes that there are *two* petitioners in this matter, only one of whom (T.T.) signed the agreement and consented to withdrawal of the petition; the other (I.D.) expressly refused to do so, as indicated by the notation "No Agreement/Refused to Sign" on the line designated for his signature. Since the petition has not been withdrawn by I.D. and there is no explanation on record as to why the proposed settlement resolves this matter notwithstanding I.D.'s refusal to consent to its terms, the Commissioner cannot approve the agreement as recommended.

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 such proceedings as are necessary to fully resolve the parties' dispute.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/10

Date of Mailing: 4/23/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 371-10

AGENCY DKT. NO. 6-1/10

T.T. AND I.D. ON BEHALF OF MINOR CHILD, D.T.,

Petitioners,

v.

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

Respondent.

T.T. and **I.D.**, petitioners, pro se

William R. Burns, Esq., for respondent (Destribats, Campbell, Magee, Staub & Burns, attorneys)

Record Closed: March 19, 2010 Decided: March 22, 2010

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 8, 2010, 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.

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

MARCH 22, 2010
DATE

RONALD W. REBA, ALJ

Date Received at Agency: 3/24/10

Date Mailed to Parties: 3/24/10

/cad

(E, 9/10)

T.T and I.D. on behalf of D.T.

Petitioner,

v.

Hamilton Township Board of Education

Respondent

Before Commissioner of Education of NJ

Agency- 6-1/10

ED U-00371-10

Settlement Agreement Default Judgment & Release (3/19/2010)

INT T.T

The petitioners, ~~[redacted]~~ Tiasha Tyson (Mother) Pro Se ; the Respondent's Hamilton Township thru their Attorney William R. Burns, of Desteibats Campbell Magee Staub & Hamilton Burns, Do hereby agree & Stipulate to the following:

A) All parties are of sound mind and body Do hereby freely & voluntarily Agree to without undue influence the following

1) That Petitioner's shall pay the Hamilton Township Board of Education the sum of

IN: I.T

~~$6000.00 (Seven~~ Thousand four ~~hundred Dollars)~~, 6500 (six Thousand five hundred)

(3/19/10) (2) Said payment shall be made as follows: Six hundred fifty) $650 ~~(Six hundred fifty~~ (seven hundred and ~~fifty~~ Dollars) within 10 days of 3/19/2010 or by 3/29/2010.

(B) $100.00 (One Hundred Dollars) a month w/ first payment due on the 15th of every month beginning April 15th 2010 until remaining $850 is paid

(3) If the above terms are not met, specifically, the ~~$~~ $650 being paid within 10 days or by 3/29/2010 and/or ~~[illegible]~~ 2 consecutive $100 monthly payments are missed ~~A~~ Default Judgment Civil Judgment shall be entered against ~~the~~ T. Tyson (Mother) ~~[illegible]~~ in the amount of $13,000.00 (Thirteen Thousand Dollars)

Int / / T.T

(4) Deontay Tyson-(Davis) shall remain in Hamilton Twp Schools pending a home Inspection

Int D.I

(5) Said home inspection shall be completed within 10 days as of 3/19/2010 or March ~~29~~ 29, 2010.

(6) The Home Inspector and employee of the HTBE shall have free & unlimited access to 14 Clark Ave, Hamilton NY Said inspection shall include and inspection of the student's (D.T.D) Room. The Room is to be age & sex appropriate for a 4th grade MALE

(7) If the home inspection does not occur, thru no fault of the District, specifically, the Inspector is not given access the Child shall be immediately Removed from HTBE Schools.

(8) Upon completion of ~~Inspection~~ HTBE to provide confirmation to petitioners, & Confirmation to include District position w/ Regard to student's eligibility.

(9) ALL ~~to~~ Diplomas will not be issued to student until the $1000 total sum is paid. In the event a default judgment is entered Diplomas shall not be issued until $13,000.00 is paid.

Init I.T

(3/19/10) (7) No other promises or conditions have been made. This 4 page agreement is the totality of the agreement between the parties.

(8) T. Tyson withdrawing her Appeal, EDU 37-10 is Dismissed

~~The Honorable Frank W. Reba, JSC~~

William R. Burns
NTBE

Michael J. Gilbert
NTBE

} Respondent

NO AGREEMENT Refused to Sign
Irvin Davis

Tiasha Tyson

} Petitioner

Entered into this the 19 of March 2010
DATE 3/19/2010

Checks to be made payable to
Hamilton Twp Board of Edu
c/o Michael Gilbert
90 Park Ave, Hamilton NJ 08610

128-10R

OAL DKT. NO. 9947-09
(EDU 5801-08 ON REMAND)
AGENCY DKT. NO. 112-4/08

BELINDA MENDEZ-AZZOLLINI,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

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

Upon review, the Commissioner fully concurs with the analysis and conclusions of the Administrative Law Judge, as thoroughly and clearly set forth in the Initial Decision.

Accordingly, the Initial Decision of the OAL – finding that petitioner has acquired tenure and is entitled to the relief sought, including back pay, less mitigation, from the date of her removal, together with all of the benefits of her tenured position – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/10
Date of Mailing: 4/23/10

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

128-10 R

BELINDA MENDEZ-AZZOLLINI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a guidance counselor who was employed by the Board of Education for each year from 2004-05 through 2007-08, contended that she had acquired tenure and that her employment was unlawfully terminated on January 29, 2008. The Board countered that petitioner – owing to leaves of absence, including two granted pursuant to the federal Family and Medical Leave Act (FMLA) – had not provided the thirty-plus months of service required to obtain tenure under *N.J.S.A.* 18A:28-5(c). The case was originally heard at the OAL in November 2008, and an Initial Decision was issued denying petitioner tenure based upon language contained in the FMLA. The Commissioner found that the FMLA was not dispositive of the petitioner's claim, and the matter required review pursuant to the standards of applicable education case law, i.e.: *Kletzkin v. Bd. of Ed. of the Borough of Spotswood*; accordingly, the matter was remanded to the OAL for further fact-finding and argument.

On remand, the ALJ found that, based on the principles in *Kletzkin, supra,* and *Blinn v. Board of Trustees of the Public Employees' Retirement System,* petitioner's employment relationship with the Board continued during her leaves of absence and that these leaves of absence had no adverse impact on the Board's ability to evaluate her. The ALJ found that petitioner met the requisite number of months for tenure and is entitled to back pay, less mitigation, from the date of her removal, together with all of the benefits of her tenured position.

The Commissioner concurred with the analysis and conclusions 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.

April 23, 2010

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09947-09
AGENCY DKT. NO. 112-4/08

BELINDA MENDEZ-AZZOLLINI,

Petitioner,

v.

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

Respondent.

ON REMAND

OAL DOCKET NO: EDU 05801-08

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Kenyatta K. Stewart, Esq., for respondent (Hunt, Hamlin and Ridley, attorneys)

Record Closed: March 5, 2010 Decided: March 30, 2010

BEFORE **J. HOWARD SOLOMON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals her removal from employment with respondent, contending that such removal was unlawful since she had acquired tenure. Respondent denies she acquired tenure and that its actions were lawful. This matter was initially forwarded to the Office of Administrative Law on or about May 14, 2008, by the Department of Education

for determination as a contested case. At the hearing on November 19, 2008, the parties had stipulated all facts since none were in dispute. The record closed on January 30, 2009, upon receipt of further facts stipulated by the parties and post-hearing memoranda.

The undersigned rendered an Initial Decision dated February 24, 2009, denying petitioner tenure based upon the language contained in the Federal Family Medical Leave Act.[1]

The Commissioner of Education, in her Final Decision dated August 26, 2009, rejected the Initial Decision and remanded the matter to the OAL, stating:

> . . . the Commissioner prefers to revisit the merits of this matter following development of a factual record setting forth the effect of petitioner's series of leaves on the Board's ability to evaluate her performance, and consideration of argument regarding the appropriate application of Kletzkin[2] to such facts.

Accordingly, the matter was scheduled for hearing on the remand on November 25, 2009 but was adjourned at the request of counsel for respondent. The matter was then rescheduled for hearing on December 9, 2009. On that date, counsel for respondent appeared but advised that one of respondent's witnesses, who was most familiar with petitioner, was not available. The matter was then rescheduled for February 8, 2010, on which date the matter was heard. Both counsel were given until March 5, 2010, for the submission of legal memoranda, on which date the record closed.

FINDINGS OF FACT

Many of the facts are not in dispute. At the hearing previously scheduled for November 19, 2008, the following **FACTS** were stipulated, and reiterated here:

---

1 Initial Decision EDU 05801-08 dated February 24, 2009.
2 Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275 (1994).

1. Petitioner was employed by respondent as a guidance counselor commencing on October 27, 2004. She was employed in that capacity through June 30, 2005.

2. Petitioner was re-employed by respondent as a guidance counselor from September 1, 2005, through June 30, 2006. From June 5 through June 30, 2006, petitioner was on an approved family leave.

3. Petitioner was re-employed as a guidance counselor from September 1, 2006, to June 30, 2007. From December 4, 2006, through March 4, 2007, petitioner was on an approved family leave. From March 5 through March 30, 2007, petitioner was on an unpaid child-care leave. She returned to work on April 2, 2007, and continued working through June 30, 2007.

4. Petitioner was re-employed as a guidance counselor from September 1, 2007, to January 29, 2008. By letter dated January 25, 2008, received by petitioner on January 29, 2008, petitioner was notified that her employment was terminated effective January 29, 2008.

5. Throughout her employment with the respondent, petitioner held a standard educational services certificate with an endorsement for student personnel services.

Also at the November 19, 2008, hearing, the parties stipulated, and as reiterated here, certain documents into evidence referred to as J-1A through J-1F, enumerated as follows:

J-1A Request from petitioner dated June 1, 2006, for an unpaid medical leave with paid benefits as per the Federal Family Medical Leave Act (the FMLA) from June 5, 2006, to July 1, 2006;

J-1B Approval of the Board for the leave of absence recited above;

J-1C Request from petitioner for unpaid maternity leave of absence with paid benefits as per the FMLA from December 4, 2006, to March 4, 2007, followed by an unpaid leave for child care with paid benefits from March 4, 2007, to March 30, 2007;

J-1D Letter from the office of the superintendent, dated January 25, 2008, terminating petitioner's employment;

J-1E Letter from petitioner to the Board, dated February 7, 2008, requesting reasons for her termination.

The parties also stipulated at the November 19, 2008, hearing, and reiterated here, as **FACT** the days petitioner worked and the days she was on leave of absence. (J-2.) Accordingly, I **FIND** the following:[3]

Worked	10/27/04-06/30/05	8 months, 05 days
Worked	09/01/05-06/04/06	9 months, 04 days
Family Leave	06/05/06-06/30/06	26 days
Worked	09/01/06-12/03/06	3 months, 03 days
Family Leave	12/04/06-03/04/07 and	
Child Care	03/05/07-03/30/07	3 months, 28 days
Worked	04/02/07-06/30/07	3 months
Worked	09/01/07-01/29/08	4 months, 29 days
Total Working Days		28 months, 14 days
Total Leave (unpaid)		04 months, 23 days
Grand Total		**33 months, 06 days**

The parties further stipulated, and reiterated here, as **FACT** that petitioner's leaves of absence from June 5 to June 30, 2006, and from December 4, 2006, to March 4, 2007,

were pursuant to the Federal FMLA.[4] Her leave of absence from March 5, 2007, to March 30, 2007, was an approved unpaid leave for child care which was not pursuant to the Federal FMLA or any family leave under the laws of this State.[5]

At the time of their appearances on the hearing date scheduled for December 9, 2009, the parties stipulated as **FACT** that:

1. During the school year 2004-2005, petitioner received three formal evaluations.

2. During the school year 2005-2006, petitioner received three formal evaluations.

3. During the school year 2006-2007, petitioner received two formal evaluations. The first evaluation occurred on November 27, 2006, (P-8) before her leave of absence and the other occurred on May 24, 2007, (P-9) after she returned from her leave.

4. Petitioner worked the following school year from September 1, 2007, until January 29, 2008, when she was terminated. During the 2007-2008 school-year, petitioner received one formal evaluation.

FACTUAL DISCUSSION

The hearing continued on February 8, 2010, to allow for the testimony of Ronald N. Bligh, Jr., respondent's witness, who was not available on December 9, 2009.

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3 Petitioner's leaves were for her pregnancy and subsequent child care.

4 On January 30, 2009, this stipulation was placed on the record through a telephone conference with counsel for the parties.

5 She had used up the twelve weeks of leave allowed under the Federal FMLA. 29 U.S.C.A. § 2612.

Bligh, now employed by the West Orange Board of Education, had been the principal at respondent's Union Avenue Middle School from 2005 to 2009 at the same time petitioner was there as a guidance counselor.

Petitioner had been under his supervision since February 2005 and among his several duties as principal was the evaluation of staff members. He stated that petitioner was also responsible for teaching the STEP (Students Taking Education Personally) program and was also involved with the special needs program. Ilene Walton, who was the guidance counselor supervisor, Bligh and Mohammed Baala, the assistant vice principal, all had the opportunity to evaluate her.

Bligh was aware that non-tenured teachers were required to be evaluated three times a year, while tenured teachers were required to be evaluated twice annually. Both evaluation processes were the same. He described formal evaluations which were scheduled evaluations in the classroom on advanced notice followed by a discussion with the staff member afterwards. There were also informal unannounced evaluations which consisted of unscheduled classroom observations and discussions with the teacher.

Bligh acknowledged that petitioner had nine or ten formal evaluations during her employment.

He said that guidance counselor formal evaluations were done with the same frequency as with teachers, except that the evaluation form was different. Guidance counselors could also be teachers, such as teaching the STEP program, which petitioner did.

Bligh recalled that he conducted three to five formal evaluations of petitioner and about fifteen to twenty informal ones. He mentioned that Baala probably had the same amount of formal and informal evaluations as he did, but he could not recall how many were done by Walton. He stated also that the formal evaluations he conducted were not favorable towards petitioner.

He commented about her lack of attendance, which affected the evaluation process and its impact on students. He mentioned that petitioner, on several occasions, was either tardy or absent. He stated that, because of her leaves of absence, she was given the lightest workload of all the guidance counselors in order to impact the least amount of students.

He then discussed the process about recommending tenure. The process started with his recommendation whether or not to grant tenure, which was accompanied by documentation in support of his position and which was then submitted to the personnel department. His recommendation was then forwarded to the superintendent of schools who could agree or disagree. The superintendent then forwarded the recommendation for or against tenure to the Board of Education for its final decision.

Bligh recommended that petitioner not be granted tenure. He stated that her skills were below par, that she once made a false time-report, that she often had to be paged to be located, and at times exceeded her allotted lunch time. He further stated that once she referred to the special education students, during an assembly for others to hear, as such rather than referring to their classroom number. He also once found her talking on her cell phone during a fire drill rather than directing children out of the building. He further stated that she was given training to remediate her deficiencies which she did not complete satisfactorily.

Ethel W. Davion, superintendent of schools, also testified on behalf of respondent. She was aware of petitioner through conversations and e-mails with Bligh, but not on a personal basis.

She stated that each employee is expected fulfill his or her job description, and if not, tenure is not awarded. A recommendation either for or against tenure must be supported by written documentation. When Bligh's recommendation not to award tenure was received, Davion was in agreement and prepared a resolution to that effect, which was submitted to respondent for its decision.

Although Davion did not always agree with Bligh's recommendations, here she felt that there were overwhelming concerns about petitioner. She discussed the need for a good attendance record and that petitioner's absences raised concerns, even though she acknowledged that petitioner's leaves of absences were all approved by respondent. She, too, acknowledged that petitioner had received a sufficient number of formal evaluations.

She also noted that petitioner was given improvement plans that were not satisfied. The last improvement plan was for ninety days which commenced on November 30, 2007. However, petitioner's employment was terminated in January 2008, during the middle of an improvement plan. Davion stated that if petitioner were not performing satisfactorily during that plan, there would be no need to wait for the completion of the plan. It was Davion's position that an employee who had excessive absences should not be awarded tenure. It was her impression that sufficient time remained to discharge petitioner since her leaves of absence did not count towards the time for tenure.

Petitioner then testified in rebuttal to the allegations made by Bligh. She disagreed about her attendance, stating that she never received any written negative comments from him about this issue, nor was attendance ever discussed, during her evaluations. She stated that she filed many grievances against Bligh for harassment and denied that she was given an easy workload or was on a cell phone during a fire drill, as Bligh alleged.

ADDITIONAL 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 additional **FACTS**:

1. Bligh had been employed by respondent from 2005 to 2009 as the principal of the Union Avenue Middle School where petitioner was a guidance counselor.

2. He had been her supervisor from February 2005 until she was terminated pursuant to his recommendation.

3. The superintendant of schools and respondent agreed with his recommendation and petitioner was terminated from employment on January 25, 2008.

4. Prior to petitioner's termination, respondent had conducted nine formal evaluations of her as a non-tenured employee.

5. Respondent, through its witnesses, confirmed that no further formal evaluations were considered necessary since it had already had a sufficient number of them upon which to base its decision of termination.

6. In addition to formal evaluations, petitioner received several informal evaluations and was given additional training which failed to yield satisfactory results.

LEGAL ANALYSIS AND CONCLUSION

The acquisition of tenure is governed by N.J.S.A. 18A:28-5 which provides, in pertinent part:

> 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, . . . 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 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.

The purpose of teacher tenure laws is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Following the clear language of N.J.S.A. 18A:28-5, "all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 81 (1982). According to N.J.S.A.

18A:28-5(c) all teaching staff members, including guidance counselors, shall acquire tenure once employed in a school district for "the equivalent of more than three academic years within a period of any four consecutive academic years," Ibid., which runs for the "ten months between September 1 and June 30 of the school year." Kletzkin, supra, 136 N.J. at 277 (citing N.J.S.A. 18A:1-1). Due to "its remedial purpose, the Tenure Act [N.J.S.A. 18A:28-1 to -18] should be liberally construed to achieve its beneficent ends." Spiewak, supra, 90 N.J. at 74-75 (citing Barnes v. Jersey City Bd. of Educ., 85 N.J. Super. 42, 45 (App. Div. 1964)).

Here the parties stipulated that petitioner was actively employed for twenty-eight months, fourteen days. The question then becomes whether petitioner and respondent maintained an employment relationship during petitioner's four months, twenty-three days of approved leaves of absence. In that regard, the Appellate Division in Blinn v. Board of Trustees of the Public Employees' Retirement System, 173 N.J. Super. 277 (App. Div. 1980), has held:

> [w]e are convinced that the grant of a leave of absence to [an] employee does not terminate the employment relationship . . . and that, during the term of such leave of absence, the employment relationship continues – albeit in an inactive status. The phrase "leave of absence" itself "connotes a continuity of the employment status."
>
> [Id. at 278 (citations omitted).]

The court further stated that:

> [a leave of absence] is simply an authorized temporary absence from active service which, in the normal course and all other things being equal, implies the right of the employee to return to active employment in the employer's service at the conclusion of such leave of absence. Were it to be equated with a discontinuance or termination of employment, a leave of absence would be a meaningless term, signifying nothing.
>
> [Ibid.]

Also see Kletzkin, supra, 136 N.J. 275. In that matter, petitioner was employed initially as a learning disabilities teacher/consultant and later as the school psychologist in the same local board cumulatively from January 1986 until April 1989 when she was terminated. She provided active service continuously from January 1986 until November 1988 when she was forced to take an involuntary leave of absence due to a work-related injury. Prior to her involuntary leave, her active service was slightly in excess of twenty-eight consecutive months. The issue in Kletzkin was whether she obtained tenure when the thirtieth month passed in January 1989 while she was still disabled. The court held that she was entitled to tenure after being employed for thirty months and one day, over four academic years, because her employment continued during her absence by virtue of N.J.S.A. 18A:30-2.1, which required her employer to continue her pay up to one calendar year. Kletzkin, supra, 136 N.J. at 278. The court also reasoned that even though it recognized the importance of the probationary period during which a teacher's performance is assessed, the board had ample time to assess Kletzkin during her twenty-eight consecutive months of active employment in four school years and upheld her attainment of tenure which included the time she was on her leave of absence.

In light of Blinn and Kletzkin the employment relationship between petitioner and respondent continued during her leaves of absence, "albeit in an inactive status," until she was eventually terminated. Blinn, supra, 173 N.J. Super. 278. Since petitioner was on leaves of absence with the consent and approval of respondent, their working relationship did not terminate. In other words, and contrary to respondent's contention, petitioner's leaves of absence did not toll the time for acquiring tenure. She was employed for more than three consecutive academic years – until January 2008 in the fourth successive academic year. Pursuant to the above legal principles I, therefore, **CONCLUDE** that petitioner had been sufficiently employed by respondent to meet the requisite number of months for tenure.

The issue then remaining, as sought by the Commissioner, is whether respondent was able to adequately evaluate petitioner during her years of employment.

N.J.S.A. 18A:27-3.1, entitled "[e]valuation of nontenured teaching staff," reads:

> Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Said evaluations are to take place before April 30 each year. The evaluations may cover that period between April 30 of one year and April 30 of the succeeding year excepting in the case of the first year of employment where the three evaluations must have been completed prior to April 30. The number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.

From the testimony adduced at the hearing, I **CONCUDE** that petitioner's leaves of absence had no adverse impact upon respondent's ability to evaluate her. Bligh and Davion both acknowledged that respondent had sufficient time to evaluate petitioner, conducting at least nine formal evaluations during her years of employment. She received three formal evaluations during the school year 2004-2005; three formal evaluations during the school year 2005-2006; two formal evaluations during the school year 2006-2007, the first on November 27, 2006, before her leave of absence and the other on May 24, 2007, after she returned from her leave. Petitioner worked the following school year from September 1, 2007, until January 29, 2008, when she was terminated. During that portion of the school year and prior to her removal, the parties agreed that she received one formal evaluation.

Although N.J.S.A. 18A:27-3.1 requires at least three formal evaluations in each academic year, the statute places the obligation for such frequency of evaluations upon the board of education. Even though petitioner did not have the required three formal evaluations in each academic year—she only had two formal evaluations in the 2006-2007 school year—it was incumbent upon respondent to see that she was evaluated three times during that school year. Here there was no evidence presented whatsoever

that respondent tried to evaluate her three times during the 2006-2007 school year, but that her leaves of absence made it impossible. To the contrary, respondent, through its own witnesses, made it clear that it had sufficient time to formally evaluate her and to make its decision to terminate. I, therefore, **CONCLUDE** that her leaves of absence presented no obstacles for her formal evaluations.

Based upon the foregoing, I **CONCLUDE** that petitioner has acquired tenure because she remained employed for thirty-three months and six days, notwithstanding her leaves of absence. Although respondent sought her removal, it, nevertheless, failed to act timely. By January 25, 2008, petitioner had acquired tenure and, thereafter, could only be removed under the strict constraints of law. N.J.S.A. 18A:6-10 to -33.

ORDER

For the foregoing reasons, it is **ORDERED** that the relief sought by petitioner be and is hereby **GRANTED** and that she be entitled to back pay from the date of her removal, less any income she received, together with all of the benefits of her tenured position.

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

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

3-30-10
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: March 30, 2010

Date Mailed to Parties: APR - 1 2010

db

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

Belinda Mendez-Azzollini

For Respondent:

Ronald N. Bligh, Jr.

Ethel W. Davion

LIST OF EXHIBITS

Joint:

J-1(a-f) Stipulation of facts and documents-dated November 19, 2008

J-2 Additional stipulation of facts-dated November 19, 2008 (days worked and days on leave)

J-3 Approval for leave of absences from December 4, 2006, through March 30, 2007

J-4 Stipulation of codified facts

For Petitioner:

P-1 Professional Evaluation Report for the 2004-2005 school year dated December 22, 2004

P-2 Professional Improvement Plan dated December 22, 2004

P-3 Professional Evaluation Report for the 2004-2005 school year dated February 10, 2005

P-4 Professional Evaluation Report for the 2004-2005 school year dated March 23, 2005; Professional Improvement Plan dated April 7, 2005

P-5 Teacher Evaluation Tool for the 2005-2006 school year dated November 21, 2005

P-6 Teacher Evaluation Tool for the 2005-2006 school year dated January 25, 2006

P-7 Teacher Evaluation Tool for the 2005-2006 school year dated March 30, 2006; Professional Improvement Plan dated March 30, 2006

P-8 Professional Evaluation of Guidance Counselors for the 2006-2007 school year dated November 27, 2006

P-9 Professional Evaluation of Guidance Counselors for the 2006-2007 school year dated May 24, 2007; Professional Improvement Plan dated May 24, 2007

P-10 Professional Evaluation of Guidance Counselors for the 2007-20087 school-year dated November 30, 2007

P-11 Memorandum from petitioner to Ronald N. Bligh, Jr. dated December 18, 2007

P-12 Memorandum from petitioner to Ronald N. Bligh, Jr. dated December 21, 2007

For Respondent:

R-1 Memorandum from Ronald N. Bligh, Jr., to Alberta Sharif, director of human resources dated January 28, 2008

R-2 Memorandum from Ronald N. Bligh, Jr. dated November 30, 2007

R-3 Memorandum from Ronald N. Bligh, Jr. to petitioner dated December 3, 2007

R-4 Memorandum from Ronald N. Bligh, Jr., to petitioner dated January 2, 2008

R-5 Memorandum from Mohamed Baala, assistant principal, to Ronald N. Bligh, Jr., principal dated January 3, 2008

R-6 Memorandum from Mohamed Baala to petitioner dated November 29, 2007

#129-10

LINDA MINNELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a part-time, non-tenured substance abuse counselor – sought reinstatement to the position she had held in the 2008-2009 school year after that position was eliminated during a 2009 departmental reorganization. The alleged grounds for petitioner's requested reinstatement are her contentions that in her second year of teaching, she was not evaluated in accordance with the procedures outlined in *N.J.S.A.* 18A:27-3.1. Respondent, however, asserts that petitioner's non-renewal was not due to her performance, but was the result of restructuring and elimination of her part-time position. Since it is well-settled that a school board has virtually unlimited discretion in the hiring or renewal of non-tenured teachers, respondent urges affirmance of its decision not to renew petitioner.

The ALJ found that: the petitioner has not met the burden of establishing that respondent's elimination of her non-tenured position was arbitrary, capricious, or unreasonable; the Board has virtually unlimited discretion in hiring or renewing non-tenured teachers; the Board's decision was premised on the elimination of a part-time substance abuse counselor position as part of a restructuring, not on petitioner's evaluations; and the Board's determination is entitled to a presumption of correctness. Accordingly, the ALJ affirmed respondent's non-renewal of the petitioner.

Upon a thorough and independent review of the record, the Deputy 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. The petition was dismissed.

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

April 29, 2010

OAL DKT. NO. EDU 12070-09
AGENCY DKT. NO. 180-7/09

LINDA MINNELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner Linda Minnella (Minnella), a non-tenured substance abuse counselor, asks for reinstatement to the part-time position she held during the 2008-2009 school year. The record indicates that Minnella's employment was terminated when the respondent district eliminated her position, and that she was notified of same via a letter from the district superintendent, Karen Bilbao, dated May 8, 2009.

Bilbao's letter informed petitioner that the nonrenewal of her contract was the result of a departmental reorganization. Further, in a June 23, 2009 letter of recommendation written by Bilbao for Minnella – also included in the record – Bilbao advised that "Minnella's position was eliminated due to the district's need to reorganize existing positions to support new initiatives." It is undisputed that petitioner did not ask for a statement of reasons or a Donaldson hearing after receiving her notice of non-renewal.

The alleged grounds for petitioner's request for reinstatement are her contentions that in her second year as a substance abuse counselor she was not evaluated in accordance with the procedures outlined in *N.J.S.A.* 18A:27-3.1.[1] More specifically, petitioner states that although three written

[1] She asserts no violations of *N.J.S.A.* 18A:27-3.1 in her first year as a substance abuse counselor in respondent's district.

evaluations[2] of her were submitted in April 2009, she was not actually observed three times during 2008-2009 school year. She asserts that the Middletown High School South principal did not observe her for the evaluation he submitted on April 2, 2009 – which included negative comments – and the Assistant Superintendent of schools never observed her for the evaluation he submitted on April 27, 2009, which purportedly included a mixture of comments, good and bad, from the two other evaluations.[3]

The Administrative Law Judge (ALJ) correctly concluded in the Initial Decision of the Office of Administrative Law (OAL) that petitioner is not entitled to reinstatement. A long line of precedent, *see, e.g. Dore v. Bedminster Board of Education*, 185 *N.J. Super.* 447 (App. Div. 1982), instructs that boards of education have virtually unfettered discretion to decline to renew non-tenured employees. Further, there is nothing in the record to contradict respondent's position that the petitioner's non-renewal was the consequence of a reorganization driven by a change of priorities and initiatives. Under such circumstances, even tenured teaching staff may be let go. *N.J.S.A.* 18A:28-9; *see, also, Dennery v. Board of Educ. of Passaic County Regional High School Dist. No. 1, Passaic County,* 131 *N.J.* 626 (1993).

The Deputy Commissioner agrees with the ALJ that, since petitioner's performance was not the reason for her non-renewal, the nature and number of her evaluations is not material to same. Nor is the Deputy Commissioner persuaded by the argument in petitioner's exceptions that respondent perpetrated a fraud upon petitioner – by way of the evaluations that were allegedly submitted without prior observations of her work – and that the alleged fraud imposed obligations upon respondent that exceed those articulated in the statutes and cases cited above. As *Dore v. Bedminster Board of Education*, 185 *N.J. Super.* 447 (App. Div. 1982) instructs, *N.J.S.A.* 18A:27-3.1 sets forth procedures to be followed for evaluating teachers but does not provide for any penalty in the event a local board fails to follow the proscribed procedures. *Dore, supra,* at 456. Thus, the fact that petitioner may not have

[2] None of the evaluations are in the record.

[3] The evaluation submitted on April 3, 2009 from the Middletown High School North principal, who did observe her prior to her evaluation, allegedly gave her good marks.

received three evaluations and/or other considerations referenced in *N.J.S.A.* 18A:27-3.1 does not signify that she must be reconsidered for renewal.

Further, it appears undisputed that there are now only two substance abuse counselor positions in respondent's district, and that they are both held by tenured employees. Thus, respondent could not reinstate petitioner without violating the statutes concerning the rights of tenured employees. *See, e.g. Prysiazny v. Board of Education of the Borough of Sayreville, Middlesex County, Commissioner Decision* #165-80, May 5, 1980.

A board of education's discretionary decisions are entitled to a presumption of correctness, and they will not be disturbed absent evidence that they are arbitrary, capricious or unreasonable. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Under the circumstances of this case, the Deputy Commissioner cannot conclude that respondent was arbitrary or capricious in its reorganization, in the elimination of the part-time substance abuse counselor position, or in its placement of the two tenured counselors in the remaining positions. While respondent may have fallen short in its evaluations of petitioner in her second full year as a part time substance abuse counselor, there is no invocable statutory or regulatory penalty for such deficiencies.

Accordingly, the Initial Decision is adopted and the petition is dismissed.

IT IS SO ORDERED. [4]

DEPUTY COMMISSIONER OF EDUCATION[5]

Date of Decision: 4/29/10

Date of Mailing: 4/30/10

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

[5] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12070-09
AGENCY DKT. NO. 180-7/09

LINDA MINNELLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: January 28, 2010 Decided: March 15, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contends that the Board's non-renewal of her employment as a part-time, non-tenured Substance Awareness Coordinator (SAC) was per se arbitrary, capricious and unreasonable. She seeks reinstatement. Her appeal was filed with the Department of Education, Commissioner of Education on July 31, 2009, and transmitted to the Office of Administrative Law (OAL) on November 23, 2009, for a

hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. The matter has been submitted on respondent's motion dismissal.

FACTUAL DISCUSSION

Based upon the pleadings submitted, I make the following **FINDINGS OF FACT** relevant to the disposition of this matter. Petitioner began her employment with the Middletown Township Board of Education in or around January 2007, as a Health, Physical Education and Driver's Education. She holds certificates issued by the state Board of Examiners in Driver's Education, Physical Education and SAC. During the 2007-2008 and the 2008-2009 school years, petitioner worked as a part-time SAC. The district also employed two full-time, tenured SACs. Petitioner never attained tenure in the Middletown school district. By letter, dated May 8, 2009, Superintendent of Schools Karen Bilbao notified petitioner that:

> In accordance with N.J.S.A. 18A:27-10(b), ...due to a departmental reorganization, (her) contract is not being renewed for next year and (her) employment is terminated as of June 30.

Petitioner did not request a Statement of Reasons for her non-renewal nor did she request a Donaldson hearing in accordance with N.J.S.A. 18A:27-3.2, N.J.S.A. 18A:27-4.1(b) and N.J.A.C. 6A:32-4.6. In a June 23, 2009, letter of recommendation written on behalf of petitioner, Bilbao indicated that petitioner's "position was eliminated due to the district's need to reorganize existing positions to support new initiatives."

LEGAL ANALYSIS

In support of its motion for summary decision, respondent relies, in part, upon the affidavit of Superintendent Bilbao. In addition to attesting to the facts set forth above, Bilbao further indicates that effective with the 2009-2010 school year, the district restructured the delivery and staffing of counseling services at the high schools such that the school district reduced the number of SAC positions from two and one-half (2 ½) to two (2). The two positions are filled by two tenured, full-time SACs. Further,

Bilbao attests that petitioner's non-renewal was not due to her performance, as she contends, but as a result of the restructuring and elimination of her part-time SAC position. Based upon these facts, respondent asserts it is entitled to dismissal of the within action since it is well settled law that a school board has "virtually unlimited discretion in hiring or renewing non-tenured teachers." Dore v. Bedminster Board of Education, 185 N.J. Super. 447, 453 (App. Div. 1982). Additionally, a board's discretionary decisions are entitled to a presumption of correctness, and they will not be disturbed absent evidence that they are arbitrary, capricious or unreasonable. Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960).

Petitioner alleges the respondent did not comply with the requirements of N.J.S.A. 18A:27-3.1; that each non-tenured teacher be observed three times during each school year and not less than once in each semester. She also alleges fraud by the principal of Middletown High School South in the evaluation process in that one of the evaluators did not even observe her prior to submitting an evaluation.

Based upon the pleadings submitted, including the affidavit of Superintendent of Schools Karen Bilbao, I **FIND** and **CONCLUDE** petitioner has not met the burden of establishing that the respondent's elimination of her non-tenured position was arbitrary, capricious or unreasonable. As respondent correctly noted, the board has virtually unlimited discretion in hiring or renewing non-tenured teachers. Here, the board's decision was not premised on evaluations as the petitioner contends but rather, the elimination of a part-time SAC position that had been staffed by the non-tenured petitioner as part of a restructuring that left in place two full-time SAC positions staffed by tenured SACs. As such, the board's decision is entitled to a presumption of correctness.

DECISION AND ORDER

The respondent's motion for dismissal of this matter is hereby **GRANTED** and the respondent's non-renewal of petitioner as a part-time SAC is hereby **AFFIRMED.**

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

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

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

March 15, 2010 — Ana C. Viscomi
DATE — **ANA C. VISCOMI**, ALJ

Date Received at Agency: 3-15-10

Date Mailed to Parties: 3-15-10

/lam

131-10

IN THE MATTER OF THE TENURE	:	
HEARING OF GINA PRIANO-KEYSER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF	:	DECISION
THE BOROUGH OF THE CHATHAMS,	:	
MORRIS COUNTY.	:	

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming against respondent – a tenured speech and dramatic arts teacher, who was employed with the district for 10 years – in connection with a solitary incident that took place on April 17, 2009 in which petitioner allegedly allowed the demonstration of an inherently dangerous activity during a student presentation, which resulted in an injury, and failed to follow school procedures in dealing with the injured student.

The ALJ found that: the factual circumstances surrounding the April 17, 2009 event are not in serious dispute; petitioner was under the impression that the student presentation entitled "How to Fall Asleep" would focus on relaxation techniques and/or meditation, and her unrebutted testimony – that she stopped the presentation immediately after realizing that it was demonstrating how to pass out by hyperventilating – was credible; and the Board's charge that petitioner should have known better than to send an injured student to the nurse accompanied only by another student is an exaggerated and unproven allegation; however, the petitioner did leave her class unattended, during which time a student was injured. The ALJ concluded that the two charges involving leaving students unattended were substantiated, and this failure of supervision led to a minor injury of a student under petitioner's charge; accordingly, the ALJ recommended a penalty of forfeiture of three month's pay.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner ordered that respondent shall forfeit 90 of the 120 days salary withheld following certification of tenure charges, and directed the District to return respondent to her tenured employment forthwith.

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

Issued 4/30/10

131-10

OAL DKT. NO. EDU 11405-09
AGENCY DKT NO. 237-9/09

IN THE MATTER OF THE TENURE	:	
HEARING OF GINA PRIANO-KEYSER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF	:	DECISION
THE BOROUGH OF THE CHATHAMS,	:	
MORRIS COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the District and respondent's reply thereto – submitted in accordance with the directives of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

The District initially excepts to the Administrative Law Judge's (ALJ) dismissal of Charges 1 and 4 as unsubstantiated. With respect to Charge 1, it contends the ALJ's finding that "Ms. Priano-Keyser's credible testimony that she was surprised by the content of the demonstration was convincing" (Initial Decision at 5) is alarming. The District claims that respondent testified that she believed the demonstration was going to be about relaxation and breathing exercises for relaxation. Curiously, it argues, if this were the case why would the presentation be entitled "How to Fall Asleep." Moreover, the District urges that the ALJ's

finding as to respondent's "surprise" fails to consider why a student would attempt to mislead his teacher in this way. Urging that the ALJ erred in dismissing this charge, the District maintains:

> Ms. Priano-Keyser admitted that the student injured himself immediately after the demonstration of "How to Fall Asleep" and Ms. Priano-Keyser admitted that the student injured himself immediately after she left the classroom unattended. The Board sustained its burden of proof in this regard because Ms. Priano-Keyser admitted the causal connection between the "How to Fall Asleep" demonstration and her leaving her classroom unattended thereby caused injury to a student in her class. (*Ibid.*)

As to Charge 4, the District contends the ALJ dismissed this charge because he found that at the time of this incident, the seriousness of head injuries had not been properly emphasized in the school nurse's presentation to staff. Such a conclusion, it avers, was based on his finding that "[a]lthough I believe her [the school nurse's] presentation probably did incorporate mention of head injuries, the absence of further instruction in the Power Point presentation leads me to believe that it was not a medical situation of emphasis." (Initial Decision at 6) The District contends that the ALJ's excusing respondent from complying with the school nurse's instructions merely because head injuries were not specifically included in her Power Point presentation serves to undermine the high expectations school districts are entitled to have of their teachers. The District argues that there was no testimony by respondent denying that the nurse had instructed her in how to deal with student head injuries and it, therefore, urges that dismissal of this charge be reversed. (District's Exceptions at 3-4)

The District next excepts to the ALJ's finding that charges 2 and 3 are exaggerated. In so finding, it charges, the ALJ stated:

> The only attempt by the Board to establish an aggravating circumstance was the fact that the class was left unattended following a lesson that was considered inappropriate and dangerous. Undoubtedly, the lesson if countenanced by Ms. Priano-Keyser would have been inappropriate and dangerous, but it was

> uncontradicted that upon learning of the content of the presentation she stopped it and warned the students of its dangers. (Initial Decision at 6)

The District finds "shocking" the ALJ's apparent rationale that respondent's condemnation of the presentation on how to pass out mitigates her unbecoming conduct in leaving her classroom. Rather, it urges, because seventh graders are capable of acting irresponsibly and carelessly, respondent "had an obligation not only to admonish her students as to the danger of hyperventilating, but also to oversee and guard against the predictable outcomes of the students hearing such a lesson." Abandoning her classroom after her students were exposed to such a dangerous activity is unjustifiable. (District's Exceptions at 4)

Finally, – reiterating its post-hearing brief reliance on *Jerkins v. Anderson*, 191 *N.J.* 285 (2007) and *In the Matter of the Tenure Hearing of George Zofchak, Board of Education of the City of Trenton*, decided by the Commissioner October 15, 2002 (#365-02), *aff'd* State Board June 4, 2003, the District urges the Commissioner to terminate respondent from her position.

In response, as to Charge 1, respondent advances that the ALJ correctly determined that the District had failed to prove that she allowed the demonstration of an inherently dangerous procedure. Respondent points out that no witness testifying at the hearing contradicted her testimony in this regard. Additionally, the handwritten notes of assistant principal Gordella's investigative meeting with respondent verify her version of the events. (Respondent's Reply Exceptions at 3-4). As to Charge 4, notwithstanding that the nurse testified that she trained staff on the proper protocol to be utilized for student head injuries, respondent testified that she did not recall any discussion or training whatsoever regarding protocol for head injuries; the nurse's power point presentation did not cover head injuries; and no witness

presented at the hearing testified that the nurse provided any training in this regard. Consequently, the ALJ properly determined that the District did not meet its burden of proof on this charge. (*Id.* At 4-5)

As to Charges 2 and 3, respondent maintains that the ALJ properly found these to be exaggerated. Charge 2 alleges that respondent left her students unattended subsequent to a demonstration on passing out and that she should have expected the students would engage in the activity. Respondent does not deny that she left her classroom for a very short period of time. However, she specifically directed her students not to attempt the activity they had witnessed and prior to leaving the room all of the students were seated quietly. It is incomprehensible, respondent argues, that she could have reasonably foreseen that a student would attempt the activity after her admonition to the class not to do so. As to the District's charge that the student was injured because she left the room, respondent observes that a student could have attempted the activity even if she had been in the room. As such, the District cannot credibly allege that her actions in leaving the room were the cause of the student's injury. (Respondent's Reply Exceptions at 6-7)

In conclusion, respondent proposes that the District has proven nothing more than respondent left her classroom unattended for approximately 30 seconds while retrieving material from the copy machine. Given her unblemished ten-year record in the District, respondent maintains no good cause for termination has been demonstrated. Rather, she agrees that the ALJ properly concluded that a 90-day forfeiture of salary is an appropriate penalty under the circumstances here. (*Id.* At 7-9)

Upon full consideration of the record in this matter – which it is noted did not include transcripts of the hearing conducted at the OAL on December 16, 2009 – the

Commissioner concurs with the ALJ – for the reasons presented on pages 5-6 of his decision – that Charges 1 and 4 against respondent are appropriately dismissed as unfounded. The Commissioner further agrees with the ALJ that even though the details surrounding Charges 2 and 3 may be exaggerated, leaving a class unattended for any period of time is unbecoming conduct for a teaching staff member, and warrants discipline. In reaching these conclusions, the Commissioner was well aware of the clear and unequivocal standard governing his review of the factual findings of the ALJ based on credibility determinations:

> 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, viewing the District's exceptions as purely speculative in nature, and particularly in light of the absence of a hearing transcript in this matter, the Commissioner accepts the ALJ's factual findings and resultant conclusions, as they are amply supported by the record before him.

As to the penalty in this matter, the Commissioner is persuaded – as was the ALJ – that *Jerkins v. Anderson* and *Zofchak*, *supra,* are inapposite to the situation existing in this matter. (See Initial Decision at 7) The instant respondent is a 10-year employee of the District with a heretofore unblemished record. The charges here arose out of an isolated incident which took place on April 17, 2009 – where the Board has established that respondent failed to supervise her students for a period of time of less than one minute. Under these circumstances, the Commissioner is compelled to agree with the ALJ that forfeiture of three months pay is a

penalty sufficient to impress upon respondent that her supervisory obligations towards her students cannot be treated cavalierly.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein. Respondent shall forfeit 90 of the 120 days salary withheld following certification of the within tenure charges. The District shall forthwith return respondent to her tenured employment.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/10

Date of Mailing: 5/03/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11405-09
AGENCY DKT. NO. 237-9/09

IN THE MATTER OF THE TENURE HEARING OF GINA PRIANO-KEYSER, SCHOOL DISTRICT OF THE BOROUGH OF THE CHATHAMS, MORRIS COUNTY.

Phillip E. Stern, Esq., for petitioner (Adams, Stern, Gutierrez and Lattiboudere, attorneys)

Gail Oxfeld Kanef, Esq., for respondent (Oxfeld Cohen, attorneys)

Record Closed: January 12, 2009 Decided: March 15, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Gina Priano-Keyser is a tenured teacher at the Chatham Middle School certified to teach theater arts and public speaking.

By letter dated September 9, 2009, the School District of the Chathams forwarded a Statement of Tenure Charges along with a Statement of Evidence and Certificate of Determination with respect to Gina Priano-Keyser.

Four charges filed by James O'Neil, the superintendent of schools were forwarded. The charges alleged unbecoming conduct arising out of a solitary incident that took place on April 17, 2009.

As of September 9, 2009, Ms. Priano-Keyser was suspended without pay pending disposition of the charges.

TESTIMONY

The first witness to testify on behalf of the School District of the Chathams was Susan Butler, the school nurse.

On April 17, 2009, Ms. Butler treated a student with a contusion to his left cheek which he sustained while in Ms. Priano-Keyser's class. P-13 and P-14 marked in evidence were the accident report prepared by Nurse Butler and a subsequent narration of what occurred on April 17, 2009.

Her testimony from the witness stand confirmed what appears in the accident report and the narration (P-15). Nurse Butler's exam revealed a swollen contusion on the student's cheek but that he was alert, ambulatory and oriented.

The focus of Nurse Butler's testimony was not on the extent of the injury, which ultimately turned out not to be serious, but rather on the failure of Ms. Priano-Keyser to follow protocols with respect to head injuries. Nurse Butler indicated that at the beginning of each school year, she conducts a seminar which in part instructs teachers to have the nurse report to the room in the event of a head injury. A Power Point presentation prepared by Ms. Butler and available online did not in fact reflect those instructions.

Assistant Principal Robert J. Gardella conducted an investigation concerning the incident involving Ms. Priano-Keyser and the injured seventh grade student.

Gardella's handwritten notes marked in evidence as P-1 indicate that Ms. Priano-Keyser was under the impression that a student was going to give a presentation on "how to fall asleep" which Ms. Priano-Keyser believed to be about hypnosis, meditation, breathing, and relaxation.

Assistant Principal Gardella's testimony confirmed that he was told by Ms. Priano-Keyser that she had left the class unattended in order to retrieve a document from a printer not far from the classroom. When she returned to the classroom, the student was already injured. Assistant Principal Gardella's notes indicate that Ms. Priano-Keyser did not send a student to retrieve the document she needed from the printer for she had been told that the printer might contain documents not suitable for student observation.

On or about April 20, 2009, a letter was composed and forwarded to parents describing the incident of Friday, April 17, 2009. The letter indicates that a "how to" project was conducted in the classroom, part of which was to include a demonstration. The demonstration performed by one of the students, "How to Fall Asleep," involved a process of hyperventilation which according to the letter indicated that some students had attempted. The last sentence of Assistant Principal Gardella's letter indicates "many situations that impact our lives are unpredictable and sudden, and its moments like these that may well represent an opportunity to educate our children."

The next witness to testify was Superintendent O'Neil who confirmed that it was he who prepared and filed the tenure charges.

Gina Priano-Keyser testified on her own behalf. She has been teaching at the Chatham Middle School since the fall of 1998 and she is certified to teach arts and public speaking. During her ten years with the School District, Ms. Priano-Keyser has never been disciplined.

On April 17, 2009, as part of an instructional public speaking lesson, the students were to give a speech incorporating a demonstration. The topic of each student's speech was screened by Ms. Priano-Keyser several days prior to the actual class. When discussing the project with the student who presented the "How to Fall Asleep" demonstration, Ms. Priano-Keyser was under the impression that the demonstration was going to be about relaxation and breathing exercises for relaxation. According to Ms. Priano-Keyser as soon as she realized that the demonstration was about hyperventilating, she stopped the presentation and told the students not to try it. Ms. Priano-Keyser started to prepare the next student for her presentation, which she indicated would take some time to set-up. While the student was setting up for her demonstration, Ms. Priano-Keyser went to the printer to pick up a document.

When she returned from the printer, a period of time she estimated to be approximately forty seconds, the students were huddled in the back of the room and she saw a male student with his hands over his face crying. There was a bruise on his left cheek. Ms. Priano-Keyser called the main office and then sent the student to the nurse with an escort.

DISCUSSION

Although there were some minor discrepancies in the testimony of the witnesses the factual circumstances surrounding the event of April 17, 2009, are not in serious dispute.

Ms. Priano-Keyser's public speaking class was to present demonstrations and speeches on that day involving topics that she had pre-cleared at least several days prior to April 17. She was under the impression that the presentation involving "How to Fall Asleep" was going to involve relaxation techniques and/or meditation. Her unrebutted testimony was that as soon as she realized that the subject matter of the demonstration did not in fact involve relaxation or meditation techniques, she immediately stopped the demonstration and instructed the students not to try what had just been demonstrated.

Ms. Priano-Keyser was aware that a class should not be left unattended. Her testimony with respect to this issue was brief and quite straight forward. She left the class unattended and should not have. Her candor and conciseness enhanced her credibility. Her testimony that she was unaware that the demonstration by the student was going to incorporate "hyperventilation" was believable. There was nothing offered in evidence to refute Ms. Priano-Keyser's testimony.

According to Ms. Priano-Keyser, she had not been instructed on the manner in which to handle head injuries and considering the fact that the injured child was alert and responsive, she did what she thought was necessary by sending the child to the nurse immediately.

Nurse Butler's testimony with respect to the manner in which head injuries should be handled undoubtedly would be the safer procedure. But, this appears to be an issue which should be re-emphasized by the school board to the teachers in that the absence of any mention in the Power Point presentation offered in evidence at the hearing concerning the manner in which head injuries should be treated lends credibility to Priano-Keyser's testimony.

CONCLUSIONS

The contention that allowing the lesson on hyperventilating was conduct unbecoming has not been established. Ms. Priano-Keyser's credible testimony that she was surprised by the content of the demonstration was convincing. Charge No. 1 of the tenure allegations that contends Priano-Keyser permitted a student to demonstrate an inherently dangerous practice that resulted in injury is not established. There was no evidence that she permitted the student to conduct the demonstration in question nor could it be contended that it was a lack of appropriate judgment, for I am convinced she knew not what the content of that demonstration was going to be.

Charge No. 4 contending that Ms. Priano-Keyser " . . . should have known better than to send an injured student to the nurse accompanied only by another student" is an exaggerated and unproven allegation. Unquestionably, recent publicity concerning the danger of what appears to be innocuous head injuries resulting in unforeseen consequences has heightened everyone's awareness to the dangers of head injuries. I am, however, convinced, that at the time of this incident the emphasis on the seriousness of head injuries had not been properly emphasized in Ms. Butler's presentation. Although I believe her presentation probably did incorporate mention of head injuries, the absence of further instruction in the Power Point presentation leads me to believe that it was not a medical situation of emphasis.

Thus, the unbecoming conduct alleged in Charges No. 1 and No. 4 are dismissed as unfounded.

With respect to Charge No. 2 and Charge No. 3, both charge Ms. Priano-Keyser with leaving her students unattended. The details of both charges No. 2 and No. 3—other than the conceded fact that the class was left unattended—are exaggerated. However, there is no doubt that a class of students should not be left unattended under any circumstances.

Ms. Priano-Keyser has experienced no prior discipline whatsoever. Leaving a class unattended warrants discipline. Although a class of students should never be left unattended, factors to be considered in mitigation of penalty would be age of the students, type of students and length of time left unattended. The only attempt by the Board to establish an aggravating circumstance was the fact that the class was left unattended following a lesson that was considered inappropriate and dangerous. Undoubtedly, the lesson if countenanced by Ms. Priano-Keyser would have been inappropriate and dangerous, but it was uncontradicted that upon learning of the content of the presentation she stopped it and warned the students of its dangers.

PENALTY

Tenure teachers shall not be dismissed or reduced in compensation "except for inefficiency, incompetency, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. It is the Board that bears the burden of establishing proof of the charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Although the School District in this matter seeks the termination of Gina Priano-Keyser, a review of prior decisions cited in In re Prinzo, EDU 10324-00, Comm'r (Aug. 20, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>, clearly indicate that termination is an extreme penalty and in this matter clearly unwarranted.

Respondent cites In re Zofchak, EDU 0146-02, Initial Decision (Aug. 26, 2002), <http://lawlibrary.rutgers.edu/oal/seach.html>, in support of the conclusion that termination is warranted. The Board also cites Jergens v. Anderson, 191 N.J. 285 (2007), in support of the termination request.

The offenses in Zofchak were considerably more serious than the allegations in this matter. Among other conclusions, the judge in the Zofchak matter found that Zofchak failed to discipline and control students in his charge and continuously failed to discipline in an effective manner and on many occasions continuously failed to teach his students in any manner whatsoever.

In Jergens, supra, which was a negligence case, a student was released from the school and hit by a car in attempting to cross the street, resulting in quadriplegia. The lack of supervision in Jergens was considerably more serious than the lack of supervision by Ms. Priano-Keyser.

Ms. Priano's lack of supervision of her students was for a period of time less than one minute, was an isolated incident, and was the first time Ms. Priano-Keyser ever faced disciplinary charges. Although these factors mitigate against a termination, a failure of supervision requires discipline.

In this matter, a very short failure of supervision led to an injury of minor magnitude which could have been much more serious. Supervisory shortcomings cannot be treated cavalierly. As a result, I **CONCLUDE** that the penalty for Ms. Gina Priano-Keyser should be forfeiture of three month's pay.

ORDER

It is **ORDERED** that Gina Priano-Keyser shall suffer a loss of three month's pay as a result of a finding of failure to properly supervise students for which she was responsible.

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

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

March 15, 2010

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 3/15/10

Date Mailed to Parties: MAR 17 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

APPENDIX

WITNESSES

For Petitioner:

Gina Priano-Keyer

For Respondent:

Susan Butler, R.N., CSN

Robert J. Gardella, assistant principal

James O'Neil, superintendent of schools

EXHIBITS

For Petitioner:

P-1 True copy of handwritten notes from Vice Principal Robert Gardella on the day of the incident, April 17, 2009, from his interview with Gina Priano-Keyser

P-2 True copy of handwritten notes from Vice Principal Robert Gardella on the day of the incident, April 17, 2009, and on April 20, 2009, concerning communications with mother of injured student

P-3 True copy of handwritten notes from Vice Principal Robert Gardella, dated April 20, 2009, regarding interview with the school nurse, Sue Butler

P-4 True copy of handwritten notes from Vice Principal Robert Gardella, dated April 21, 2009, regarding telephone conversation with parent of student in class, B.F.

P-5 True copy of handwritten notes dated April 20, 2009, from Vice Principal Robert Gardella and Vice Principal Peter Trebour of student interview of B.F.

P-6 True copy of handwritten notes dated April 20, 2009, from Vice Principal Robert Gardella and Vice Principal Peter Trebour of student interview of J.V.W.

P-7 True copy of handwritten notes dated April 20, 2009, from Vice Principal Robert Gardella and Vice Principal Peter Trebour of student interview of N.C.

P-8 True copy handwritten notes dated April 20, 2009, from Vice Principal Robert Gardella and Vice Principal Peter Trebour of student interview of J.H.

P-9 True copy of handwritten notes dated April 20, 2009, from Vice Principal Robert Gardella and Vice Principal Peter Trebour of student interview of M.H.

P-10 True copy of handwritten notes dated April 20, 2009, from Vice Principal Robert Gardella and Vice Principal Peter Trebour of student interviews of A., J.P., M., M., and B.

P-11 True copy of letter to parents dated April 20, 2009, regarding incident in question

P-12 True copy of electronic mail from Robert Gardella, dated September 9, 2009, regarding incident in question

P-13 True copy of Student Accident Report, dated April 17, 2009, prepared by Susan Butler, R.N., CSN

P-14 True copy of detailed report from Nurse Susan Butler, dated April 17, 2009

P-15 True copy of the tenure charges sworn to by Superintendent of Schools James O'Neill

P-16 True copy of Employment Contract of Gina Priano, dated June 8, 1998

P-17 True copy of job description of teacher

P-18 True copy of Regulation 3280, "Liability for Pupil Welfare," School District of the Chathams, dated November 19, 2007

For Respondent:

R-1 Chatham Middle Schools Health Office 2008-2009 Policy Manual

R-2 Copy of e-mail from Robert Accardi to CMS dated May 19, 2009, re: FAC meeting follow-up

#132-10

OAL DKT. NO. EDU 6762-09
AGENCY DKT. NO. 223-9/09

CATHY PIETRAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER 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. To the extent that the release in Section 4(a) of the Agreement refers to "payment," 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.

COMMISSIONER OF EDUCATION

Date of Decision: 5/03/10
Date of Mailing: 5/04/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6762-09

AGENCY DKT. NO. 223-9/09

CATHY PIETRAS,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

William R. Burns, Esq. for respondent (Destribats, Campbell, DeSantis, Magee & Staub

Record Closed: March 19, 2010 Decided: March 22, 2010

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 15, 2009, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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.

March 22, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

/bdt

Destribats, Campbell,
DeSantis, Magee and Staub, Esqs.
247 White Horse Avenue
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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

CATHY PIETRAS *&* HAMILTON TOWNSHIP BOARD OF EDUCATION	**Agency Docket Number: 223-9709** **OAL Docket Number: EDUOR 06762-2009S** **SETTLEMENT AGREEMENT** **&** **RELEASE**

Cathy Pietras, by and through her counsel Michael T. Barrett, Esquire, and the Hamilton Township Board of Education , by and through their counsel, William R. Burns, Destribats Campbell Magee Staub & Burns, LLC, hereby enter into this Settlement Agreement and Release for settlement of claims herein described against the Hamilton Township Board of Education.

WHEREAS, Cathy Pietras is an employee with the Hamilton Township Board of Education. Cathy Pietras claims the Hamilton Township Board of Education has denied her payment that she is entitled to.

WHEREAS, the Hamilton Township Board of Education have denied and continue to deny Ms. Pietras' claims, and the Hamilton Township Board of Education deny any wrong doing or liability of any kind to Ms. Pietras.

WHEREAS, the Parties to this Settlement Agreement and Release have conducted a thorough examination and investigation of the facts and law relating to the matter in this litigation.

WHEREAS, the Hamilton Township Board of Education have concluded that settlement is desirable in order to avoid the time, expense, and inherent uncertainties of defending protracted

litigation and to resolve finally and completely all pending potential claims of Ms. Pietras relating alleged conduct involved in his claims; and do so without admission of fault or liability.

WHEREAS, Ms. Pietras and her counsel recognize the costs and risks of prosecuting a claim against the Hamilton Township Board of Education, and believe that it is in their interest, to resolve this litigation, and any and all claims against the Hamilton Township Board of Education, as well as all employees of the Hamilton Township Board of Education who may have devised, promulgated or taken part in the conduct that is the subject of this Settlement Agreement.

WHEREAS, substantial adversarial settlement negotiations have taken place between the parties.

NOW, THEREFORE, it is hereby stipulated and agreed, by and between the undersigned as follows:

1. The Hamilton Township Board of Education and Cathy Pietras have agreed to settle this matter.
2. The Hamilton Township Board of Education and Cathy Pietras have agreed to settlement, the Board will restore 7 ½ sick days to Ms. Pietras' sick bank. The Board will pay Ms. Pietras 7 ½ days of salary based upon the 2008-2009 salary guide.
3. This agreement is not precedent setting.
4. The settlement will release the Hamilton Township Board of Education, their respective affiliates, predecessors, successors, and assigns, officers, agents, representatives, insurers, employees, and Board of Education Members, from any and all claims or causes of action that were, could have been, could be, or should have been asserted by Cathy Pietras.

a. **RELEASE** thy Pietras, hereby give up and all claims and rights, which I may have against, the Hamilton Township Board of Education, "You". It is agreed and understood that the resolution of this matter does not reflect and is not intended to be considered an admission of fault or liability but is instead simply a resolution of a civil dispute. This releases all claims, including those, which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything, which has happened up to now. I specifically release you, your respective affiliates, predecessors, successors, assigns, officers, agents, representatives, insurers, employees, and Board of Education Members, from any and all claims or causes of action that were, could have been, could be, or should have been asserted by me, Cathy Pietras, and all claims arising out of my Cathy Pietras's employment with the Hamilton Township Board of Education. Said Release also includes any and all outstanding economic loss claim. Payment herein represents full and complete payment on the part of the Hamilton Township Board of Education.

b. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for the benefit of the Hamilton Township Board of Education and all who succeed your rights and responsibilities, such as your successors, and the heirs or the executor of your estate.

c. I understand and agree to the terms of this Release.

INITIALS CP
C.P. DATE: 3-5-10

MB
M.B. DATE: 3-8-10

5. The parties agree that other than as required by law that the terms of the settlement, the allegations, and facts in support of his claims are confidential and will not disclose or cause to be disclosed and the terms of the settlement, claims of the underlying allegations, or the facts relating to those claims.

IN WITNESS WHEREOF, Cathy Pietras and the Hamilton Township Board of Education and their respective counsel have executed this Settlement Agreement as of the date(s) indicated on the lines below.

DATED: 3/10, 2010

Cathy Pietras

Michael T. Barrett, Esquire

HAMILTON TOWNSHIP BOARD OF EDUCATION

Dr. Elric A. Cicchetti, President
Hamilton Township Board of Education

Carol Chiacchio, Board Secretary
Hamilton Township Board of Education

William R. Burns, Board Attorney
Hamilton Township Board of Education

OAL DKT. NO EDU 11393-08
AGENCY DKT. NO. 265-9/08

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY BARTOLOMEO,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF WHARTON, MORRIS COUNTY.	:	DECISION
	:	

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

Upon such review, the Commissioner observes that the President of the Board of Education of the Borough of Wharton signed the settlement agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating 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.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|04|10

Date of Mailing: 5|04|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11393-08

AGENCY REF. NO. 265-9/08

IN THE MATTER OF THE TENURE HEARING OF ANTHONY BARTOLOMEO,

Petitioner,

v.

WHARTON BOROUGH BOARD OF EDUCATION MORRIS COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner Anthony Bartolomeo (Oxfeld Cohen, attorneys)

Philip E. Stern, Esq., for respondent Wharton Borough Board of Education (Adams Stern Gutierrez & Lattiboudere, attorneys)

Record Closed: April 5, 2010 Decided: April 6, 2010

BEFORE **GAIL M. COOKSON**, ALJ:

The Wharton Borough Board of Education filed its Certification of Determination dated August 28, 2008, and supporting documents under cover of August 28, 2008, in regard to tenure charges with the New Jersey Commissioner of Education sufficient for

termination of employment and suspension without pay against Anthony Bartolomeo, a tenured teacher within the Wharton Borough District. The Commissioner of Education transmitted the matter to the Office of Administrative Law on September 26, 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 charges involved allegations that Mr. Bartolomeo had abused sick time and submitted illegitimate or no medical documentation which demonstrated a pattern of conduct unbecoming during certain periods in each of the years 2005-2008, all of which allegations Mr. Bartolomeo denied.

The parties have now entered into a settlement of all issues in dispute and prepared a Stipulation of Settlement and Settlement Agreement, which is attached and fully incorporated herein. Prior to the entry herein, there were some inadvertent delays between the original settlement of this matter and transmittal of the final document for reasons that have been previously placed on the record on July 2, 2009, and which did not relate to the underlying charges or the reasons either party chose to enter into the settlement. In that document or on the record, the parties have detailed the nature of the allegations made against Mr. Bartolomeo, the evidential considerations which have been considered in determining to resolve the matter without a full hearing, including the limits of proof perceived by the Board in connection with the charges made, the recognition of the importance of the matter and of the right of the Commissioner of Education to refer matters to the Board of Examiners, as well as their position that this matter should be permitted to resolve without any such referral, and the recognition that should the Commissioner determine that he cannot abide by the parties' view that the matters involving Mr. Bartolomeo be resolved that the settlement will be null and void and the matter be returned to the Office of Administrative Law for a full evidentiary hearing. The parties have also presented their position that the nature of the charges, taken in light of the proof issues, are such that removal of tenure may not be warranted although other sanctions might be proper, and have noted that as a result of this agreement Mr. Bartolomeo will no longer be employed by the Board as of June 30, 2009, contingent upon the acceptance of this Settlement by the Commissioner.

I have consulted with counsel regarding this matter and based upon those discussions, I am satisfied that this Settlement, which I **FIND** was entered into

voluntarily and disposes of the issues in dispute, incorporates a proper and reasonable resolution of the issues in dispute between this Board and its employee. The Settlement also reasonably protects the interests of the public and students, while acknowledging that in a case of this nature, there is no certainty as to the outcome of a hearing, one way or another.

I **CONCLUDE** that this settlement is in accord with the requirements of N.J.A.C. 1:1-19.1 and of In re Cardonick, 1990 S.L.D. 842, 846 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.

April 6, 2010

DATE

Gail M. Cookson

GAIL M. COOKSON, ALJ

Date Received at Agency:

4-8-10

Date Mailed to Parties: APR 8 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

Attachment

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Attorneys for Anthony Bartoloemo

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OFFICE OF ADMIN. LAW

COMMISSIONER OF EDUCATION
OAL Docket No. EDU 11393-08
Agency Ref. No. 265-9/08

In the Matter of the
Tenure Hearing of

ANTHONY BARTOLOMEO

WHARTON BOROUGH BOARD
OF EDUCATION, MORRIS COUNTY

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The Wharton Borough Board of Education ("Board") and Anthony Bartolomeo ("Mr. Bartolomeo"), agree to the following terms in full resolution of this matter:

WHEREAS, Mr. Bartolomeo disputes the allegations of misuse of sick time which resulted in the filing of the tenure charges; and

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

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

NOW, THEREFORE, the parties agree as follows:

1. Mr. Bartolomeo agrees to resign from employment with the Wharton Borough School District, effective at the close of business on June 30, 2009.

2. Mr. Bartolomeo shall continue to receive health benefits until the Commissioner of Education renders her Final Decision.

3. Pursuant to N.J.S.A. 18A:6-14, Mr. Bartolomeo will be suspended without pay from September 1, 2008 through December 31, 2008. Pursuant to N.J.S.A. 18A:6-14, Mr. Bartolomeo shall then be placed on the payroll from January 1, 2009 until the date of settlement, March 20, 2009.

4. The period between March 20, 2009, the date of settlement, and June 30, 2009, the effective date of resignation, shall be treated as an unpaid leave.

5. Mr. Bartolomeo and the Board agree that in full settlement of this matter, the Board shall pay Mr. Bartolomeo one month's salary for a total of five thousand four hundred forty-nine ($5,449.00) dollars upon the final determination of the Commissioner of Education.

6. Upon approval by the Board and the Commissioner of Education, the Board shall withdraw the tenure charges filed against Mr. Bartolomeo.

7. Mr. Bartolomeo acknowledges that the payments reflected in this agreement constitute the full financial obligation of the Board and that he shall receive no additional payments, except as set forth in this Agreement. In exchange for the above consideration, Mr. Bartolomeo, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the Board, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind or character, that he has had or may now have against any of them, including, without limitation, any and all claims related to his employment with the Board or the separation from that employment. Likewise, the Board, on behalf of itself,

its successors and assigns, hereby fully releases and forever discharges Mr. Bartolomeo, his heirs and successors and assigns, for any and all actions, claims and liabilities of whatsoever kind or character, that it has had or may now have against him, including without limitation any and all claims related to Mr. Bartolomeo's employment with the Board or the separation from that employment.

8. Mr. Bartolomeo acknowledges, as required under *In re Cardonick*, that despite the approval of this Agreement, the issue of possible revocation of his teaching certificate may be considered by the State Board of Examiners. Mr. Bartolomeo understands that the Commissioner of Education may accept, reject or modify this Settlement, and that the Commissioner of Education may forward this matter to the State Board of Examiners for consideration of revoking his certificate.

9. The parties agree that it is in the public interest to avoid the time, expense and uncertainty attendant to litigation. The parties further agree that this Settlement accomplishes the remedy which the District sought by bringing the tenure charges: Mr. Bartolomeo will be separated from his employment with the District.

10. The parties further agree that the charges at issue do not represent a danger to the public welfare.

11. This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

12. This Agreement is subject to the approval of the Wharton Borough Board of Education and the Commissioner of Education. Should the Commissioner of Education decide

not to approve the application for approval of the parties' settlement and withdrawal of the tenure charges, this Agreement, and all of its terms, shall be null and void.

Wharton Borough Board of Education

Anthony Bartolomeo
Dated: 3-28-10

By: Amy Rhead, President
Dated: 3-18-10

M.B. and C.B. on behalf of minor child, J.B.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the residency determination of the respondent Board that their child, J.B., was not entitled to a free public education in Kinnelon schools during the 2006-2007 school year. Petitioners contended that at the time they enrolled J.B. in school, they established domicile at a Kinnelon property they had purchased in 2005 and intended to occupy upon completion of renovations; however, delays in construction necessitated a move to an extended-stay residence until mid-August 2007, when they began residing at the Kinnelon property full time. The Board asserted that J.B. was not domiciled in Kinnelon during the school year in question, and sought reimbursement of tuition in the amount of $ 9,989.

The ALJ found that: credible evidence supports petitioners' contention that they fully disclosed their residency circumstances and provided truthful responses on the district's registration forms; unexpected construction delays prevented petitioners from moving into their Kinnelon residence by September 2006 and necessitated their move into temporary housing, but their clear intent was to occupy the Kinnelon house as their permanent home, though they did not occupy the residence until August 2007; respondent district had knowledge on May 31, 2006 that petitioners were not occupying the house in Kinnelon, but made no attempt to inquire about their occupancy status or present them with the district's "Policy 5111 – Eligibility of Resident/Nonresident Pupils" until February 2007, eight months after J.B. was enrolled in school. The ALJ concluded that petitioners had established domicile in Kinnelon for the purposes of J.B. receiving a free public education in 2006-2007, and dismissed the Board's claim for payment of tuition.

Upon a full and independent review, the Commissioner was constrained to reject the Initial Decision, finding that the petitioners failed to establish that Kinnelon was their domicile for purposes of *N.J.S.A.* 18A:38-1(a) during the 2006-2007 school year, and that the respondent Board had discretion, pursuant to *N.J.S.A.* 18A:38-3(a), to charge tuition for J.B. for his attendance in the district's schools during that period of time. Accordingly, the Commissioner dismissed the petition and granted respondent's counterclaim for tuition in the amount of $ 9,989.

This synopsis is not part of 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 4, 2010

135-10

OAL DKT. NO. EDU 7362-07
AGENCY DKT. NO. 171-6/07

M.B. and C.B. on behalf of minor child, J.B.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

Petitioners challenge respondent's determination that petitioners had not been domiciled in respondent's school district during the 2006-2007 school year, that petitioners' child had consequently not been entitled to a free education in the district, and that petitioners therefore owe respondent tuition in the amount of $9,989. Upon review of the record of this matter, including the transcript of the February 4, 2009 hearing in the Office of Administrative Law (OAL), the Initial Decision finding in favor of petitioners, and respondent's exceptions,[1] the Commissioner is constrained to reject the Initial Decision.

A summary of undisputed facts – some, but not all of which were set forth in the Initial Decision – is appropriate. In 1998 petitioners moved to West Milford, New Jersey.

[1] Petitioners submitted no reply exceptions.

(T11)[2] In 2005, while living in West Milford, they bought the Kinnelon home of M.B.'s mother, with the intention to eventually reside therein. (Petitioner's Exhibit 1) They decided in the Spring of 2006 to have extensive renovations performed on the Kinnelon property (T18) – including the removal and rebuilding of walls and fireplaces, the replacement of windows and doors, the addition of rooms, closets, porches and decks (Petitioner's Exhibit 2), and extensive plumbing, electrical and fire protection renovations (Petitioner's Exhibits 5, 6, and 7) – before moving in.

On or about May 31, 2006, notwithstanding that the contemplated renovations had not commenced and the family was still living in West Milford, petitioners completed a registration form to enroll J.B. in the Kinnelon School District for September 2006. On the form petitioners listed their "current address" as "B.L.," Hewitt, N.J.[3] (Respondent's Exhibit 1) Petitioners filled in the address of the Kinnelon property on another line entitled "future address." (*Ibid.*) That line was provided for the enrollment of out-of-district students who would be transferring into the district prior to the upcoming school year.

It is undisputed that in September 2006, J.B. commenced school in the Kinnelon School District. On September 8, 2006, petitioner C.B. filled out and submitted to respondent an emergency reference card which affirmatively listed the Kinnelon property as J.B.'s residence, notwithstanding that J.B. and petitioners were admittedly still living in West Milford and J.B. had never resided in Kinnelon. (Respondent's Exhibit 2) Further, at the time C.B. filled out the emergency reference card, petitioners knew that renovations on the Kinnelon property had not begun and that the required construction permits had not even been obtained. In point of fact, petitioners did not enter into a contract for renovations of the Kinnelon property or obtain the

[2] T = Transcript of the February 4, 2009 hearing in the OAL.

[3] Hewitt is in West Milford Township.

construction permits until January 2, 2007, four months after the commencement of the school year. (Respondent Exhibit 13 at 3; Petitioner's Exhibits 3 through 7)

On October 28, 2006, M.B. and C.B. executed a contract for sale of the Hewitt/West Milford property, (Petitioner's Exhibit 8), but the closing/passing of title did not occur until May 2007. (Respondent's Exhibit 13 at 3). The record indicates that petitioners remained in their West Milford home until at least November 2006, and that when they moved therefrom, they did not move into the Kinnelon school district. (T 24-25) Rather, they resided in Wayne until they were able to occupy the Kinnelon house. (Interrogatory Answer # 11.)

On January 29, 2007, respondent received an anonymous letter from "An Utterly Agitated Couple in Kinnelon" claiming J.B. did not reside in respondent's district, but rather that the address where he supposedly resided was uninhabitable. (Exhibit 2, attached to Certification of Alice M. Robinson [Robinson] dated January 2, 2008) This – according to Robinson, Business Administrator and Secretary to the Kinnelon Board of Education – was the first notice respondent received that J.B. was not domiciled in Kinnelon. (T141) She went to the address herself on February 1, 2007, and saw that the property was "completely gutted." (T144 and Certification of Robinson dated January 2, 2008, ¶ 6)

Robinson sent petitioners a letter – to the West Milford address – asking them to call her about the residency issue. (Respondent's Exhibit 3) M.B. telephoned her the next day about the letter. The swiftness of the response suggested to Robinson that at that time petitioners were still using the West Milford premises. (T142) After hearing from M.B. on February 1, 2007, Robinson provided petitioners with Policy #5111, "Eligibility of Resident/Nonresident Pupils". (Respondent's Exhibit 4) That policy, which tracks *N.J.S.A.* 18A:38 and corresponding regulations, explains that to receive a free education in

Kinnelon a student must be domiciled in Kinnelon. Exceptions are allowed for students who become domiciled in the district within five weeks of the beginning of their school attendance in the district. Robinson testified that families are frequently delayed more than five weeks in moving into the district – due to construction delays or otherwise. (T134) In such cases they are sent a letter, followed by a tuition bill. (*Ibid.*)

Two telephone conversations occurred between Robinson and M.B. on February 1, 2007. (T142) Robinson recorded notes about them in her telephone log. (T143) In the first conversation Robinson explained that owning property in a district and paying taxes thereon, in and of itself, is not a sufficient basis for a free public education in that district. (*Ibid.*) Robinson testified that M.B. called her again, later in the day, expressing the view that his property taxes should be enough to cover J.B.'s school tuition. (T145)

On February 6, 2007, M.B. telephoned Robinson to ask that the matter be held in abeyance until the end of February while his wife underwent a medical procedure, and Robinson accommodated the request. (T148 and 153) At approximately the same time, petitioners' counsel apparently sent Robinson a letter, entered into evidence as Respondent's Exhibit 12, which stated that the Kinnelon property would be habitable in mid-March of 2007.[4] However, respondent subsequently hired an investigator, who advised in a March 15, 2007 report that the house was still "undergoing extensive renovations" and was "obviously, uninhabitable." (Respondent's Exhibit 6) In the report the investigator further explained that he spoke to one of the individuals who were working on the property, which individual confirmed that the house had been vacant for many months. (*Ibid.*)

[4] This exhibit has disappeared from the file, but is described via other evidence.

Having learned that the property had not been inhabited, T152, Robinson forwarded the investigator's report to respondent's attorneys and brought the matter to the attention of respondent's board of education (Board). (T153) When the Board indicated it wished to move forward on the matter Robinson sent petitioners a Notice of Initial Determination of Ineligibility, dated April 30, 2007. (*Ibid.*; Respondent's Exhibit 5)

On May 31, 2007, M.B. and petitioners' attorney appeared before the Board for a hearing on J.B.'s eligibility for a free education in Kinnelon. The Board decided that J.B. had not been eligible for a free education in Kinnelon and sent petitioners a final notice of ineligibility on June 7, 2007. (Respondent's Exhibit 7) The Certificate of Approval for the Kinnelon renovations was not issued until September 25, 2007, after which petitioners moved into the premises. (Petitioner's Exhibit 9) It is undisputed that, subsequent to the 2006-2007 school year, no tuition was charged for J.B.'s public education in Kinnelon.

After a hearing in the OAL and the submission of post-hearing briefs the Administrative Law Judge recommended that J.B. receive a free public education from respondent. This determination was based on the conclusion that petitioners had established domicile in Kinnelon. (Initial Decision at 10)

The following summarizes the statutory framework within which the instant controversy must be addressed. "Public schools shall be free to . . . persons . . . who [are] domiciled within the school district [.]" *N.J.S.A.* 18A:38-1(a). However,

> [i]f the . . . school district finds that the parent . . . of a child who is attending the schools of the district is not domiciled within the district . . . the superintendent . . . may apply to the board of education for the removal of the child. The parent . . . shall be entitled to a hearing before the board and if in the judgment of the board the parent . . . is not domiciled within the district . . . , the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the [C]ommissioner within 21 days of the

> date of the decision and shall be entitled to an expedited hearing before the [C]ommissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the [C]ommissioner. If in the judgment of the [C]ommissioner the evidence does not support the claim of the parent or guardian, the [C]ommissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.
>
> *N.J.S.A.* 18A:38-1(b)(2).

And "[a]ny 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. [Emphasis added] *N.J.S.A.* 18A:38-3(a).

The State Board of Education has promulgated regulations to supplement and clarify the statutes. For example:

> A student is domiciled in the school district when he or she is living with a parent . . . whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere. [Emphasis added.]
> *N.J.A.C.* 6A:22-3.1(a)(1).

It remains for the Commissioner to apply the foregoing legal framework to the instant matter. In so doing, the Commissioner notes that the facts of this case are similar to those in a decision rendered in favor of the respondent Kinnelon board of education in a case recently affirmed by the Appellate Division of New Jersey Superior Court, *i.e., K.L. and K.L. on behalf of minor children M.L. and C.L. v. Board of Education of the Borough of Kinnelon, Morris County,*

Docket No. A-5671-07T1, Superior Court of New Jersey, Appellate Division, decided January 4, 2010.

In that case, petitioners registered their children in the Kinnelon school district for the 2007-2008 school year. They had purchased a single-family home in Kinnelon and had represented that they planned to move in after the completion of renovations. In October 2007 the renovations were not completed and petitioners did not occupy the Kinnelon house. Nevertheless they petitioned the Commissioner to bar the district from charging them tuition for their children. In their view, the Kinnelon property was the family's true, fixed and permanent home, notwithstanding that they had never lived there.

The Kinnelon board of education moved to dismiss the petition in lieu of filing an answer. The Administrative Law Judge (ALJ) converted the motion to dismiss to a motion for summary decision and recommended that the petition be dismissed. After reviewing the applicable case law and administrative rulings, the Commissioner concluded that "petitioners . . . had never lived in Kinnelon before the 2007-2008 school year and d[id] not appear to have lived in Kinnelon at any time during that school year." She dismissed the petition, and the petitioners appealed – raising the same arguments before the Appellate Division that they had offered the Commissioner.

More specifically, petitioners urged that the Commissioner had erred in determining that their Kinnelon home was not their domicile for purposes of *N.J.S.A.* 18A:38-1(a). They relied, in particular, upon *In re Unanue*, 255 *N.J. Super.* 362 (Law Div. 1991), *aff'd*, 311 *N.J. Super.* 589 (App. Div.), *certif. denied*, 157 *N.J.* 541 (1998), *cert. denied sub. nom., Unanue-Casal v. Goya Foods, Inc.*, 526 *U.S.* 1051. Although not a case involving education law, *Unanue* contains a legal delineation of "domicile" that has been relied

upon by the Commissioner: "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." *Unanue, supra*, 255 *N.J. Super.* at 374 (quoting *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944)); *accord D.L. v. Bd. of Educ. of Princeton Regional School Dist.*, 366 *N.J. Super.* 269, 273 (App. Div. 2004). Focusing on the portion of the description of domicile that refers to "intention," petitioners reasoned that since it was undisputed that they had planned to occupy the Kinnelon home as soon as possible, but were delayed by unforeseen construction delays and by the approval and permitting processes, it followed that the Kinnelon house should have been regarded as their domicile.

In evaluating petitioners' position the Appellate Division construed the holdings in *Unanue.* More specifically, it discussed the three elements set forth in *Unanue* that must be considered to determine whether 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 had an intention to make his home there permanently or at least indefinitely; and (3) whether the subject had had an intention to abandon his old domicile. [Emphasis added.] *Unanue, supra*, 255 *N.J. Super.* at 376 (citing *Lyon v. Glaser*, 60 *N.J.* 259, 264-65, (1972)). Thus, domicile is established where "there is the necessary concurrence of physical presence and an intention to make that place one's home." [Emphasis added.] *Ibid.*

The Appellate Division concluded that petitioners and their children had never been domiciled in Kinnelon, notwithstanding their undisputed ownership of property in Kinnelon. While they may have possessed an intention to reside on the property after the completion of the planned renovations, it was undisputed that they never did physically reside in

the district before or during the 2007-2008 school year. Therefore, their intention to do so was irrelevant. They had never established an actual and physical abode in Kinnelon, and therefore they lacked the necessary concurrence of physical presence and intention to make a place one's home, upon which the legal concept of domicile rests.

The fact pattern in the instant case is strikingly similar to the fact pattern in *K.L. and K.L.,* and the same legal principles apply. The record indicates that petitioners remained in their West Milford home – which was not conveyed to buyers until May of 2007 – for all of 2006 and possibly part of 2007. The petitioners in this case undisputedly owned the Kinnelon property but never physically occupied it before or during the 2006-2007 school year. Consequently, they failed to establish that it was their domicile for purposes of *N.J.S.A.* 18A:38-1(a) during that period of time. Thus, respondent had discretion under *N.J.S.A.* 18A:38-3(a) to charge tuition for J.B for the 2006-2007 school year.

The Commissioner may not disturb respondent's exercise of that discretion unless he finds that it was arbitrary, capricious, unreasonable or in bad faith. *Kopera v. Board of Education of the Township of West Orange, Essex County,* 60 *N.J. Super.* 288, 294-96 (App. Div. 1960). Here, the record provides no basis for such a finding. Further, the record supports respondent's contention that until the end of January 2007 – when it received an anonymous letter – it had no notice that petitioners were not domiciled at their Kinnelon address. Thus, the Commissioner rejects any contention that respondent acted in bad faith by not notifying petitioners of their liability for tuition until then.

In sum, petitioners have not met their burden to show that they and their children were domiciled in Kinnelon during the 2006-2007 school year. Accordingly, it was within respondent's discretion to charge tuition for the education the district provided to J.B. during that

period of time. The petition is dismissed and respondent's counterclaim is granted. Petitioners are liable to respondent for tuition in the amount of $ 9,989.00.

IT IS SO ORDERED. [5]

COMMISSIONER OF EDUCATION

Date of Decision: 5|04|10

Date of Mailing: 5|04|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07362-07
AGENCY DKT. NO. 171-6/07

M.B. AND C.B. ON BEHALF OF J.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,
Respondent.

Edward P. Azar, Esq., for petitioners

Linda Ganz Ott, Esq., for respondent (Apruzzese, McDermott, Mastro and Murphy, attorneys)

Record Closed: May 14, 2009 Decided: February 11, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners M.B. and C.B, on behalf of J.B., challenge the residency determination of respondent Kinnelon Board of Education (Board or District). The Board maintained that petitioners were not domiciled in the Kinnelon School District during school year 2006-2007. Therefore, petitioners' son J.B. was not entitled to a free

education. The District seeks reimbursement for the cost of the tuition in the amount of $9,989.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) July 9, 2007. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Thereafter, respondent moved for summary decision. Based on a review of the papers the undersigned denied respondent's motion. The hearing was held on February 9, 2009. The parties submitted post-hearing briefs and the record closed on May 15, 2009. Based on the administrative law judge's voluminous caseload, extensions of time to complete the Initial Decision were granted. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

FACTS

Based on the relevant evidence, I **FIND** the following as **FACT**:

1. On or about May 31, 2006, petitioners completed a registration form to enroll their son J.B. in the Kinnelon School District for September 2006. (R-1.)

2. The registration form requested a current address; petitioners listed their current address as "B," Hewitt, N.J. (R-1.)

3. The registration form states, "If currently out of town, FUTURE ADDRESS." Petitioners listed 4 "D" Circle, Kinnelon, N.J. (R-1.)

4. Petitioners also provided copies of tax bills for years 2002 to 2007 for the property located at "D" Circle, Kinnelon, N.J.

5. Petitioners provided documents showing transfer of the property on February 3, 2005, to M.B., who then resided in Hewitt, N.J.

6. In September 2006, J.B. commenced school in the Kinnelon School District.

7. On October 28, 2006, M.B. and C.B. executed a contract for sale of the Hewitt property.

8. On January 2, 2007, petitioners were issued a construction permit for "D" Circle, Kinnelon, N.J. The Certificate of Approval for work completed was issued on September 25, 2007.

9. On January 29, 2007, the Board received an anonymous letter from, "An Utterly Agitated Couple in Kinnelon" claiming J.B. did not reside in the District.

10. On February 1, 2007, the District provided petitioners with Policy #5111 Eligibility of Resident/Nonresident Pupils.

11. Alice M. Robinson, Kinnelon business administrator, "observed that the house was completed gutted."

12. On or about January 31, 2007, Robinson contacted petitioners regarding their residency and J.B.'s enrollment in the Kinnelon School District.

13. On March 15, 2007, Gerald Wyhopen, investigator, under the "ruse of house hunting," approached a worker on petitioners' Kinnelon property and inquired whether the house was being remodeled to be sold or "flipped." The contractor replied, "No." Wyhopen reported the house to be "undergoing extensive renovations."

14. Wyhopen relayed to Robinson that he was "reassured the family planned to move in, although they were 'moving slow.'"

15. On May 1, 2007, the Board mailed petitioners a Notice of Ineligibility, which states in part, "The [B.] family is not domiciled in Kinnelon. Mr. and Mrs. [B.] have owned a home at 4 D-- Circle since February 3, 2005. At no time since that date has the [B.] family moved into the residence. The [B.] family continues to reside in Hewitt. [J.B.] began attending 2nd grade at Kiel School on September 7, 2006, and continues to attend to date."

16. The Kinnelon "premises were occupied by [petitioners] on or about mid-August 2007."

ISSUE

Whether petitioners were domiciled in the Kinnelon School District for school year 2006-2007 and therefore entitled to a free public education?

DISCUSSION

The State of New Jersey provides that "[p]ublic schools shall be free to . . . [a]ny [child] who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a child follows that of his parents. The New Jersey Supreme Court noted that "[s]ince the concept of domicile[e] involves the concurrence of physical presence in a particular [place], and an intention to make that [place] one's home, determination of a disputed issue on the subject requires an evaluation of all the facts and circumstances of the case." Lyon v. Glaser, 60 N.J. 259, 264-65 (1972). N.J.A.C. 6A:22-3.1(a)(1) explains that "[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." The courts have consistently held that "[d]omicil[e] is very much a matter of the mind-of intention." Lyon, supra, 60 N.J. at 264. A person may have multiple residences, but he may have only one domicile at any given time. State v. Benny, 20 N.J. 238 (1955).

Information and documentation used to establish a student's eligibility for enrollment in the school district include proof of property ownership such as property tax

bills, deeds, contracts of sale, utility bills and "personal attachment to a particular location." N.J.A.C. 6A:22-3.4. The District's policy regarding eligibility of resident and nonresident pupils provides in part:

> Policy #5111 - Eligibility of Resident/Nonresident Pupils
>
> Eligibility to Attend School
>
> The Board shall admit pupils eligible to attend school free of charge that are domiciled within the district, as defined in N.J.A.C. 6A:22-3.1.
>
> Proof of Eligibility
>
> The district shall accept forms of documentation from persons attempting to demonstrate a pupil's eligibility for enrollment in the district in accordance with N.J.A.C. 6A:22-3.4.
>
> The district shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular from of documentation, or a particular subset of documents, without regard to other evidence presented.

I have carefully considered the evidence presented by the parties.

Position of the Parties

Petitioners contend that at the time they enrolled J.B. in school they established domicile at the Kinnelon. They provided the Board proof of payment of property taxes, utility tax bills and received mail at the address. They intended to occupy the premises upon completion of renovations, which was targeted on or before September 2006. Moreover, as proof of intent they signed a contract to sell their Hewitt house in September 2006, moved personal property into the Kinnelon house and between September 1, 2006, and March 15, 2007 spent a substantial period of time at the Kinnelon home. Unfortunately, after the sale of the Hewitt house renovations were not completed and they moved into an extended-stay residence until mid-August 2007, when they began residing at the Kinnelon residence full time. The delays to the final move-in date were due to difficulties in replacing a contractor. Petitioners maintained

that they intended Kinnelon to be their permanent residence and, therefore, their domicile.

Petitioners further claim that they were never made aware of Policy #5111 or advised of any residency requirements. Therefore, the Board should be equitably estopped from enforcing Policy #5111. Indeed, on the student registration form, petitioners disclosed their current address in Hewitt, N.J. However, the registration form neither references Policy #5111 nor inquires into petitioners' anticipated move-in date to the Kinnelon address. Moreover, petitioners maintain that the District never requested additional information about their intentions regarding the Kinnelon home or asked about the status of their occupancy until months after they enrolled J.B. in the District.

The Board argues petitioners were not domiciled in Kinnelon during the 2006-2007 school year, and relies on In re Unanue, 255 N.J. Super. 362 (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 Board asserts that the key element in determining a domicile is whether there has been an actual and physical taking up of an abode. Unanue, supra, 255 N.J. Super. at 376. Here, petitioners did not physically occupy their Kinnelon residence for the "majority" of the 2006-2007 school year. Thus, J.B. was ineligible to attend the school free of charge when he commenced school in the Kinnelon School District in September 2006, and for most of that school year.

M.B. testified about the family's intent to reside and be domiciled in Kinnelon in the house in which his parents owned and where he lived as a child. On May 31, 2006, M.B. enrolled his son in the Kinnelon School District. (R-1.) M.B. intended to sell the Hewitt property, renovate the Kinnelon property, and move into the home upon completion of the renovations scheduled in September, 2006. M.B. further testified the sale of their Hewitt property was not conditioned on or tied to taking occupancy or renovating the Kinnelon property. Indeed, he possessed sufficient funds to complete all of the renovations to the Kinnelon property without selling the Hewitt property. The Hewitt property was sold on May 14, 2007. (P-1.)

M.B. further testified that the registration form clearly indicates the family's current address to be the Hewitt location. (R-1). The next line on the form indicates "future address – 4 D G Circle." When the Board requested documentation to substantiate their domicile in Kinnelon, M.B. provided documentation including copies of property tax and utility bills. Since no further inquiry was requested, M.B. believed that the information submitted satisfied the Board's requirements. M.B. maintained that he was not informed that the family was required to physically occupy the premises. Had the Board provided him notice he would have altered the construction plans to accommodate the family's ability to occupy the premises during the renovations. Indeed, since he was never presented with the occupancy requirement, the construction plans included the complete renovation of the premises while the family occupied a temporary-long-term residence.

I am persuaded by the credible evidence that petitioners fully disclosed information to the District and provided truthful responses to the requested information. Indeed, on the registration form petitioners revealed their residence in Hewitt. They contend that unexpected construction delays prevented them from moving into their Kinnelon residence before September 2006. I have also considered petitioners' argument they were not provided with the District's eligibility policy #5111 at the time of enrollment. However, petitioners provided what they believed was required to establish residency. Petitioners acquired the property in 2005, registered J.B. in 2006 and they intended to occupy the premises as their principle home.

I have also considered the Board's position. Respondent maintained paying property taxes is not sufficient to establish domicile. Rather, domicile is established by "a contract of sale or inten[t] to move to Kinnelon, and in fact actually do move into the District." (Respondent's Brief at 14.) Alice Robinson, school business administrator, testified that she reviewed the emergency card forwarded to her office. (R-2.) "Based upon the District's receipt of the Emergency Reference Card for [petitioners], which stated they lived in Kinnelon, the District had 'absolutely no doubt' that the family lived in Kinnelon." (Ibid.) Indeed, the District received no information to indicate that [petitioners] were not living at "D" Circle as of September 2006 until January 29, 2007. (Ibid.)

However, Respondent's argument appears to conflict with the District's registration form, which was completed on May 31, 2006. Petitioners candidly disclosed their current and future addresses. (R-1) Robinson conceded that petitioners completed the proper registration form. Robinson also maintained that the secretaries in each school carefully review "every document to make sure there's nothing questionable." Nevertheless, respondent's waited until February 1, 2007, to mail petitioners a copy of the Board's residency policy and inform them that they might be in violation of the residency requirement. (R-4). Indeed, respondent failed to provide any explanation for not reconciling the two addresses appearing on the registration document.

Petitioners maintained that had they been made aware of Policy 5111 at the time they registered J.B. (May 2006) they would not have enrolled him in the District. Instead, respondents sent them the policy on February 1, 2007, eight months after J.B. was enrolled. Petitioners submit, at the very least, the representative of the District should have engaged in some communication or discussion about petitioners' residence and their intentions to charge for tuition prior to February 1, 2007. They did not. Thus, equitable estoppel should be invoked to prevent respondent's claim for tuition.

Although petitioners presented credible evidence on their intent to occupy the premises, equitable estoppel should rarely be invoked against public entities. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 91 (App. Div. 1977). Furthermore, equitable estoppel may only be invoked against a public entity to prevent manifest injustice. W.V. Pangborne and Co. v. N.J. Dep't of Transp., 116 N.J. 543, 554 (1989); Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954); Hackensack v. Winner, 82 N.J. 1 (1980). Since the record reveals no discussion between the parties on this issue at the time of or near enrollment, it would be a stretch to conclude petitioners would have refrained from enrolling J.B. in the District in May 2006. Indeed, based upon the representations of their builder/contractor, petitioners believed the renovations would be completed by September 2006; it is more reasonable that petitioners would have altered their construction plans to occupy the premises during the completion renovations.

Therefore, I have considered the District's delay in providing petitioners notice that their residency in Kinnelon was questionable.

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 must be sent. N.J.A.C. 6A:22-4.2 and N.J.A.C. 6A:22-4.3(b)(1).

Respondent's correspondence on February 1, 2007, (R-4) appears to have been the first indication that the District might charge petitioners tuition under Policy 5111. The right to attend public schools free of charge in a school district is determined by domicile, not physical residence. N.J.S.A. 18A:38-1. Domicile is established by the facts and circumstances of each case, and the examination of the parties' intent. I have considered whether there has been an actual taking up of an abode, whether the subject had an intention to make his home there permanently, and whether the subject had an intention to abandon his old domicile. However, the district did not notify petitioners that their residency was under scrutiny until sometime in January 2006.

In a similar case the District provided notice and inquiry about petitioners' residency almost immediately after registration. In K.L. and K.L. o/b/o M.L. v Board of Education of the Borough of Kinnelon, EDU 1191-08 and EDU 1192-08 (consolidated), Initial Decision (April 24, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>, petitioners purchased home in May 2007 but did not occupy the premises during renovations. In July 2007, petitioners executed an affidavit of anticipated residency

furnished by the Board with the attached Board's Policy #5111. In October, the Board requested an update on the renovations and advised petitioners that it would "charge tuition until a Certificate of Occupancy was issued." The ALJ found petitioners did not eat, sleep, entertain, or otherwise treated the Kinnelon residence as their domicile. Moreover, petitioners had not surrendered their current domicile outside of Kinnelon. Thus, the ALJ concluded that 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. Ibid.

Here, petitioners' acquired title to the home in 2005, and took affirmative steps to complete a permanent move from Hewitt to Kinnelon. Renovations were delayed for several months, during which time petitioners abandoned their former domicile and moved to temporary quarters until renovation were completed. Property taxes and utility bills were paid, mail delivered and a close watch on the renovations. Although petitioners' day-to-day-physical abode occurred in August 2007, their action demonstrated an intention to make D. Circle their home. "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." Here petitioners abandoned their former domicile and resided in temportary quarters until the home was completed. Even though the District had knowledge on May 31, 2006, that petitioners were not occupying the home in Kinnelon, it made no attempt to inquire on their occupancy status or present them with the residency policy until eight months after the registration form was completed.

Based on the whole of the credible evidence I **CONCLUDE** petitioners have established residency in Kinnelon for the purposes of J.B. receiving a free public education.

ORDER

It is **ORDERED** that petitioner J.B. receive a free public education in the School District of Kinnelon for school year 2006-2007.

It is further **ORDERED** that the District's claim for payment of tuition 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, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 11, 2010
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 2-16-10

Date Mailed to Parties: FEB 16 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

APPENDIX

Witnesses

Presented by Petitioner:

M.B.

Presented by Respondent:

Alice Robinson

Exhibits

For Petitioner:

P-1 Deed – Transfer of Property
P-2 House Plans undated
P-3 Construction Permit
P-4 Building Subcode Permit dated January 2, 2007
P-5 Plumbing Subcode Permit dated January 2, 2007
P-6 Electrical Subcode Permit dated January 2, 2007
P-7 Fire Protection Subcode Permit dated January 2, 2007
P-8 Contract for Sale of Real Estate
P-9 Certificate of Approval dated September 25, 2007
P-10 Sale of Contract dated May 14, 2007
P-11 Electrical Bill dated November 1, 2005
P-12 Electrical Bill dated November 1, 2006
P-13 Preliminary Tax Bill
P-14 Proof of Residency

For Respondent:

R-1 Barry Student Registration Form (with tax bill attached)
R-2 September 8, 2006 Barry Emergency Referenced Card
R-3 January 31, 2007 letter from Alice Robinson to John Barry's parents
R-4 February 1, 2007 letter from Alice Robinson to Martin Barry

R-5 May 1, 2007 letter from Alice Robinson to Mr. and Mrs. Martin Barry

R-6 March 15, 2007 report of ION U

R-7 June 7, 2007 letter from Alice Robinson to Mr. and Mrs. Barry

R-8 Kinnelon School District Policy 5111 – "Eligibility of Residents/Nonresident Pupils

R-9 January 14, 2009 Summary Judgment Decision of ALJ Mumtaz Bari-Brown

R-10 Interrogatories

R-11 Petitioners Answers to Interrogatories

R-12 Letter dated February 8, 2008

R-13 Petitioners Response to Statement of Facts

R-14 Petition of Appeal dated June 14, 2007

136-10

OAL DKT. NO. EDU 8561-09
AGENCY DKT. NO. 157-7/09

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE PICCOLI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, ALBERT C. WAGNER	:	
YOUTH CORRECTIONAL FACILITY.	:	
	:	

The record of this matter, the parties' proposed Stipulation of Settlement, 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 such review – notwithstanding that the terms of the parties' agreement as presented to the Commissioner are consistent with established standards governing 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, 846 and *N.J.A.C.* 6A:3-5.6 – the Commissioner is reluctant to approve a settlement document evidencing numerous substantive handwritten alterations to the document's typewritten text with no concomitant indication, either in the document itself or elsewhere in the record, of acceptance of each such alteration by both parties through initialing or other generally recognized mechanism.

Accordingly, the Initial Decision recommending approval of the Stipulation of Settlement is rejected and this matter is remanded to the OAL for proper execution of the

settlement document, or for such proceedings as are necessary to bring the matter to closure should either party be unwilling to indicate acceptance of alterations as set forth above.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 5/04/10

Date of Mailing: 5/04/10

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08561-09

AGENCY DKT. NO. 157-7/09

IN THE MATTER OF THE TENURE HEARING OF SALVATORE PICCOLI, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY.

Ellen M. Hale, Deputy Attorney General, for petitioner, New Jersey State Department of Corrections, Albert C. Wagner Youth Correctional Facility (Paula T. Dow, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent, Salvatore Piccoli (Weissman & Mintz, LLC)

Record Closed: April 13, 2010 Decided: April 13, 2010

BEFORE **LAURA SANDERS,** ACTING CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law on August 4, 2009, 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 New Jersey Department of Corrections filed charges with the Commissioner of the Department of Education on or about June 29, 2009, charging

tenured teacher Salvatore Piccoli with conduct unbecoming and specific incidents of insubordination, verbal abuse, and inappropriate conduct, and seeking to impose a ninety-day suspension. No suspension has been served at this time.

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.

April 13, 2010
DATE

Laura Sanders
LAURA SANDERS, ACTING CHIEF ALJ

Date Received at Agency: APR 2004

Date Mailed to Parties: APR 16 2004

mjm
Attachment

~~ANNE MILGRAM~~ PAULA T. DOW
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)633-7786

In the Matter of the Tenure		Agency Dkt. No.: EDUTH 08561-2009S
Hearing of Salvatore Piccoli, Department of Corrections	:	Agency Ref. No.: 157-7/09
	:	STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), represented by ~~ANNE MILGRAM~~ Paula Dow, Attorney General of New Jersey, Ellen M. Hale, Deputy Attorney General, appearing; and Salvatore Piccoli, a tenured employee of the NJDOC represented by Rosemarie Cipparulo, Esq., appearing; by way of this Stipulation of Settlement say:

WHEREAS, the Department initiated the filing of tenure charges against Mr. Piccoli, having filed the charges with the Commissioner of Education on or about June 29, 2009; and

WHEREAS, Mr. Piccoli was charged with Conduct Unbecoming a Teacher as defined in N.J.S.A. 18A:6-10; N.J.A.C. 6A:3-5.1, N.J.A.C. 4A:2-2.3(a) and Human Resources Bulletin 84-17, as amended, C-4 verbal abuse of an inmate, patient, client resident, or employee; C-9 insubordination: intentional disobedience or

refusal to accept order, ~~assaulting or~~ resisting authority, disrespect or use of insulting or abusive language to a supervisor; C-11 conduct unbecoming an employee; and C-24 ~~threatening~~, ~~intimidating, harassing, coercing, or~~ interfering with fellow employees on State Property; and D-4 having an inmate present during a union consultation.

WHEREAS, the tenure charges alleged that on March 17, 2009 and June 15, 2009, Salvatore Piccoli, a Teacher I within the New Jersey Department of Corrections, violated the above-noted statute, regulations and Policies, ~~when he verbally abused his supervisor in the school hallway and in his classroom in front of an inmate and a union representative~~; and

WHEREAS, the NJDOC sought the suspension of Mr. Piccoli for ninety (90) days without pay for the above set of charges;

WHEREAS, Mr. Piccoli disputed the charges;

WHEREAS, the matter was initially referred in June 2009 to the Office of Administrative Law for a plenary hearing;

WHEREAS, a hearing has ~~not yet~~ been scheduled.

WHEREAS, Mr. Piccoli has not yet served any suspension time;

WHEREAS, the petitioner has concluded that it may be time consuming and expensive to prove the tenure charges against Mr. Piccoli;

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Piccoli;

WHEREAS, Mr. Piccoli entered into the agreement with a full

understanding of his rights;

WHEREAS, Mr. Piccoli is not owed any pay, counsel fees or any other costs associated with this matter;

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. Piccoli admits to the charges and underlying conduct as set forth above.

2. As the penalty, Mr. Piccoli shall be suspended ~~fifteen~~ ten (~~15~~ 10) days without pay. The suspension time shall be scheduled consistent with Operational needs and at the management's discretion. The suspension will be completed and served consistent with Department Policy.

3. Mr. Piccoli's personnel record shall reflect a ~~30~~ 20-day suspension.

3a. Mr. Piccoli agrees to attend anger management class

4. This Agreement shall be part of Mr. Piccoli's official personnel file and Mr. Piccoli'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.

5. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes

3b. Mr. Piccoli will be placed on the next available transfer list.

3c. Mr. Piccoli agrees to withdraw his appeal of the Final Notice of Disciplinary Action dated 6-15-05 (5 working days)

Settlement Agreement attached as Exhibit A.

of all issues in controversy between the parties hereto. Mr. Piccoli 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 ninety day suspension to ~~fifteen~~ 10 days to be without pay and 20 days on the record is equitable in exchange for eliminating the expense, time and uncertainty connected with a contested tenure hearing.

7. This Agreement shall 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:

Salvatore Piccoli — Dated:

Rosemarie Cipparulo, Esq. — Dated: 4/13/10
Weissman & Mintz, LLC

Attorney for Piccoli

For the Department of Corrections:

_____ Dated:
Kenneth Green, Director

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

_____ Dated: 4/13/10
By: Ellen M. Hale
Deputy Attorney General

Exhibit A

Salvatore Piccoli Appellant Vs	} } }	SETTLEMENT AGREEMENT
AC Wagner Youth Correctional Facility Respondent	} }	

The parties hereto agree to settle this matter in accordance with the following terms:

1. The appellant will withdraw his appeal of the Final Notice of Disciplinary Action dated 6-15-05 (5 working days) on the following charges:

A. N.J.A.C. 4A: 2-2.3 (a) 6 Conduct unbecoming an employee
B. N.J.A.C. 4A: 2-2.3 (a) 11: Other sufficient cause
C. Human Resource Bulletin 84-17 (as amended) C-11 Conduct unbecoming an employee
D. Human Resource Bulletin 84-17 (as amended) C-31 Violation of the NJDOC policy prohibiting racial and/or sexual harassment, discrimination and/or retaliation

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

3. The appellant will not receive any back pay, counsel fees, costs or any other monetary relief as a result of this settlement.

4. The personnel file for the Department of Corrections will indicate that the appellant received a 5 working day suspension for the charges above.

5. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

6. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal, or administrative in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including, but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract expressed or implied.

7. All internal records of the Department of Corrections that concern this matter will be kept intact. Nothing herein shall preclude the Respondent from releasing information on this matter to anyone who has a release executed by appellant, or as consistent with the law. Any information regarding the underlying charges may be provided to the Division of Pensions upon request pursuant to N.J.S.A. 43:1-3 as amended effective April 14, 2007.

Authorization has been given by the Department to agree to this settlement. The parties have read the settlement agreement and freely and voluntarily agree to its provisions.

Ellen Hale 4/13/10

Appointing Authority Representative (Date)

Ellen Hale

4/13/10

Appellant (Date)

4/13/10

Appellant's Representative (Date)

CERTIFICATION

I, Salvatore Ficcoli, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey, Department of Corrections.

Salvatore Ficcoli 4/13/10

Appellant's Signature Date

137-10R

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her son, E.E., was not eligible for a free public education in the Newark school district during the period from January through June of 2006. The respondent contended that E.E. lived with petitioner in East Orange during the time period in question, and counterclaimed for tuition in the amount of $4,478.88. This matter addressed on remand the final remaining issue in a controversy that began with the filing of a petition in September 2006.

The ALJ found that: petitioner owned property in East Orange from which she operated a business; petitioner resided in a unit in one of the houses her company was renovating in East Orange prior to moving to Newark; petitioner provided proofs regarding her residence in Newark, including, *inter alia,* a lease agreement dated July 26, 2005, a notarized statement from her landlord dated September 24, 2006, and a driver's license bearing the Newark address; respondent's evidence indicated that petitioner had a day to day physical presence in East Orange, while petitioner's evidence pointed to a home address in Newark. The ALJ concluded that, on remand, the petitioner met her burden to prove that she was domiciled in Newark during the period in question; therefore, E.E. was eligible to receive a free public education in Newark schools from January through June of 2006.

Upon a full and independent review, the Commissioner concurred with the ALJ and adopted the Initial Decision as the final decision in this matter. Petitioner's claim for relief was granted and respondent's counterclaim for tuition was dismissed.

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

May 4, 2010

137-10R

OAL DKT. NO. EDU 9238-08
(EDU 10085-06 ON REMAND)
AGENCY DKT. NO. 322-9/06

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter,[1] and the Initial Decision of the Office of Administrative Law (OAL). Said decision adjudicates the residual issue in a controversy that began in 2006 when respondent sent notice to petitioner that it had found petitioner's minor child ineligible to receive a free public education in Newark – based upon the district's conclusion that the child lived with petitioner in East Orange. The focus of this final segment of the case is the location of petitioner's domicile from January through June of 2006.[2]

As the Administrative Law Judge (ALJ) stated in the Initial Decision, the party seeking relief in an administrative proceeding has the burden to establish her claim by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962); *In re Polk,*

[1] The record contains no transcripts of a February 11, 2009 hearing which was held in this matter.

[2] Respondent has submitted exceptions that are 18 days past the regulatory time period for filing same. Although counsel alleges that he did not receive the Initial Decision at the time it was issued, he has not provided a certification to establish this contention.

90 *N.J.* 550 (1982). The evidence presented by the parties in the instant case conflicted on a number of salient facts; however, the ALJ noted the following:

> Petitioner produced several documents connecting her to a residence [on South 10th Street] in Newark. These included a lease agreement dated July 26, 2005 (P-12), a notarized signature of Frank Hodges dated September 24, 2006 (P-13), a driver's license bearing the Newark address (P-20), correspondence to petitioner from the property's new owners (P-14), mortgage applications to purchase the property (P-15; P-16; P-17), and eviction papers for non-payment of rent (P-19).
> (Initial Decision at 7)

Turning to the law regarding domicile, the ALJ observed that:

> A person has the right to choose her own domicile, and her motive in doing so is immaterial. A very short period of residence in a given place may be sufficient to show domicile, but mere residence, regardless of its length, is not sufficient. *Lyon v. Glaser*, 60 *N.J.* 259, 264 (1972). Determination of domicile requires an evaluation of all the facts and circumstances of the case. *Id.* at 265. When there is more than one residence, a court should consider numerous factors in determining domicile, including "the physical characteristics of each, the time spent and the things done in each place, the other persons found there, the person's mental attitude toward 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) (citation omitted).
> (Initial Decision at 8)

In light of the foregoing, the ALJ concluded that the evidence as a whole showed 1) an intent by petitioner to reside in Newark, 2) physical use of the South 10th Street address, and 3) a totality of circumstances sufficient to support a finding of domicile. While the ALJ made no express credibility determinations, the Commissioner finds that a credibility assessment of petitioner is implicit in the ALJ's ultimate findings.

Because there is evidence supporting petitioner's version of the material facts, and because deference is owed to the ALJ's credibility assessments, *see, e.g. D.L. and Z.Y. on behalf of T.L. and K.L. v Board of Education of the Princeton Regional School District,* 366 *N.J. Super.*

269, 273 (App. Div. 2004) and *N.J.S.A.* 52:14B-10(c), the Commissioner adopts the Initial Decision.[3] Petitioner's claim for relief is granted and respondent's counterclaim is dismissed.

IT IS SO ORDERED. [4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/04/10

Date of Mailing: 5/04/10

[3] While the Commissioner may reject an ALJ's factual findings and credibility determinations if they are distinctly contrary to the record, the absence of a hearing transcript makes such an analysis unavailable to the Commissioner in the instant case.

[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
OAL DKT. NO. EDU 9238-08
AGENCY DKT. NO. 322-9/06
(Remand of EDU 10085-06)

Y.E. ON BEHALF OF MINOR CHILD E.E.,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Michaelene Loughlin, Esq., for petitioner (Loughlin & Latimer, attorneys)

Arsen Zartarian, Esq., for respondent (Office of the General Counsel)

Record Closed: February 16, 2010 Decided: March 26, 2010

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

STATEMENT OF THE CASE

Petitioner Y.E., on behalf of her minor son E.E., appealed the final decision of the State Board of Education affirming in part the decision of the Commissioner of Education that her son was not domiciled in the city of Newark from January 2006 to June 2006 and ordering petitioner to reimburse the District $4,478.88 for tuition.

PROCEDURAL HISTORY

On September 11, 2006, petitioner appealed the District's determination that E.E. was not entitled to a free public education from the District because he was not domiciled in Newark. On September 22, 2006, petitioner sought emergent relief. The Department of Education transmitted the case to the Office of Administrative Law (OAL), where it was filed under OAL Dkt. No. EDU 10085-06 on September 26, 2006. The District counterclaimed for tuition and moved to dismiss the petition as untimely. On October 2, and 17, 2006, a hearing was held, and on November 22, 2006, the administrative law judge denied the application for emergent relief, dismissed the petition on the merits, and ruled in favor of the District on tuition reimbursement. The Commissioner of the Department of Education adopted the Initial Decision. On June 8, 2007, the State Board affirmed the Decision of the Commissioner. Petitioner filed an appeal before the Superior Court of New Jersey, Appellate Division. On June 24, 2008, the court reversed the State Board and remanded the matter for a plenary hearing on E.E.'s eligibility to receive a free public education in Newark from January to June 2006. On July 28, 2008, the Department of Education remanded the case to the OAL for a hearing on E.E.'s eligibility to receive a free public education in Newark from January to June 2006.

A hearing was held on February 11, 2009. On December 23, 2009, petitioner's counsel notified the undersigned of a change of address. On February 16, 2010, the parties confirmed that all post-hearing submissions were filed and the record closed.

ISSUE

The issue in this case is whether E.E. was eligible to receive a free public education in Newark from January 2006 to June 2006.

Petitioner bears the burden of proving by a preponderance of the evidence that E.E. was domiciled in the Newark School District during the period at issue and thus was eligible for a free public education from the District. N.J.S.A. 18A:38-1(b)(2). In an

administrative proceeding the party seeking relief has the burden to establish her claim by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

SUMMARY OF TESTIMONY

Y.E.

Y.E. is the mother of E.E., born on October 9, 1994. Y.E. testified that E.E. has lived with her since his birth, except during short periods when he lived with his father in June and July 2005, and then with his aunt, J.H., from September to December 2005. She further testified that during the period E.E. lived with J.H., he attended Rafael Hernandez School in Newark. As found in the prior emergent proceeding, E.E. continued to attend Rafael Hernandez School through the end of the 2005–2006 school year.

Y.E. is self-employed and the owner of "Ms. Fix It," a business that purchases and rehabilitates houses for rental. In 1998, Y.E., doing business as "Ms. Fix It," purchased a three-family house at ___ North 17th Street, East Orange, for investment purposes. While renovating the house she resided in one of the apartments and rented the other two apartments. In 2004, Y.E. purchased another three-family house in East Orange, located across the street from the first house. She moved into one of the units in that house and rented the other two apartments while renovating this property. Petitioner presented copies of rental leases from both East Orange properties. (P-3; P-4; P-5; P-6; P-7; P-8; P-9; P-10; P-11; P-22.)

Y.E. operated "Ms. Fix It" from the basement of the East Orange property, where she kept a washer and dryer and did the family's laundry. Occasionally, she stayed overnight with her sons. (Petitioner's Brief at 6.) At night she parked her van, containing her tools, in a locked parking lot in East Orange. Y.E. believed that the neighborhood in which she lived was drug-infested, and she did not feel safe living there. In August 2005, Y.E. moved into a rooming house on South 10th Street, Newark, owned by Frank Hodges. Although the lease agreement, dated July 26, 2005, reveals

that she agreed to pay monthly rent of $500, Y.E. testified that she and Hodges agreed that in lieu of rent she would provide maintenance services for the property. (P-12; P-13).

The distance between the East Orange and Newark properties is thirteen blocks. Each morning Y.E. drove her car from Newark to East Orange with her sons, picked up the van, drove the boys to school, and then drove to her job site for the day.

On September 27, 2006, Y.E. received a notice to forward "all rental payments" to M. Credit, Inc., the new owner of the rooming house. (P-14.) The correspondence also stated, "Please call me to discuss your tenancy. If I do not hear from you within five (5) days from the date of this letter, I will have no alternative but to commence eviction proceedings against you." (Ibid.)

Y.E. took steps to purchase the property and convert the rooming house into an apartment house. On October 16, 2006, Y.E. applied for a mortgage to purchase the property on South 10th Street, Newark. (P-15; P-16.) On November 30, 2006, she had the property appraised. (P-17.) On January 8, 2007, Y.E. was approved for the mortgage. (P-18.) However, Y.E. never purchased the rooming house.

At the hearing, Y.E. presented a document that she claimed had been written by Frank Hodges. The document, dated September 24, 2006, states, "I Frank Hodges, [am the] owner of . . . So. 10th Street, Newark. . . . [Y.E.] resides at . . . So. 10th St. Newark NJ." (P-13.) The signature was notarized.

Y.E. also presented a letter from the District addressed to Hodges, which states:

> September 13, 2006
>
> . . . South 10th Street
> Newark, NJ 07107-2114
>
> Dear Mr. Frank Hodges:

> We are sending you this letter in an effort to verify [Y.E.]'s residence.
>
> [Y.E.] presented a copy of a lease to the Newark Public School stating she lives at . . . South 10th Street and that you own the property and she pays rent to you.
>
> The IRS has no records of you reporting any security deposit in the name of [Y.E.] in any bank. Please contact us ASAP concerning this matter.
>
> John Scott-Bey
> Chief Investigator
>
> [P-22.]

The bottom of the letter contained the following handwritten response: "24, Sept. '06, Dear Sir, The first lease was for a room. There was nothing to report if I were reporting those things. She is present in an apartment and there is no money involved. . . . Thank you, Frank Hodges." (P-21.)

In October/November 2006, Y.E. was served an eviction notice for non-payment of rent on the Newark property. (P-19; P-20.) She vacated the apartment sometime in March 2007. (Petitioner's Brief at 8.) Between 2005 and 2007 she received mail at addresses in East Orange and Newark and at a post office box.

Fabian Wiley

Fabian Wiley rented an apartment from Y.E. at ___ North 17th Street, East Orange, in February 2006. He was employed part time and spent a great deal of time at home. He testified that Y.E. did not reside at ___ North 17th Street, East Orange. However, under cross-examination, he conceded that he had no knowledge of whether Y.E. lived at the South 10th Street address in Newark.

Manuel Quinones

Manuel Quinones, employed by the District, was assigned to investigate petitioner's residence. On March 20, 21, 22, and 23, 2006, he conducted surveillances of ___ North 17th Street, East Orange, and observed "[b]lack female and two children exit residence enter vehicle" and drive to Rafael Hernandez School in Newark. (R-1.) Quinones' records show that he photographed a van parked at the curb at ___ North 17th Street on "March 21, 2005," at 8:15 a.m.; on "March 22, 2005," at 7:55 a.m. and 7:56 a.m.; on "March 23, 2005," at 7:54 a.m.; and on March 20, 2006, at 7:35 p.m. and 7:36 p.m. (R-2.) The parked vehicle was registered to an East Orange address. Quinones acknowledged discrepancies in the dates and years recorded on the photos. (R-2.)

John Scott-Bey

John Scott-Bey is employed by the District as chief investigator. He has twenty years of experience in investigation and has taken some courses in handwriting analysis. In August 2006, Scott-Bey was assigned to investigate petitioner's residence. He spoke with Y.E., verified the Newark address on her driver's license, reviewed several letters, and spoke with Hodges, who informed him that Y.E. paid no rent for the South 10th Street residence. Scott-Bey also spoke with Mary Johnson, whom he identified as a tenant at the Newark property. Johnson identified two neighbors who lived in the building, neither of which was Y.E. Scott-Bey also reviewed a closed DYFS case, which listed Y.E.'s home address in East Orange. He determined that Y.E. resided in East Orange, not Newark, from January 2006 to June 2006.

LEGAL DISCUSSION AND CONCLUSION

The record in the prior emergent proceeding included an Affidavit by J.H. dated May 19, 2006, which stated in part:

> I reside in Newark. While my nephew [E.E.] resided in my home in the beginning of the 2005–2006 school year, [E.E.]

> has not resided in my home since December 25, 2005. At that time I released him to his natural mother, [Y.E.]. A petition of appeal was filed in my name on behalf of [E.E.] on May 12, 2006, claiming that [E.E.] resides with me and seeking [E.E.'s] continued attendance in Rafael Hernandez School. . . . [E.E.] does not reside with me and I am not responsible for his education. To the best of my knowledge, [E.E.] resides with his mother in East Orange. Therefore, I withdraw my Petition of Appeal claiming residency for [E.E.] submitted under my signature dated May 12, 2006.

The statement is consistent with petitioner's testimony that E.E. lived with his aunt J.H. from September to December 2005. At face value the statement shows that J.H. cared for her nephew for several months and then sent him back to his mother in East Orange. The remand has provided the opportunity to present proof of Y.E.'s domicile from January 2006 to June 2006.

I **FIND** that Y.E. owned property in East Orange from which she operated a business under the name "Ms. Fix It." While renovating two houses in East Orange she resided in one of the units before moving to Newark. Petitioner produced several documents connecting her to a residence in Newark. These included a lease agreement dated July 26, 2005 (P-12), a notarized signature of Frank Hodges dated September 24, 2006 (P-13), a driver's license bearing the Newark address (P-20), correspondence to petitioner from the property's new owners (P-14), mortgage applications to purchase the property (P-15; P-16; P-17), and eviction papers for non-payment of rent (P-19).

The District relies on the investigation reports of Manuel Quinones and John Scott-Bey; a surveillance of the East Orange property on March 20, 21, 22, and 23, 2006; and pictures taken of a van parked in front of the property. The District's chief investigator interviewed a resident of the Newark property, who did not identify Y.E. as one of the building's tenants. Further, the District's investigator believed that the lease for the unit in the Newark rooming house was "fraudulent," but provided no evidence to support his conclusion. While the District's evidence points to Y.E.'s day-to-day physical presence in East Orange, petitioner's evidence points to a home address in Newark.

Despite inconsistencies in the record, all factors must be considered to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. Some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible and the conclusion that the witness is wholly unworthy of belief. United Stations of N.J. v. Getty Oil Co., 102 N.J. Super. 459, 476 (Ch. Div. 1968).

The State of New Jersey provides that "[p]ublic schools shall be free to . . . [a]ny person who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a minor child follows that of his parents. See V.R. ex rel. A.R. v. Bd. of Educ. of Hamburg, 2 N.J.A.R. 283, 286 (Dep't of Education 1980); N.J.S.A. 18A:38-1(b)(1). The right to attend public schools free of charge in a school district is determined by domicile, not physical residence. N.J.S.A. 18A:38-1. Domicile is established by the facts and circumstances of each case, and the examination of the parties' intent.

A person has the right to choose her own domicile, and her motive in doing so is immaterial. A very short period of residence in a given place may be sufficient to show domicile, but mere residence, regardless of its length, is not sufficient. Lyon v. Glaser, 60 N.J. 259, 264 (1972). Determination of domicile requires an evaluation of all the facts and circumstances of the case. Id. at 265. When there is more than one residence, a court should consider numerous factors in determining domicile, including "the physical characteristics of each, the time spent and the things done in each place, the other persons found there, the person's mental attitude toward 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) (citation omitted).

I **CONCLUDE** that petitioner owned property in East Orange, where she was observed by a District investigator leaving the premises with her children on four days of surveillance. I **CONCLUDE** that petitioner presented documents showing intent to reside in Newark. The evidence also supports the use of the Newark address from which she was evicted for non-payment of rent.

Based on the whole of the evidence, I **CONCLUDE** that petitioner met the burden of proof on remand. Therefore, I **CONCLUDE** that E.E. was eligible to receive a free public education in Newark from January 2006 to June 2006.

ORDER

It is **ORDERED** that the petitioner's claim for relief be **GRANTED**.

It is further **ORDERED** that the Districts request for payment of tuition be **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 26, 2010
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: March 26, 2010

Date Mailed to Parties: MAR 30 2010

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

Presented by Petitioner:

Y.E.

Fabian Wiley

Presented by Respondent:

Manuel Quinones

John Scott-Bey

Exhibits

For Petitioner:

P-1 Deed for 173 North 17th Street, East Orange, NJ property

P-2 Deed for 174 North 17th Street, East Orange, NJ property

P-3 Apartment Lease, Tenant Kim Stuger, September 1, 2005-August 31, 2006

P-4 Apartment Lease, Tenant Kim Stuger, September 1, 2006- August 31, 2007

P-5 Apartment Lease, Tenant Debra Denson, November 1, 2005 – October 31, 2006

P-6 Apartment Lease, Tenant Debra Denson, November 1, 2006-September 30, 006

P-7 Apartment Lease, Tenant Brenda Bailey, October 1, 2005 – September 30, 2006

P-8 Apartment Lease, Tenant Brenda Bailey, October 1, 2006 – September 30, 2007

P-9 Apartment Lease, Tenant Sharon Wiley, February 7, 2006 – February 6, 2007

P-10 Apartment Lease, Tenant Sharon Wiley, January 1, 2007 – December 31, 2007

P-11 Apartment Lease, Tenant Tibrina Williams, March 1, 2006 – February 28, 2007

P-12 Apartment Lease, Tenant Y.E., August 1, 2005 – August 1, 2006

P-13 Frank Hodges notarized letter regarding Y.E.'s residency

P-14 Correspondence Robert A. DelVecchio, Esq. to Y.E., dated September 27, 2006

P-15 Uniform Residential Loan Application of Y.E., dated October 16, 2006 ($188,000)

P-16 Uniform Residential Loan Application of Y.E., dated October 16, 2004 ($47,000)

P-17 Advantage Appraisals, Inc. handwritten receipt of $400 paid by Y.E.

P-18 Pre-approval for conventional mortgage letter, American Financial Resources, Inc., dated January 8, 2007

P-19 Landlord/Tenant File M. Credit IV, Inc. v. Y.E., Docket # ESX-LT-034936-06\

For Respondent:

R-1 Surveillance Report

R-2 Photo

R-3 Easterly Investigation

R-4 Letter to Frank Hodges dated September 13, 2006

R-5 Business Checking Account Statement for September 20, 2006 – October 31, 2006

R-6 Parental Complaint dated February 14, 2006

137-10R+

OAL DKT. NO. EDU 9238-08
(EDU 10085-06 ON REMAND)
AGENCY DKT. NO. 322-9/06

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	AMENDED DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter,[1] and the Initial Decision of the Office of Administrative Law (OAL). Said decision adjudicates the residual issue in a controversy that began in 2006 when respondent sent notice to petitioner that it had found petitioner's minor child ineligible to receive a free public education in Newark – based upon the district's conclusion that the child lived with petitioner in East Orange. The focus of this final segment of the case is the location of petitioner's domicile from January through June of 2006.[2]

As the Administrative Law Judge (ALJ) stated in the Initial Decision, the party seeking relief in an administrative proceeding has the burden to establish her claim by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962); *In re Polk,*

[1] The record contains no transcripts of a February 11, 2009 hearing which was held in this matter.

[2] Respondent's exceptions were received on April 30, 2010, after the regulatory time period for filing same had expired. Counsel's May 5, 2010 Certification supporting his request for an extension of time to file exceptions – and establishing that he did not receive the Initial Decision at the time it was issued – was received after the Commissioner's decision had been issued in this matter, as were petitioner's reply exceptions.

90 *N.J.* 550 (1982). The evidence presented by the parties in the instant case conflicted on a number of salient facts; however, the ALJ noted the following:

> Petitioner produced several documents connecting her to a residence [on South 10th Street] in Newark. These included a lease agreement dated July 26, 2005 (P-12), a notarized signature of Frank Hodges dated September 24, 2006 (P-13), a driver's license bearing the Newark address (P-20), correspondence to petitioner from the property's new owners (P-14), mortgage applications to purchase the property (P-15; P-16; P-17), and eviction papers for non-payment of rent (P-19).
> (Initial Decision at 7)

Turning to the law regarding domicile, the ALJ observed that:

> A person has the right to choose her own domicile, and her motive in doing so is immaterial. A very short period of residence in a given place may be sufficient to show domicile, but mere residence, regardless of its length, is not sufficient. *Lyon v. Glaser*, 60 *N.J.* 259, 264 (1972). Determination of domicile requires an evaluation of all the facts and circumstances of the case. *Id.* at 265. When there is more than one residence, a court should consider numerous factors in determining domicile, including "the physical characteristics of each, the time spent and the things done in each place, the other persons found there, the person's mental attitude toward 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) (citation omitted).
> (Initial Decision at 8)

In light of the foregoing, the ALJ concluded that the evidence as a whole showed 1) an intent by petitioner to reside in Newark, 2) physical use of the South 10th Street address, and 3) a totality of circumstances sufficient to support a finding of domicile. While the ALJ made no express credibility determinations, the Commissioner finds that a credibility assessment of petitioner is implicit in the ALJ's ultimate findings.

Because there is evidence supporting petitioner's version of the material facts, and because deference is owed to the ALJ's credibility assessments, s*ee, e.g. D.L. and Z.Y. on behalf of T.L. and K.L. v Board of Education of the Princeton Regional School District,* 366 *N.J. Super.*

269, 273 (App. Div. 2004) and *N.J.S.A.* 52:14B-10(c), the Commissioner adopts the Initial Decision.[3] Petitioner's claim for relief is granted and respondent's counterclaim is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/25/10

Date of Mailing: 5/27/10

[3] While the Commissioner may reject an ALJ's factual findings and credibility determinations if they are distinctly contrary to the record, the absence of a hearing transcript makes such an analysis unavailable to the Commissioner in the instant case.

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

138-10

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DANIELLE PONTI, GRAY CHARTER SCHOOL, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

In September 2007, an Order to Show Cause was served upon respondent – a non-tenured teacher – requiring her to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning her position as a first grade teacher on the second day of school, without notice and contrary to the terms of her employment contract. The respondent contended, *inter alia*, that: the aforementioned statute was not applicable to her as a non-tenured charter school employee; she was the subject of a constructive discharge as the result of alleged mistreatment and discriminatory harassment, namely that she was referred to as "Blondie" during a phonics workshop prior to the first day of school; and that any suspension is discretionary in nature and unwarranted under the circumstances of the case.

The ALJ found that: respondent ceased to perform her duties before the expiration of the term of her employment without the consent of the charter school, contrary to *N.J.S.A.* 18A:26-10; respondent's contention that she was subject to harassment, discrimination, disparate treatment, or a hostile work environment is not supported by the evidence; rather, the job did not meet respondent's expectations, and she was at odds with the director of the school. The ALJ concluded that the respondent resigned her teaching position on approximately 15 minutes notice and left her class without a teacher; accordingly, the respondent's actions constituted unprofessional conduct and warrant the suspension of her teaching certificate for a period of one year.

Upon independent review of the record, the Commissioner concurred that the facts in this case do not support a finding of constructive discharge and that respondent's behavior warrants the suspension of her teaching certificate for a period of one year from the filing date 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.

May 12, 2010

OAL DKT. NO. EDU 11971-07
AGENCY DKT. NO. 294-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DANIELLE PONTI, GRAY CHARTER SCHOOL, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, the Gray Charter School, demands that respondent Danielle Ponti's teaching certificate be suspended for a year in consequence of her resignation from her position before the end of her contractual term – in violation of *N.J.S.A.* 18A:26-10. Respondent's defense is that she was constructively dismissed from the position by virtue of alleged mistreatment and discriminatory harassment. After review of the record, the Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions and petitioner's replies thereto, the Commissioner adopts the recommendation of the Administrative Law Judge (ALJ) that respondent's teaching certificate be suspended for the term of one year.

It is undisputed that respondent signed a contract requiring her to teach at the Gray Charter School for one school year, *i.e.,* from August 23, 2007 to June 30, 2008. (Petitioner's Exhibit P-1) It is also undisputed that respondent resigned by letter dated August 28, 2007, ten months before the end of her contractual obligation to petitioner. (Petitioner's Exhibit P-6) Such an early resignation, on its face, violates the provisions of *N.J.S.A.* 18A:26-10, which states:

> 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. [1]

Relying on *Penns Grove-Carneys Point Board of Education v. Leinen,* 94 *N.J.A.R.*2d (EDU) 405, 407, the Administrative Law Judge (ALJ) for this matter explained that "the obvious purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students . . . . The ultimate objective is to protect the students." (Initial Decision at 29) The record reveals that respondent's precipitous departure created disruptions that were contrary to the best interests of the pupils in the class to which respondent was assigned. (1T28-29[2]) Thus, both the letter and spirit of *N.J.S.A.* 18A:26-10 was defeated by respondent's behavior. [3]

Further, after considering the testimony and exhibits, the ALJ found that respondent fell short of proving her affirmative defense of constructive discharge. In evaluating respondent's most serious claim, *i.e.,* that she was repeatedly referred to by a phonics seminar instructor as "Blondie," the ALJ noted that the instructor and three other seminar attendees denied that such behavior occurred. (Initial Decision at 23) The ALJ also found it significant that respondent never complained to the school affirmative action officer, the principal, or her mentor about the alleged harassment. (Initial Decision at 23-24) Further, the ALJ regarded respondent's testimony as lacking in credibility (Initial Decision at 24), a finding to which the Commissioner must accord deference. *See, e.g. D.L. and Z.Y. on behalf of T.L. and K.L. v Board of*

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[1] It also violates Section 4.1 of the contract between petitioner and respondent, which allows employees to terminate their contract only under the following circumstances:

> Termination Upon Agreement. Upon the written agreement of both Employee and the School (which agreement may be made by the Executive Director), this agreement shall immediately terminate.

[2] 1T signifies the transcript of the first day of the hearing conducted in the OAL.

[3] The ALJ also found, and the Commissioner concurs, that during a meeting at the beginning of the school year, Principal Verna Gray impressed upon the teachers the importance of proper and sufficient (two months) notice of resignation. At that meeting, there was a discussion about the disruptions caused by the abrupt resignation of five teachers which, *inter alia,* caused the commencement of the school year to be delayed. (Initial Decision at 24-25)

Education of the Princeton Regional School District, 366 *N.J. Super.* 269, 273 (App. Div. 2004) and *N.J.S.A.* 52:14B-10(c).

Another of respondent's allegations of mistreatment was the assertion that she was formally evaluated on her first day of work. The ALJ found, and the Commissioner concurs, that the record does not support the allegation. The facts show that on her first day respondent was observed by Mr. Collins, the phonics instructor, to ascertain whether she understood and could implement the techniques taught at the phonics seminar. (1T44; 3T18-19) She was also informally observed by Principal Gray, who apparently routinely observes the teachers on the first day. (1T43) No evidence was presented suggesting that a formal evaluation of respondent was conducted on her first day in class.

A third issue that respondent raised in defense of her sudden resignation was a letter from Gray to respondent, delivered to respondent on the second day of school, which warned that respondent had exhibited insubordination on the first day of school. The insubordination referenced in the letter was respondent's failure to teach, commencing at 8:00 a.m., the phonics skills presented at Mr. Collins' seminar. Respondent characterized the letter as unfair, disputing that Gray instructed her to teach the phonics method presented at the Collins seminar, claiming that respondent had good reasons for not teaching the required phonics at 8:00 a.m., and denying that Gray was in or about respondent's classroom between 8:00 and 8:30 a.m. on the first school day. However, the ALJ found Gray credible as a witness, and concluded that Gray had directed respondent to teach the phonics at 8:00 a.m. and that respondent did not do so. The warning about insubordination was consequently, in the ALJ's view, not unfounded. (Initial Decision at 25) The Commissioner finds that the record supports the ALJ's conclusion.

After an extensive review of the evidence as a whole, the ALJ found that "respondent ceased to perform her duties before the expiration of the term of her employment

without the consent of the Gray Charter School contrary to *N.J.S.A.* 18A:26-10 and that respondent's actions constituted unprofessional conduct." (Initial Decision at 30) He further determined that "the findings in this matter do not support respondent's contention that she was subject to harassment, discrimination, disparate treatment or a hostile work environment." (Initial Decision at 31)

The facts of this case may suggest differences in style and philosophy between an experienced school administrator and a new teacher, but the Commissioner agrees with the ALJ that they do not support a finding of constructive discharge. Respondent's precipitous resignation was unjustified, violated *N.J.S.A.* 18A:26-10, disrupted her students' education and was serious enough to warrant more than a minimal suspension of her teaching certificate. Accordingly, petitioner's request for the suspension of respondent's teaching certificate for one year is granted.[4] A copy of this decision shall be forwarded to the State Board of Examiners for implementation.

IT IS SO ORDERED. [5]

COMMISSIONER OF EDUCATION

Date of Decision: 5|12|10

Date of Mailing: 5|12|10

[4] Respondent's argument, in Point VII of its exceptions, that *N.J.S.A.* 18A:26-10 does not apply to charter school teachers has already been rejected in Commissioner Decision No. 297-08, issued on July 9, 2008, in consequence of a motion by the parties in this and six other cases. Said decision is thus the law of this case.

[5] 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 11971-07
AGENCY DKT. NO. 294-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DANIELLE PONTI, GRAY CHARTER SCHOOL, ESSEX COUNTY.

Cherie L. Adams, Esq., and **Erin E. McLaughlin**, Esq., for Gray Charter School (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Lane J. Biviano, Esq., for Danielle Ponti

Record Closed: November 17, 2009 Decided: February 18, 2010

BEFORE **RICHARD McGILL**, ALJ:

Gray Charter School (petitioner) seeks the suspension of the teaching certificate of Danielle Ponti (respondent) for unprofessional conduct based upon a resignation that did not comply with applicable statutory requirements. Respondent maintains that the statutes upon which petitioner relies are not applicable to her as an untenured employee of a charter school, that she was the subject of a constructive discharge as the result of various forms of mistreatment and that any suspension is discretionary in nature and unwarranted under the circumstances of this case.

PROCEDURAL HISTORY

At the request of petitioner, the Commissioner of Education issued an Order to Show Cause on September 27, 2007, ordering respondent to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent filed an Answer on November 13, 2007, and the matter was transmitted to the Office of Administrative Law on November 19, 2007, for determination as a contested case.

One of respondent's contentions in this proceeding is that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 are not applicable to charter schools. In the same general time frame, six similar matters were transmitted to the Office of Administrative Law raising the issue of the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.[1] By Order dated March 31, 2008, the seven matters were consolidated for the limited purpose of determining the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.

Three teachers 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. In an Order dated June 6, 2008, the determination was made that these statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, are applicable to charter schools. However, one statute, N.J.S.A. 18A:28-8, relates to teachers who have tenure. The determination was that this statute is not applicable to teachers who do not have tenure. Five of the seven teachers in the consolidated proceeding including respondent herein did not have tenure. As a result,

[1] The other matters are as follows: 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 Tyarra Hunter, Gray Charter School, Essex County, OAL Dkt. No. EDU 11956-07, Agency Dkt. No. 293-10/07; In the Matter of the Suspension of the Teaching Certificate of Claude Gentil, Gray Charter School, Essex County, OAL Dkt. No. EDU 11745-07, Agency Dkt. No. 298-10/07; In the Matter of the Suspension of the Teaching Certificate of Taheerah Jackson, Gray Charter School, Newark, Essex County, OAL Dkt. No. EDU 11972-07, Agency Dkt. No. 300-10/07; and 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.

the portion of the Order to Show Cause based on N.J.S.A. 18A:28-8 was dismissed as to those five teachers including respondent.[2]

One or more parties sought interlocutory review of the Order dated June 6, 2008. By Decision on Motion for Interlocutory Review dated July 9, 2008, the Commissioner of Education affirmed the Order dated June 6, 2008. Thereafter, by Order dated August 14, 2008, the seven matters were severed for each to proceed separately.

The hearing in this matter was conducted on May 20, July 7 and August 28, 2009, at the Office of Administrative Law in Newark, New Jersey. The record closed on November 17, 2009, upon receipt of briefs.

ISSUES

With the question of applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools having been resolved by motion, the remaining issues are whether respondent engaged in unprofessional conduct within the meaning of N.J.S.A. 18A:26-10, whether respondent's teaching certificate should be suspended and, if so, the length of the suspension. Respondent's main defense is that she was subject to a constructive discharge caused by harassment, discrimination and other forms of mistreatment.

FACTS

A. Undisputed Facts

The general course of events in this matter is not in dispute, and I **FIND** as follows:

[2] It was later determined that a sixth teacher did not have tenure.

1. Ms. Verna Gray is the executive director and principal of The Gray Charter School. She has held those positions since 2000.

2. As of August 2007, respondent held a Certificate of Eligibility with Advanced Standing as an elementary school teacher.

3. On August 13, 2007, Ms. Gray interviewed respondent for the position of first grade teacher at The Gray Charter School.

4. Ms. Gray offered respondent the position, and respondent accepted the offer.

5. On August 13, 2007, the parties executed an Employment Agreement for the 2007-2008 school year.

6. Respondent's contract contains a provision which states as follows: "Upon the written agreement of both Employee and the School (which agreement may be made by the Executive Director), this agreement shall immediately terminate."

7. On August 13, 2007, respondent signed a form acknowledging receipt of a copy of The Gray Charter School Workplace Harassment Statement.

8. According to the Statement, prohibited harassment refers to behavior that is not welcome, that is directed against a person because of his or her gender, race or other legally protected category, and that is severe or pervasive enough to make the person reasonably believe that the conditions of his/her employment are altered and the working environment is hostile or abusive.

9. The Statement further states that anyone who believes that he or she has been the subject of unlawful harassment should immediately report the matter to the Director or the Assistant Director.

10. The Gray Charter School had seventeen classroom teachers plus several other teachers.

11. Respondent reported to The Gray Charter School on August 14, 2007, to begin her employment.

12. At the first faculty meeting, Ms. Gray announced that the school would not open on August 20, 2007, as scheduled, because four teachers had quit without proper notice.

13. Back-to-school night was postponed.

14. Then another teacher resigned from her position.

15. As a result, Ms. Gray had to hire five new teachers.

16. Respondent spent the rest of her first week getting her classroom ready.

17. During respondent's second week, back-to-school night was rescheduled for August 22, 2007.

18. All faculty were required to attend a three-day workshop on phonics given by Patrick Collins, who was an outside consultant.

19. The three-day workshop on phonics took place during the period from August 22 to 24, 2007. The workshop began during the afternoon of Wednesday, August 22, and ended around noon on Friday, August 24.

20. Ms. Gray advised the faculty that Mr. Collins would observe them during the first week of school.

21. Ms. Gray took the teachers to a luncheon after the conclusion of the workshop on Friday.

22. School opened on Monday, August 27, 2007, at 7:30 a.m. The normal school day was from 7:30 a.m. to 4:30 p.m.

23. Prior to the opening; Ms. Gray told respondent to teach phonics at 8:00 a.m. and that Mr. Collins would observe her.

24. Respondent was previously informed that phonics would be taught every day at 8:00 a.m.

25. Another first grade teacher, Megan Groome, was respondent's mentor.

26. There were ten new faculty members including three first year teachers.

27. When Mr. Collins arrived in respondent's classroom, respondent taught phonics using a method known as "Read, Sing, Spell and Write." This is a different method from the one taught by Mr. Collins at the workshop. Respondent also read a story entitled "First Grade Jitters."

28. Ms. Gray visited respondent's classroom during the morning of August 27, 2007.

29. After 4:00 p.m., Ms. Gray spoke with respondent and told her to be sure to teach phonics, reading and language arts, when Mr. Collins was in the classroom.

30. Respondent reported to work on August 28, 2007, and picked up her mail. Respondent found a schedule for Mr. Collins' observations of the teachers. Respondent was the only teacher scheduled to be observed three times.

31. During the day, Assistant Director and Vice Principal Richard Salles delivered to respondent an envelope containing a letter dated August 28, 2007, from Ms. Gray.

32. In the letter, Ms. Gray stated that she told respondent that at 8:00 a.m. she was to teach phonics and reading as taught at the workshop by Mr. Collins. Further, at 8:25 a.m., respondent was not teaching in accordance with the orders Ms. Gray had given just an hour earlier. Ms. Gray then stated as follows: "This is insubordination on your part. I have a right as your boss and employer to expect that you will follow my orders when I give them to you." Ms. Gray continued with the schedule for teaching phonics, reading and language.

33. During the evening of August 28, 2007, respondent prepared a resignation letter.

34. On August 29, 2007, respondent arrived at school at 6:45 a.m. Respondent cleaned her classroom and removed all items that she had purchased herself.

35. At approximately 7:15 a.m., respondent and a kindergarten teacher went back to submit their resignation letters.

36. Unable to locate Ms. Gray, respondent placed her letter under the door.

37. In the letter, respondent sets forth her defense to the charge of insubordination. Respondent then noted that she "was highly offended by Mr. Collins' disrespectful and inappropriate behavior when he referred to me as 'Blondie,' in front of my colleagues throughout the three day workshop." Finally, respondent stated that she regrets that her "educational philosophy, consisting of a proactive positive behavioral approach conflicts with your reactive authoritative approach." The notice of resignation was effective that day.

38. Respondent left the school without seeing Ms. Gray and returned home.

39. At approximately 8:45 a.m., respondent received a telephone call from Ms. Gray, who stated that respondent had to give sixty days notice.

40. Respondent told Ms. Gray that there was no notice requirement in the contract.

41. Ms. Gray demanded that respondent return to work, but respondent refused to do so.

42. Ms. Gray then asked respondent to return until a placement could be found, but respondent refused to do so.

43. Ms. Gray continued to demand that respondent return to work.

44. Respondent said that she would return to work the next day.

45. Respondent never returned to The Gray Charter School.

46. Respondent checked for telephone messages from other schools where she was seeking a job.

47. On Thursday, August 30, respondent found a message from St. Peter's School in Belleville.

48. Respondent called in the morning and went for an interview in the afternoon.

49. Respondent received an offer to teach middle school English. Despite the fact that she wanted to teach first grade, respondent accepted the offer.

50. Respondent took a decrease in pay from $40,000 per year to $28,000 per year.

51. Respondent is now in her third year at St. Peter's School, and she is teaching fifth grade.

52. At the request of Ms. Gray, Mr. Collins submitted a letter dated September 4, 2007, responding to respondent's accusations in her letter of resignation dated August 28, 2007.

53. In his letter, Mr. Collins noted that respondent was not teaching the phonics method presented at the workshop. In addition, Mr. Collins stated: "Ms. Pointe's allegation I called her 'Blondie' is false; Mrs. Zablow jokingly said, quote 'Have the blond say the wall cards she hasn't said much during the training.' "

B. Summary of Evidence

Petitioner presented the testimony of six witnesses, and respondent testified on her own behalf. Petitioner presented its case first, but due to the fact that most of the factual issues relate to respondent's defenses, this summary of evidence will begin with respondent's testimony.

1. Respondent's Evidence

Respondent testified that she received a bachelor of arts degree in American history and a masters degree in elementary education from Fairleigh Dickenson University. Respondent was a student teacher in several school districts while she was obtaining her degrees. From January to June 2007, respondent worked as a substitute in Secaucus. For nine years, respondent worked part-time for a law firm specializing in real estate.

Respondent applied for a full-time position with The Gray Charter School in the spring of 2007, and she was interviewed by Ms. Gray in August 2007. During the interview which lasted fifteen minutes, Ms. Gray and respondent discussed the importance of classroom management and the beginning of school for setting up a foundation for the school year. They also discussed cooperative learning groups where students are able to socialize and learn from each other, and Ms. Gray agreed with all of respondent's ideas. Ms. Gray discussed a phonics program by Marva Collins. Respondent knew how to teach phonics, but she was not familiar with the Marva Collins Program. Ms. Gray said that a consultant would come in and explain how to teach this type of phonics.

At the end of the interview, Ms. Gray offered a maternity leave position. Respondent said that she was looking for a full-time position. In response, Ms. Gray said that she would keep respondent for the full year and that respondent would teach

science and social studies to both first grade classes when the other teacher returned from maternity leave. Despite reservations, respondent accepted the offer.

During her first or second day at work, respondent learned that students were not allowed to talk and that they are not allowed to leave their seats without permission. There was no social interaction throughout the school day. In this environment, there could be no cooperative learning groups.

Respondent spoke with other teachers during back-to-school night. One teacher, Ms. Johnson, told respondent that Ms. Gray hires a licensed teacher to fill in for one on maternity leave, promises to keep her and then finds a reason to get rid of her.

The phonics workshop was scheduled for August 22 to 24, 2007, and was conducted by Patrick Collins. The Gray Charter School has a policy that faculty and staff will be addressed by their surnames. Respondent's mentor, Megan Groome, was present on the first day of the workshop but did not return for the next two days. During the workshop, Mr. Collins addressed all of the faculty members by the surnames except that he referred to respondent as "Blondie." At one point, Mr. Collins referred to respondent as "Blondie" and called her to the front of the room to go over wall cards. While respondent was standing in the front of the room before the other teachers, Mr. Collins again referred to respondent as "Blondie." Respondent felt that Mr. Collins' words were degrading and humiliating, and she felt that he was making fun of her. The other faculty members in the room were laughing. Respondent had to do most of the letters, while other faculty members did just a few. Mr. Collins did nothing to mock or embarrass other faculty members in front of their peers. Mr. Collins repeatedly referred to respondent as "Blondie" over the three days. Later, respondent learned from a teacher, Ramesha Francois, that Mr. Collins and another teacher, Ms. Zablow, planned to embarrass her. Respondent described their agreement as a bet.

Respondent stated that Ms. Francois would testify in this proceeding, but she did not do so. A certification dated May 9, 2009, from Ms. Francois was submitted in regard to an earlier motion and was accepted into evidence at the hearing. The certification states in part that: (1) Ms. Francois was hired as a new teacher at The Gray Charter School in August 2007; (2) Megan Groome was present for only a small portion of the phonics seminar taught by Patrick Collins; (3) at the seminar Mr. Collins addressed all faculty by their surname with the exception of respondent whom he referred to as "Blondie" throughout the three-day seminar; and (4) it was clear that Mr. Collins' comments toward respondent were intended to embarrass or otherwise humiliate respondent in front of her peers. Ms. Francois left The Gray Charter School during the following winter.

On the last day of the seminar, Ms. Gray announced that Mr. Collins would be observing the teachers during the following week. As set forth in a printed schedule, respondent who was one of nine new faculty members was the only teacher who would be observed three times.

Classes started at 7:30 a.m. on Monday, August 27, 2007. At approximately 7:30 a.m., respondent received a call from Ms. Gray to come to her office. Respondent and Ms. Groome proceeded to Ms. Gray's office. Ms. Gray told respondent that Mr. Collins would observe her at 8:00 a.m. and that she should teach phonics and reading. After Ms. Gray left, Ms. Groome told respondent to use the "Read, Sing, Spell and Write" phonics cards. Ms. Groome said that they were used in the first grade until November.

Mr. Collins did not arrive in respondent's classroom at 8:00 a.m. Since Mr. Collins was coming to observe respondent teaching phonics, respondent decided that she would not teach phonics at that time. Instead, she continued with classroom management. Respondent waited until Mr. Collins arrived in the classroom between 8:30 a.m. and 8:35 a.m., and then respondent proceeded to teach phonics using the

"Read, Sing, Spell and Write" cards as Ms. Groome had instructed her. Mr. Collins was sitting in the back of the classroom.

Respondent presented a diagram of the classroom. The blackboard is at the front of the classroom, and there are windows along the back wall. Respondent stood near the blackboard to teach the students who were seated at desks facing her. The classroom had two doors. The front door was on the same wall as the blackboard. The door is separated by a wall from floor to ceiling that extends out approximately five feet creating an alcove. As a result, respondent could not see a person at the door. Likewise, a person at the door could not see respondent. A door in the middle of a side wall could easily be seen by respondent.

Respondent continued to teach phonics, and then she read a story called "First Grade Jitters." Mr. Collins left when the class started standardized testing at 9:00 a.m. Mr. Collins spoke to the students for a few minutes, but he did not say anything to respondent about her teaching.

In regard to Mr. Collins' letter dated September 4, 2007, respondent testified that it contained inaccuracies as to certain details such as the time that he arrived in her classroom, the title of the book that she read to the pupils and the spelling of both her first and last names. Further, the letter states that Ms. Gray told respondent to teach phonics using the concepts taught during the three-day workshop. But according to respondent, Ms. Gray told her to teach phonics but did not mention the method taught at the workshop. Further, Ms. Gray had told the teachers that during the first week of school the teachers did not need lesson plans because most of the time would be spent on standardized testing. Instead, they should have a basic outline on their desk. Ms. Groome provided a basic outline for respondent, who placed it on her desk. Mr. Collins never asked to see a lesson plan. In the letter, Mr. Collins interprets respondent's use of the "Read, Sing, Spell and Write" method as a refusal or inability to use the method taught at the workshop. Respondent states that she was following her instructions from

Ms. Gray and Ms. Groome. Finally, Mr. Collins' denial that he called respondent "Blondie" is completely false. He called respondent "Blondie" the whole time.

During the morning of August 27, 2007, Ms. Gray and Mr. Collins were never in respondent's classroom at the same time. Standardized testing lasted from 9:00 a.m. to 11:30 a.m. Ms. Gray came into respondent's classroom at approximately at 10:00 a.m. Ms. Gray yelled at the students, but she did not say anything to respondent at that time. Respondent was not in agreement with Ms. Gray's authoritarian approach to dealing with first graders.

Respondent met with Ms. Gray at the end of the school day on August 27, 2007. Ms. Gray told respondent to be sure that she taught phonics, reading and language arts when Mr. Collins comes into her classroom. Respondent said that she would do so. Ms. Gray did not mention any problem with respondent's work.

In regard to the letter dated August 28, 2007, from Ms. Gray, respondent testified that Vice Principal Richard Salles delivered it to her classroom at approximately 10:00 a.m. and left it on her desk. Respondent opened the envelope at approximately 10:20 a.m. and read the letter. Respondent initially thought that she was fired, but she went to Ms. Groome, who told her that it was a warning letter.

Respondent noticed various inaccuracies in Ms. Gray's letter. According to respondent, Ms. Gray told respondent to teach phonics and reading but never mentioned the method taught at the workshop by Mr. Collins. Ms. Gray stated that she entered respondent's classroom at 8:25 a.m., but respondent testified that she would have seen Ms. Gray if she had done so. Ms. Gray did not come into respondent's classroom until 10:00 a.m. According to respondent, she did what she was told to do, and she was not insubordinate. Ms. Gray never told respondent prior to the letter that she was not teaching the correct lesson.

Respondent testified that it is not appropriate to observe a first year teacher within the first hour of the first day of school. If Mr. Collins was not conducting a formal observation, there should not have been a formal letter stating that she did not follow procedure. The observer should have taken notes and had a follow-up discussion within a few days.

Respondent referred to a regulation, N.J.A.C. 6A:32-4.5, which relates to evaluations of nontenured teaching staff members. According to this regulation, each district board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation of all nontenured teaching staff members. Further, such policy shall be distributed to each teaching staff member at the beginning of his or her employment. Respondent testified that she never received any written policy for evaluations. Likewise, she never received any evaluation form. According to respondent, Mr. Collins' letter dated September 4, 2007, is a formal observation, despite the fact that he does not hold any certificates in New Jersey.

Respondent signed a contract when she began her employment with The Gray Charter School. In the contract, there is no provision that requires sixty days notice or any other type of notice. Ms. Gray never told respondent that a teacher had to give sixty days notice.

Respondent decided to resign because her time at The Gray Charter School was not what she expected and because she was being treated unfairly. Respondent was sick all day after she read the letter. Respondent realized that it would be like this every day for the rest of the school year and that she could not handle it.

On August 29, 2007, respondent left her letter of resignation at The Gray Charter School. Respondent assumed that one of the aides or substitutes who were in the building would teach her class. Respondent felt bad about what she was doing. Respondent acknowledged that she was teaching for only two days.

At approximately 8:45 a.m., respondent received a telephone call. According to respondent, Ms. Gray said over the telephone that she understood why respondent wanted to leave and that she accepted respondent's letter of resignation. Ms. Gray then said that respondent had to give sixty days notice. Respondent said that there was no sixty-day clause in the contract, and Ms. Gray said that a New Jersey statute required sixty days notice. Ms. Gray told respondent to come in, until Ms. Gray found a replacement. Respondent said that she would come in the following day, but she did not intend to do so. Respondent did not report to The Gray Charter the following day, and Ms. Gray did not call again.

In regard to respondent's replacement, Ms. Gray found one by Tuesday or Wednesday of the following week after the Labor Day weekend. With respect to Mr. Collins, respondent did not say anything to him because she was extremely intimidated and did not know what to do. Respondent thought that it was extremely inappropriate to refer to teachers by their race or gender. In regard to the race of the individuals involved, respondent is Caucasian, and Ms. Gray and Mr. Collins are African-Americans.

Respondent acknowledges that she knew that Mr. Collins was a consultant and that he would be leaving after a short amount of time. Prior to submitting her letter of resignation, respondent did not tell anyone other than Ms. Francois how she felt about being called "Blondie."

When respondent resigned from The Gray Charter School, she did not have another teaching job. She planned to continue working part-time as a secretary. At St. Peter's School, respondent was teaching English and language arts to fifth, sixth, seventh and eighth graders. Her preference was to teach first grade.

2. Petitioner's Evidence

a. Verna Gray

Verna Gray is the executive director and principal of The Gray Charter School. Her responsibilities include making offers of employment to teachers and entering into contracts with teaching staff members.

After an interview on August 13, 2007, Ms. Gray hired respondent to replace a teacher on maternity leave. Respondent received a contract for the entire school year.

Teachers reported to school on August 14, 2007. On that day, Ms. Gray became aware that five teachers had resigned without providing notice. At a meeting with the entire staff, Ms. Gray explained the situation and announced that school would not open on schedule. Ms. Gray stated that the actions of those five teachers were unlawful because they did not provide proper notice. The teachers should have spoken with Ms. Gray and provided two months written notice. Respondent was in attendance at that meeting.

Ms. Gray also discussed the harassment policy at that meeting and identified the affirmative action officer as Richard Salles. Ms. Gray informed the staff members that they should speak with Assistant Director Salles if they had a problem. Assistant Director Salles spoke at the meeting.

Patrick Collins provided a workshop on the phonics program used at The Gray Charter School on August 22, 23 and 24, 2007. Mr. Collins has conducted other workshops for The Gray Charter School and has been very professional. Aside from respondent, no one has ever made a complaint about Mr. Collins' behavior during a workshop. From August 22 to August 27, respondent did not complain about Mr. Collins. At a luncheon after the completion of the workshop on August 24, respondent seemed very happy, and she was speaking with the other teachers.

On August 27, 2007, the first day of school for the students, Ms. Gray told respondent to teach phonics exactly the way she learned at the workshop. The teachers were to teach phonics at 8:00 a.m. Mr. Collins was to observe the teachers using the phonics method taught at the workshop and later speak with them to improve their performance.

At approximately 8:25 a.m. on August 27, 2007, Ms. Gray went to respondent's classroom to observe her teaching phonics. Mr. Collins was in the classroom, but Ms. Gray could see that respondent was not teaching phonics. Ms. Gray left immediately without respondent seeing her. Ms. Gray stood outside the door for close to fifteen minutes, but respondent did not do anything with the lesson that she was supposed to teach at that time. Since respondent was not presenting the lesson that Ms. Gray had just told her to teach, Ms. Gray wrote a warning letter dated August 28, 2007, to respondent. The letter did not terminate respondent. Vice Principal Salles gave the letter to respondent.

Ms. Gray arrived at work at 7:15 a.m. on August 29, 2007, and found that respondent had left a letter of resignation. Ms. Gray called respondent and said that she accepted respondent's resignation but that respondent had to give sixty days written notice. Respondent said that she did not want to stay sixty days. Ms. Gray said that she needed a teacher for these children and explained to respondent that the law prohibits her from just walking out and leaving the class with no teacher. Respondent still did not want to return, and Ms. Gray stated that this was the law. Ms. Gray then asked respondent to return, until Ms. Gray could find another teacher. Ms. Gray stated that as soon as she found a teacher, respondent could leave the school. Eventually, respondent agreed to return, but she never did so. Since Ms. Gray had no teacher for that first grade class, she had to put Mr. Collins in the room, and then she found a substitute. Ms. Gray hired a replacement teacher three and a half weeks later. Prior to submitting her resignation, respondent did not complain to Ms. Gray about anything.

Ms. Gray never discussed the issues raised in her letter dated August 28, 2007, with respondent.

Ms. Gray immediately discussed with Mr. Collins respondent's allegation that he referred to her as "Blondie". Mr. Collins vehemently denied the allegation. Ms. Gray asked Mr. Collins to put his response to respondent's allegation in writing. Ms. Gray spoke with every teacher in the workshop and asked if they heard Mr. Collins call respondent "Blondie." Every teacher said that he did not do so and that he was very professional. According to Ms. Gray, it would not be appropriate at all to refer to someone as "Blondie" at The Gray Charter School. Personnel are supposed to refer to each other by their surnames.

There was no formal observation or evaluation of respondent on the first day of school. That would be too early in the school year. The purpose was simply to see who needs help. Mr. Collins was not in the classrooms to conduct evaluations. He was there to see if the teachers were teaching what they learned in the workshop or if they needed help.

Ms. Gray entered respondent's classroom at 8:25 a.m., and Mr. Collins was already there. Ms. Gray was not doing a formal evaluation, and she did not take any notes. Ms. Gray observes all of her teachers during the first several weeks of school. It is not possible that respondent misunderstood Ms. Gray's instructions.

Ms. Gray hired Ms. Adamafil to teach the second or third grade. Ms. Gray had to put her in the first grade class, because she had absolutely nobody.

b. Patrick Collins

Patrick Collins testified that he is an educational consultant and that he provides training in the areas of teacher empowerment, classroom management, phonics, reading and language arts. Mr. Collins has provided training at The Gray Charter

School for the last nine years. Mr. Collins has no certificates for teaching or supervision in New Jersey.

Mr. Collins provided training at The Gray Charter School in August 2007 in various areas including phonics. Respondent was in attendance for that training. Mr. Collins did not refer to respondent as "Blondie" at any time during that training. One of the other teachers, Ms. Zablow, said, "Why don't you call on the blonde? She hasn't said very much during the entire training." The reference was to respondent. Mr. Collins did not see Ms. Zablow's comment about the "blonde" as inflammatory. Mr. Collins acknowledged that he did call on respondent to do the phonics wall cards in response to Ms. Zablow's comment. At that point, respondent had not really participated in the training, and it was time for her to do so. After he called her up, Mr. Collins did not refer to respondent as "blonde" or "Blondie." Mr. Collins did not have a bet with Ms. Zablow to have the blonde girl come up and teach.

Mr. Collins was in respondent's classroom on August 27, 2007, for observation and recommendations. He was not there to evaluate her. Mr. Collins stated that he was not aware that Ms. Groome told respondent that phonics is not taught in first grade until November.

c. Jennifer Orlando

Jennifer Orlando is employed by The Gray Charter School as an eighth grade teacher, and as of May 2009, she was in her third year. Ms. Orlando attended the entire training workshop given by Mr. Collins in August 2007. Ms. Orlando did not hear Mr. Collins refer to respondent as "Blondie" at any time during the training. When called upon by Mr. Collins, another teacher, Ms. Zablow, said "Call on Blondie instead of me." That teacher liked to joke around. Respondent did not complain to Ms. Orlando about Ms. Zablow's comment. After the workshop, the teachers attended a luncheon. Ms. Orlando did not speak with respondent, but she did not seem upset at the luncheon. Ms. Orlando stated that she would not have been offended if Ms. Zablow

had directed a similar comment toward her, but she acknowledged that she could not speak for respondent's feelings.

d. Hyun Shin

Hyun Shin testified that she is employed by The Gray Charter School as a third grade teacher. As of May 2009, she was in her sixth year. Ms. Shin attended the entire training workshop given by Mr. Collins in August 2007. Respondent was also present for the workshop. Mr. Collins did not refer to respondent as "Blondie" at any time during the workshop.

Another teacher, Ms. Zablow, said, "Why don't you call that Blondie since she is not doing that much?" Ms. Shin was not offended by the comment. Respondent never complained to Ms. Shin about the comment.

During the first week of school, Mr. Collins was in Ms. Shin's class twice for approximately forty-five minutes. Ms. Gray came into Ms. Shin's classroom on the first day of school.

e. Megan Groome

Megan Groome has been employed by The Gray Charter School since it opened in 2000, and she is currently a first grade teacher. Respondent was employed by The Gray Charter School in August 2007, and Ms. Groome served as her mentor. Ms. Groome attended the training seminar given by Mr. Collins in August 2007. Mr. Collins did not make any ethnic remarks about any of the participants during the workshop. Respondent was also in attendance at the workshop. Ms. Groome did not hear Mr. Collins refer to respondent as "Blondie." Ms. Groome acknowledged that she was not present for the entire seminar. Respondent never complained to Ms. Groome about being called "Blondie" by Mr. Collins. Ms. Groome did not hear the terms "Blondie" or "blond" during the training session.

Respondent came to Ms. Groome after she received the letter from Ms. Gray. Ms. Groome told respondent that it was just a warning and tried to ease her concerns. Mr. Collins usually visits her classroom twice after the workshop.

f. Richard Salles

Richard Salles is the assistant director and vice principal of The Gray Charter School. He has held these positions since October 2001. Mr. Salles is also the affirmative action officer for The Gray Charter School. At a staff meeting, which is typically on the first day of each school year, Mr. Salles goes over his role as the affirmative action officer so that everyone knows where to go if there is an issue or a complaint. This occurred for the 2007-2008 school year. Mr. Salles did not receive any complaint from respondent.

Mr. Salles visited respondent's classroom on August 28, 2007, to deliver a letter from Ms. Gray. There were no students in the classroom at the time. Respondent opened the letter, and Mr. Salles said that if respondent had any questions, she could ask. Respondent did not have any questions. Respondent never mentioned any comments referring to her as "Blondie." Mr. Salles was never made aware of any allegations by respondent against Patrick Collins, and he has never investigated any complaint while the affirmative action officer for The Gray Charter School.

C. Findings

The main factual issue in this proceeding is whether Mr. Collins referred to respondent as "Blondie" during the workshop that he gave at The Gray Charter School from August 22 to August 24, 2007. According to respondent, Mr. Collins' use of this term was ongoing over the course of the three-day workshop. In contrast, Mr. Collins testified that he never referred to respondent as "Blondie."

The first consideration is that it seems very improbable that Mr. Collins would refer to respondent as "Blondie". As several witnesses including Ms. Gray stated, it would be inappropriate to refer to a teacher as "Blondie." In fact, a comment of that nature would violate The Gray Charter School's harassment policy. Mr. Collins has been in the field of education since 1993, and he impressed as a person who would have the sense and sensitivity not to refer to a teacher as "Blondie." Under the circumstances, it is unlikely that Mr. Collins referred to respondent as "Blondie."

Second, the comments allegedly occurred during a workshop attended by a group of teachers. Their testimony should provide a reliable guide as to the actual events. Three teachers who were present at the workshop testified in this proceeding. Two of the teachers were present for the entire workshop, and they testified that Mr. Collins did not refer to respondent as "Blondie." The third teacher was not present for the entire workshop, but she would likely have heard Mr. Collins say "Blondie," given respondent's claim that he did so over the course of the three days. The third teacher testified that she did not hear Mr. Collins refer to respondent as "Blondie."

Further, Ms. Gray testified that she interviewed all of the teachers who attended the workshop. Every teacher stated that Mr. Collins did not refer to respondent as "Blondie" and that he was very professional. In contrast, no one from the workshop other than respondent testified in support of respondent's allegations. Respondent stated that Ms. Francois would testify, but she did not appear at the hearing. Under the circumstances, her certification is entitled to little weight. It follows that the evidence from the other teachers at the workshop strongly supports Mr. Collins' testimony.

There are other reasons to doubt respondent's version of the incident. It seems likely that repeated references to respondent as "Blondie" would have evoked some type of response. Only the week before the workshop, respondent signed an acknowledgement of receipt of petitioner's Workplace Harassment Statement. Mr. Collins' alleged action would certainly violate petitioner's policy, and the statement advised staff members how to proceed with a complaint. Yet, respondent claims that

she mentioned her concerns only to Ms. Francois. In addition, it seems likely that respondent would have mentioned her concerns to her mentor, Ms. Groome.

Finally, during a telephone conversation with Ms. Gray on August 29, 2007, respondent said that she would report to work at The Gray Charter School on August 30, 2009. In fact, respondent did not report to work on August 30. Further, respondent acknowledged that at the time she made the statement to Ms. Gray, respondent did not intend to report to work on August 30. In other words, respondent lied to Ms. Gray to get off the telephone. Under all of these circumstances, respondent's testimony that Mr. Collins referred to her as "Blondie" lacks credibility and is overborne by the testimony of petitioner's witnesses. The testimony that Mr. Collins never referred to respondent as "Blondie" is accepted as true.

In other testimony related to the phonics workshop, respondent claimed that Mr. Collins and Ms. Zablow had concocted some sort of scheme to embarrass her in front of her peers. According to respondent, she received this information from Ms. Francois. However, this incident is not mentioned in Ms. Francois' certification.

Mr. Collins, Ms. Orlando and Ms. Shin testified that Ms. Zablow said something about calling on the blonde, but none of them mentioned anything about trying to embarrass respondent. For substantially the same reasons as the "Blondie" issue, I accept the testimony of petitioner's witnesses as true and reject respondent's version of this incident.

Another factual issue is whether Ms. Gray mentioned a sixty-day notice requirement for a teacher to terminate employment with The Gray Charter School. Ms. Gray testified that she discussed notice requirements when the teachers first reported on August 14, 2007. Ms. Gray explained that the actions of several teachers who quit without adequate notice were unlawful and that they have to give two months written notice and speak with her. In contrast, respondent testified that Ms. Gray did not mention a sixty-day notice requirement.

The surrounding circumstances provide an indication as to the likelihood that Ms. Gray would mention a notice requirement to the teachers. On or about August 14, 2007, Ms. Gray received communications from five teachers that they were resigning. As a result, Ms. Gray had to delay the opening of school because she did not have sufficient teachers. Under these circumstances, it is highly probable that Ms. Gray would advise the remaining teachers that there were notice requirements to resign and that the actions of those who left without proper notice were unlawful. In addition, Ms. Gray was a fully credible witness. Under the circumstances, I accept her testimony as true.

The next group of factual issues relates to events during the morning of August 27, 2007, and to Ms. Gray's letter dated August 28, 2007, reprimanding respondent for insubordination. Ms. Gray testified that prior to the start of classes on August 27, 2007, she told respondent to teach phonics at 8:00 a.m. using the method taught at the workshop. Ms. Gray testified that she observed respondent in her classroom at 8:25 a.m. and that she was not teaching phonics. Ms. Gray viewed respondent as insubordinate. In contrast, respondent testified that Ms. Gray told her that Mr. Collins would observe her at 8:00 a.m. and that she should teach phonics and reading. Because Mr. Collins did not arrive until 8:30 a.m., respondent did not start phonics until that time. Respondent did not claim that she was teaching phonics at 8:25 a.m. but rather testified that Ms. Gray did not enter the classroom and observe her at that time. Finally, respondent testified that she was not insubordinate and that she was following Ms. Gray's instructions.

Despite these differences, the core facts were admitted by respondent. Ms. Gray told respondent to teach phonics at 8:00 a.m., but respondent decided not to do so, because she was waiting for Mr. Collins. Irrespective of her reason, the fact is that respondent was not following Ms. Gray's instructions.

There was a discrepancy in the testimony of respondent and Mr. Salles concerning the delivery of Ms. Gray's letter dated August 28, 2007. According to respondent, Mr. Salles came into the classroom while the pupils were present and left the letter. In contrast, Mr. Salles testified that no pupils were present, that he asked respondent if she had any questions and that she did not have any. This discrepancy does not seem to have any particular consequence one way or the other and may be the result of a failure of memory. Due to the inconsequential and immaterial nature of this discrepancy, there is no need to make a finding of fact.

Another factual issue relates to respondent's claim that petitioner unfairly conducted a formal evaluation of her during the first hour of her first day of teaching. Ms. Gray and Mr. Collins testified that he was not conducting a formal evaluation. Rather, he was observing her for limited purposes to see if she was teaching the phonics method as taught at the workshop correctly and to offer recommendations.

The notion that petitioner was conducing a formal evaluation of respondent during the first hour of the first day of school makes no sense at all. The testimony of Ms. Gray and Mr. Collins concerning the purpose of the observation is readily believable and is accepted as true.

Finally, respondent claims that Ms. Gray hired her with the intent to terminate her when another teacher returned from a maternity leave. According to respondent, all of her factual claims fit this pattern.

Respondent's factual assertions to support this claims have been rejected. Only hearsay from Ms. Johnson and speculation support this claim. Under the circumstances, this factual assertion by respondent is not accepted as true.

After consideration of the evidence presented at the hearing in this matter, I **FURTHER FIND** as follows:

54. Ms. Gray interviewed respondent on August 13, 2007, for a teaching position with The Gray Charter School.

55. Respondent came away with the impression that Ms. Gray agreed with her ideas concerning classroom management, the beginning of school, and the use of cooperative learning groups, where students are able to socialize and learn from each other.

56. On August 14, 2007, Ms. Gray conducted a meeting with staff members. Ms. Gray explained that the actions of several teachers who quit without adequate notice were unlawful and that teachers have to give two months written notice and speak with her.

57. During the workshop from August 22 to 24, 2007, Mr. Collins did not refer to respondent as "Blondie."

58. Another teacher, Ms. Zablow, referred to respondent as "the blonde."

59. On August 27, 2007, Ms. Gray told respondent to teach phonics at 8:00 a.m. and that Mr. Collins would be in the classroom to observe her.

60. Respondent disregarded Ms. Gray's instructions because Mr. Collins was not present at 8:00 a.m., and she did not start teaching phonics until approximately 8:30 a.m.

61. Mr. Collins' observation of respondent on August 27, 2007, was not a formal evaluation.

62. Mr. Collins was observing respondent for limited purposes to see if she was teaching the phonics method as taught at the workshop correctly and to offer recommendations.

63. When she arrived at work at approximately 7:15 a.m. on August 29, 2007, Ms. Gray found respondent's letter of resignation.

64. During a telephone conversation on August 29, 2007, Ms. Gray offered to accept respondent's resignation conditionally. First, Ms. Gray said that she would require sixty days notice.

65. After respondent rejected the first condition, Ms. Gray asked respondent to return to work until Ms. Gray found a replacement.

66. Respondent agreed to return to work on August 30, 2007.

67. At the time that she agreed, respondent did not intend to return to work on August 30, 2007.

68. Respondent did not return to work at The Gray Charter School on August 30, 2007.

69. On August 30, 2007, Ms. Gray did not have a teacher or a substitute for respondent's first grade class.

LAW AND ANALYSIS

The applicable statute is N.J.S.A. 18A:26-10, which provides in pertinent part 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.

The obvious purpose of N.J.S.A. 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students. Penns Grove-Carneys Point Board of Education v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The ultimate objective is to protect the students.

Respondent's main defense is that her resignation on short notice was justified by mistreatment in the form of harassment, discrimination, and, implicitly, disparate treatment and a hostile work environment, which in total effect amounted to a constructive discharge. Respondent also maintains that Ms. Gray accepted her resignation.

A constructive discharge occurs when an employer knowingly permits conditions of employment so intolerable that a reasonable person subject to them would resign. Muench v. Township of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992). The findings in this matter do not support respondent's contention that she was subject to harassment, discrimination, disparate treatment or a hostile work environment. Rather, the job did not meet respondent's expectations, and she found herself at odds with the director of the school. These circumstances do not amount to a constructive discharge.

Respondent also contends that Ms. Gray accepted her resignation. This argument implies that respondent had consent to cease to perform her duties within the meaning of N.J.S.A. 18A:26-10.

This argument is not supported by the facts. Ms. Gray initially offered to accept respondent's resignation provided that she gave sixty days notice. After respondent refused these terms, Ms. Gray offered to accept respondent's resignation, provided that she returned to work long enough for Ms. Gray to find a replacement. Respondent told

Ms. Gray that she would return the next day. But respondent had no intention of doing so, and in fact, she did not return the next day or at any time thereafter. Under the circumstances, respondent did not have the consent of The Gray Charter School to cease to perform her duties.

In the context of this case, N.J.S.A. 18A:26-10 prohibits a teaching staff member from ceasing to perform his duties without the consent of the charter school. Here, respondent entered into an employment agreement for a term set to expire on June 30, 2008, and thereafter, respondent submitted a letter of resignation dated August 28, 2007. This date was the second day of the school year, and respondent did not have the consent of the charter school. Under the circumstances, I **CONCLUDE** that respondent ceased to perform her duties before the expiration of the term of her employment without the consent of The Gray Charter School contrary to N.J.S.A. 18A:26-10 and that respondent's actions constituted unprofessional conduct.

Petitioner seeks a suspension of respondent's teaching certificate for a period of one year and cites multiple cases in which such action was taken. According to petitioner, this matter should be handled in the same manner as in the cited cases.

The prior precedent has been summed up as follows: "Generally, the Commissioner has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. (Citations omitted). In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons. (Citation omitted.)" Board of Education of Borough of Alpine v. Leonid Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008), http://lawlibrary.rutgers.edu/oal/search.shtml.

Respondent argued for dismissal of the petition rather than a reduction in the length of any suspension. Nonetheless, respondent's arguments will be considered in relation to the length of any suspension.

As noted above, the findings in this matter do not support respondent's contention that she was subject to harassment, discrimination, disparate treatment or a hostile work environment. As respondent points out, she resigned without another job and had to accept a position with a lower salary. While this circumstance shows that respondent did not leave The Gray Charter School simply to benefit herself with a higher salary, there is no indication that respondent acted out of any commendable motivation.

The salient facts are that respondent resigned her teaching position on approximately fifteen minutes notice and left her class without a teacher. Respondent's precipitous action was highly unprofessional. Under the circumstances, I **CONCLUDE** that respondent's teaching certificate should be suspended for a period of one year.

Accordingly, it is **ORDERED** that respondent's teaching certificate 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.

February 18, 2010

DATE

RICHARD McGILL, ALJ

Date Received at Agency: 2/18/10

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 19 2010

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Verna A. Gray
Jennifer Orlando
Hyun Shin
Megan Groome
Richard Salles
Patrick Collins

For respondent:

Danielle Ponti

EXHIBIT LIST

P-1	Employment Agreement dated August 13, 2007, between The Gray Charter School and Danielle Ponti	Evidence
P-2	Certificate of Eligibility with Advanced Standing of Danielle M. Ponti	Evidence
P-3	Workplace Harassment Statement	Evidence
P-4	Acknowledgment Form dated August 13, 2007	Evidence
P-5	Letter dated August 28, 2007, from Miss Gray to Miss Ponti	Evidence

P-6	Letter dated August 28, 2007, from Danielle Ponti to Miss Gray	Evidence
R-1	Letter dated April 16, 2009, from Erin E. McLaughlin to Lane J. Biviano, Esq.	Evidence
R-2	Curriculum Vitae of Patrick Collins	Identification
R-3	Certification of Jennifer Orlando	Evidence
R-4	Certification of Hyun Shin	Evidence
R-5	Certification of Richard Salles	Evidence
R-6	Certification of Danielle Ponti dated November 10, 2007	Evidence
R-7	Certification of Danielle Ponti dated May 8, 2009	Evidence
R-8	Certification of Ramesha Golaub (Ramesha Francois)	Evidence
R-9	Diagram of classroom	Evidence
R-10	Letter dated September 4, 2007, from Patrick Collins	Evidence
R-11	Copy of N.J.A.C. 6A:32-4.5	Identification

OAL DKT. NO. EDU 1980-10
AGENCY DKT. NO. 18-2/10

E.P.F. 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 Commissioner has reviewed the record of this matter, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies to same. The Administrative Law Judge's (ALJ) finding that M.W. is not entitled to a free public education in respondent's district is adopted. However, the Commissioner was unable to find evidence, by way of certification or recitation of testimony,[1] that the daily tuition fee in respondent's district is $75.00.

Accordingly, this case is remanded to the OAL for the sole purpose of factual findings regarding the tuition due to respondent.

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/10
Date of Mailing: 5/12/10

[1] The Commissioner was not provided with a transcript of the hearing.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

139-10

E.P.F. 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.	:	

SYNOPSIS

Petitioner filed a *Pro Se* residency appeal, challenging the respondent Board's determination that her niece, M.W., is not entitled to a free public education in the Mt. Olive School District. Petitioner stated that she is M.W.'s guardian, her niece relocated from Florida to live with her because of conflicts with her stepfather and because she missed petitioner and her grandmother, and M.W.'s parents will continue to support her financially. Respondent Board filed a counterclaim seeking payment of tuition for the number of days M.W. attended school in the district.

The ALJ found that: petitioner is not the legal guardian of M.W.; M.W.'s parents live in Florida and do not have a permanent home within the district; and petitioner has failed to establish that M.W.'s parents are incapable of supporting or providing care for their daughter due to a family or economic hardship pursuant to *N.J.S.A.* 18A:38-1. Accordingly, the ALJ concluded that M.W. is not entitled to a free public education in Mt. Olive schools, and the respondent Board is entitled to reimbursement for tuition for the period of M.W.'s ineligible attendance at the rate of $75 per day.

Upon a full and independent review of the record, the Commissioner adopted the ALJ's finding that M.W. is not entitled to a free public education in respondent's district. The case file, however, did not include evidence that the daily tuition rate is $75.00; accordingly the Commissioner remanded the case to the OAL for the sole purpose of factual findings regarding the 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.

Issued May 12, 2010

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01980-10
AGENCY DKT. NO. 18-2/10

E.P.F., ON BEHALF OF MINOR CHILD, M.W.,
Petitioner,
v.
TOWNSHIP OF MOUNT OLIVE BOARD OF EDUCATION, MORRIS COUNTY,
Respondent.

E.P.F., pro se

Aaron Mizrahi, Esq. for respondent (Schwartz Simon Edelstein Celso & Zitomer, attorneys)

Record Closed: March 25, 2010 Decided: April 5, 2010

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE

M.W., who resides with her aunt E.P.F. (Petitioner), contends that she is entitled to attend school within the Mount Olive School District (District) because Petitioner is domiciled in the District and is her aunt and guardian. The school residency law in New

Jersey, N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1 and 3.2, provides that public schools shall be free for a student who is living with a parent or guardian whose permanent home is located within the school district; **or** for a student kept in the home of a person other than the student's parent or legal guardian (1) where that person is domiciled in the district, and where the non-parent signs a sworn statement stating that (2) s/he is supporting the child gratis, and (3) s/he assumes all personal obligations for the student relative to school requirements, and (4) s/he intends to support the child for a longer time than the school term, and (5) the parent or guardian is not capable of supporting or providing care for the student due to family or economic hardship, and (6) the student is not residing with other persons solely for the purpose of receiving a free public education. The District denied the request for admission of M.W. because of the failure to satisfy all of these requirements, and Petitioner appealed. The issue in Petitioner's appeal is whether M.W. has met the eligibility requirements so as to entitle her to admission in the District's high school. I **CONCLUDE** that she has not, and, therefore, the District is entitled to tuition.

PROCEDURAL HISTORY

On February 1, 2010 Petitioner filed a pro se residency appeal with the Commissioner of Education ("Commissioner") from the District's January, 2006 denial of the request for admission of M.W. On or about February 17, 2010, the District filed a Notice of Motion to Dismiss in Lieu of Answer and supporting brief. Following the filing of the District's motion, the Commissioner 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. The OAL filed it for hearing and determination as a contested case on March 9, 2010. I heard the matter on March 25, 2010, and closed the record on March 25, 2010, after the conclusion of the hearing.

FINDINGS OF FACT

Background

Petitioner testified and her son, Brian Lawrence offered limited testimony over the objection of Respondent. Upon listening to Mr. Lawrence's testimony, I determined that it had no probative value and sustained Respondent's objection. His testimony was not considered in rendering this decision. Aaron Mizrahi, Esq. argued the motion on behalf of Respondent. The following background facts are undisputed, and I **FIND** them to be **FACTS** of this case:

Petitioner is the aunt of M.W., who moved back to New Jersey on or around January 11, 2010. Petitioner is domiciled within the District and will provide for the personal obligations of M.W. as it relates to school requirements. M.W. previously resided with her mother in Florida and relocated at her own request because of conflicts with her stepfather, and because she missed her aunt and grandmother. M.W.'s parents ("Parents") are capable of supporting, and providing care for M.W.

M.W. was registered to attend the District's high school effective February 5, 2010. As of the date of the hearing in this matter, M.W. had been in attendance in the district for thirty-three days. The district's daily tuition rate for 2009-10 is $75.00 per day.

Factual discussion

On January 26, 2010 Petitioner submitted "Sworn Statements of Mount Olive Resident" to the District on behalf of M.W. wherein the following representations were made: M.W. will continue to be supported financially by her parents; her mother will provide whatever she needs including living expenses; M.W. will live with Petitioner until she has completed high school and is enrolled in a university; Petitioner will assume responsibility for all of M.W.'s personal obligations with respect to school requirements;

and the reason that M.W. will be living with Petitioner is that she misses her grandmother and Petitioner.

On or about January 26, 2010 Petitioner submitted the Parent's "Affidavit of Parent/Guardian" to the District wherein M.W.'s mother made the following representations: she resides in Sanford, Florida; she is employed as a Community training specialist; M.W.'s mother, P.W., has legal custody of M.W.; P.W. has primary physical custody of M.W.; the reason that M.W. will reside in the district with Petitioner is that M.W. was very close to her aunt and grandmother so she wanted to be with them when they moved back to New Jersey; and both parents are capable of supporting M.W.

Petitioner testified that she resides and pays taxes in the district. Her niece, M.W., was "crying that she wanted to live with her" because she was having emotional and mental problems stemming from a poor relationship with her stepfather. Petitioner felt that the child was "in distress" and wanted to help her. At one point in M.W.'s life the family unit was comprised of Petitioner, her sister and mother, her nieces (including M.W.) and Petitioner's own children. At one point this family unit all resided together in New Jersey. As a result, Petitioner testified that she "had M.W. all her life." Petitioner further testified that M.W.'s mother purchased a plane ticket and sent M.W. to stay with her. Petitioner felt that she could not let M.W. stay at home so she attempted to enroll her in school in the district. Petitioner testified that M.W. was living in a good neighborhood in Florida that had a good, free school system. As such, M.W. did not move to New Jersey just to get a free education in the district. She was not aware of whether the Mount Olive school district was good or not.

Based upon a review of the totality of the evidence, and having had the opportunity to assess the demeanor and credibility of the witnesses, I make the following additional **FINDINGS** of **FACT**:

The residency affidavits submitted in support of Petitioner's application to enroll M.W. in school in the district, did not comply with the eligibility requirements for

enrollment. There is no competent evidence that Petitioner is the legal guardian of M.W. Further, M.W.'s parents are not incapable of providing care for M.W. due to a family or economic hardship. They claim no such hardships in their Affidavit. Indeed, M.W.'s mother is employed. There is no competent evidence that M.W. is medically unable to reside with her parents. Petitioner is not supporting M.W. gratis as evident from Petitioner's own Affidavit which states that M.W. "will continue to be supported financially by her parents" and "[h]er mother will be providing whatever she needs." It is also telling that M.W.'s mother's affidavit states that "[b]oth parents are capable of supporting" M.W. Further, the affidavits are silent as to any medical basis for Petitioner undertaking the care of M.W.

LEGAL ANALYSIS AND CONCLUSIONS

In New Jersey public schools are free for children so long as they meet certain residency requirements.

N.J.S.A. 18A:38-1 provides eligibility in two alternative ways as follows in pertinent part:

> 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;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, ... and 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 have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. ... If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. ...

For the purpose of applying subsection (a) of the statute, the regulations of the Department of Education provide that a student is domiciled in the school district when he is with a parent or legal guardian whose permanent home is located within the school district. N.J.A.C. 6A:22-3.1. Since M.W.'s parents do not have a permanent home within the district, and, since Petitioner is not the legal guardian of M.W., I **CONCLUDE** that she is not entitled to a free public education in the District under subsection (a).

Subsection (b) of the statute entitles a free education under certain circumstances to a student living with someone domiciled in a district other than a parent or guardian if that other person is supporting the student without remuneration as if the student were his or her own child. N.J.A.C. 6A:22-3.2. However, such eligibility does not exist where the parties fail to validly establish that the parent or guardian 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. N.J.A.C. 6A:22-3.2(a)1.i. I **CONCLUDE** that M.W. is not entitled to a free public education from the District under subsection (b) because there is neither a claim nor proof of a family or economic hardship.

As Petitioner has not provided any other basis whereby M.W. would be entitled to a free public education in the District, I **CONCLUDE** that M.W. has been, and continues

to be, ineligible to attend a District school, for the 200-10 school year. I further **CONCLUDE** therefore that the District is entitled to reimbursement for those days that M.W. has attended the District's school from February 5, 2010 until the Commissioner issues his Final Decision at a rate of $75 per day.

ORDER

It is hereby **ORDERED** that the Motion to Dismiss the petition is granted and the Petition is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that the District's claim for tuition is **GRANTED** and that Petitioner shall pay to the District tuition for the 2009-10 school year at a rate of $75 per school day starting from February 5, 2010, together with post judgment interest pursuant to N.J.A.C. 6A:3-1.17.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 5, 2010
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: April 5, 2010

Date Mailed to Parties: APR - 6 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

Witnesses

For Petitioner:

E.P.F.

For District:

Aaron Mizrahi, Esq. arguing the motion

Exhibits

For Petitioner:

None

For District:

R-1 Residency Affidavits of Petitioner and M.W.'s mother dated January 21, 2010 and January 19, 2010, respectively

R-2 Letter denying M.W.'s admission

R-3 Proof of Service of Notice of Motion

R-4 2009 – 2010 school year calendar

#140-10A

OAL DKT. NO. EDE 5320-05
STATE BOARD OF EXAMINERS DKT NO. 0708-146
COMMISSIONER APPEAL NO. 6-8/09A

IN THE MATTER OF THE	:	COMMISSIONER OF EDUCATION
TEACHING CERTIFICATES OF	:	DECISION
LORI LOWENSTEIN-MASE.	:	

Decided by the State Board of Examiners, June 22, 2009

For the Petitioner-Appellant, Lori Lowenstein-Mase, pro se

For the Respondent, Deputy Attorney General Cynthia Raymond Rimol

On August 17, 2009, appellant filed with the Commissioner a copy of a notice of appeal from an order of the State Board of Examiners (the Board) revoking her teaching certificates/endorsements. By letter dated August 24, 2009, the Director of the Bureau of Controversies and Disputes (the Director) notified appellant that her notice of appeal was deficient because she did not include a copy of the order/decision from which she was appealing and because she failed to provide proof that she served the notice of appeal upon the Attorney General – counsel for the Board.

On September 2, 2009, counsel for the Board submitted a list of items comprising the record of this matter and copies of said items, including a copy of the Board's decision/order of revocation. Appellant's failure to present proof of service and a copy of the order of revocation was consequently deemed cured.

Pursuant to *N.J.A.C.* 6A:4-2.7(a), the brief supporting appellant's appeal was due 20 days later – i.e., September 22, 2009, but no brief was filed with the Commissioner by that date. By letter dated December 3, 2009, the Director then extended the deadline for the filing of appellant's brief to December 21, 2009. Upon appellant's request, on January 11, 2010 a final extension to January 31, 2010 was granted, and she perfected her appeal on January 29, 2010. Respondent's brief was filed on February 9, 2010.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. *N.J.A.C.* 6A:4-4.1(a)(1). Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a)(2). Upon review of the record, Board decision, and appellate submissions in this case, the Commissioner concludes that appellant received the process that she was due. The evidence in the record supports the Board's factual findings and provides a rational basis for the Board's revocation decision. Consequently, the Commissioner sees no reason to overturn same.

As to the penalty imposed by the Board upon respondent, the Commissioner rejects the contention that a more lenient sanction than revocation of appellant's teaching certificates is warranted under the circumstances of this case. First, appellant was convicted of at least one crime, *i.e.,* theft by deception (*N.J.S.A.* 2C:20-4a), that requires disqualification from public school employment, pursuant to *N.J.S.A.* 18A:6-7.1(c)(2). Indeed, "forfeiture of public employment in the State of New Jersey for life" was a term of the plea agreement appellant entered into on May 7, 2008. Revocation of appellant's certificates can be viewed as a

reasonable measure to impede appellant's return to employment in a primary or secondary school setting.

Second, appellant's argument – that she should not be stripped of certificates which she validly obtained – ignores the nature and severity of her subsequent conduct. She essentially stole the "speech language specialist" certificate of another individual, showing herself unworthy of retaining the previously acquired professional certificates which allow individuals to educate and serve as role models to children and youth.

Similarly, appellant's argument that revocation is too harsh a penalty for a teacher who served in good standing for many years must be rejected. Unfitness for a position may be shown by a series of incidents, or just one – if sufficiently flagrant. *See, e.g. Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd.*, 131 *N.J.L.* 326 (E&A 1944). The Commissioner cannot find fault with the Board's determination that appellant's theft of another teacher's credentials is sufficient to show unfitness to teach and to justify revocation of her certificates/endorsements.

In summary, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners. Accordingly, it is affirmed for the reasons set forth therein.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/10

Date of Mailing: 5/13/10

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

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
LORI LOWENSTEIN-MASE	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 0708-146

At its meeting of October 16, 2008, the State Board of Examiners reviewed a Judgment of Conviction forwarded by the Elizabeth School District indicating that on May 7, 2008, Lori Lowenstein-Mase pled guilty to Wrongful Impersonating (Identity Theft) and Theft By Deception-False Impression. On August 1, 2008, Lowenstein-Mase was sentenced to five years probation, fined, ordered to pay restitution and ordered to forfeit her public employment. As a result of her conviction, Lowenstein-Mase was also disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Lowenstein-Mase currently holds a Teacher of Elementary Education certificate, issued in March 1988 and a Teacher of the Handicapped certificate, issued in August 1991. Upon review of the above information, at its January 13, 2009 meeting, the State Board of Examiners voted to issue Lowenstein-Mase an Order to Show Cause.

The Board sent Lowenstein-Mase the Order to Show Cause by regular and certified mail on January 14, 2009. The Order provided that her Answer was due within 30 days. Lowenstein-Mase filed her response on February 13, 2009. In that Answer, Lowenstein-Mase admitted that she had worked under a speech therapist certificate that belonged to someone else from November 2005 to March 2006 and that she had been prosecuted for the same conduct. (Answer, ¶¶ 4, 5). Lowenstein-Mase stated that she suffered from a mental illness, bipolar disorder with ADHD, which she believed contributed to her wrongful actions. (Answer, ¶ 6.) She added that she was making restitution according to her criminal plea agreement and claimed that revoking the certificates that she validly earned and never misused would be an unfair

penalty. (Answer, ¶ 8.) She noted that she "only used another's certificate for five months of my roughly 27 year teaching career" and that, although she could never again teach in a public school, retaining her certificates would help her to find a job. (Answer ¶¶ 8, 9.) In addition to her certification, Lowenstein-Mase submitted a brief in support of her position which argued that revocation was not required in this case. (Answer Brief, pp. 1-3.) She further noted that if the Board of Examiners felt a penalty was warranted, suspension of her certificates was more appropriate since it "sends a powerful message yet is not so punitive in nature that [I] cannot start over again and market [my] skills and experience as a special education teacher." (Answer Brief, p. 4.)

Thereafter, pursuant to *N.J.A.C.* 6A:9-17.7(e), on March 3, 2009, the Board of Examiners sent Lowenstein-Mase a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute and Lowenstein-Mase was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder. It also explained that upon review of the charges against her and the legal arguments tendered in her defense, the State Board of Examiners would determine if the conduct underlying her conviction and resulting disqualification warranted action against her certificates. Thereupon, the Board of Examiners would also determine the appropriate sanction, if any. Lowenstein-Mase was also provided the opportunity to appear before the Board and testify on the sanction issue. On March 31, 2009, her counsel indicated that Lowenstein-Mase would rely upon the brief that she had submitted in response to the Order to Show Cause. (Hearing Response, p. 1.)

The threshold issue before the State Board of Examiners in this matter, therefore, is whether the conduct underlying Lowenstein-Mase's conviction and subsequent disqualification

constitute conduct unbecoming a certificate holder. At its meeting of May 11, 2009, the State Board of Examiners reviewed the charges and papers Lowenstein-Mase filed in response to the Order to Show Cause. After review of her submissions, the Board of Examiners determined that no material facts related to Lowenstein-Mase's offense were in dispute since she admitted that she had pled guilty to the offenses charged and had been sentenced accordingly. Thus, the Board of Examiners determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9-17.7(h). It is therefore ORDERED that the charges in the Order to Show Cause are deemed admitted for the purpose of this proceeding.

The State Board of Examiners must now determine whether Lowenstein-Mase's conviction and disqualification, predicated on the same offense set forth in the Order to Show Cause, provide just cause to act against her certificates pursuant to *N.J.A.C.* 6A:9-17.5. The Board finds that they do.

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. Lowenstein-Mase's acts of identity theft are inexcusable for any individual, teacher or not. While she may have been an exceptional teacher in the classroom, she has not demonstrated like behavior outside that arena. The Commissioner has long held that teachers serve as role models for their students. "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.

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). In this instance, not only did Lowenstein-Mase use another teacher's certificate, she even went so far as to have the Social Security Administration change that teacher's Social Security number to her own so she could further her fraud. This is not "role-model" behavior, nor is it behavior that can be excused by reliance on a mental illness diagnosis after-the-fact.

Notwithstanding Lowenstein-Mase'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 Lowenstein-Mase has begun paying her court-ordered restitution, while a step in the right direction, has no bearing on the decision the Board of Examiners must make with regard to her certification.

Lowenstein-Mase argues that although she cannot teach in public schools because of her disqualification, she should be allowed to retain her certificates since her plea deal did not require their revocation and her behavior occurred over only five months of a 27 year teaching career. In enacting the Criminal History Review statute, *N.J.S.A.* 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be dangerous. Individuals convicted of a crime that involves theft squarely within this category. The strong policy statement on the part of the Legislature, set forth in *N.J.S.A.* 18A:6-7.1(b), also offers guidance to the State Board of Examiners as to the appropriate sanction in this

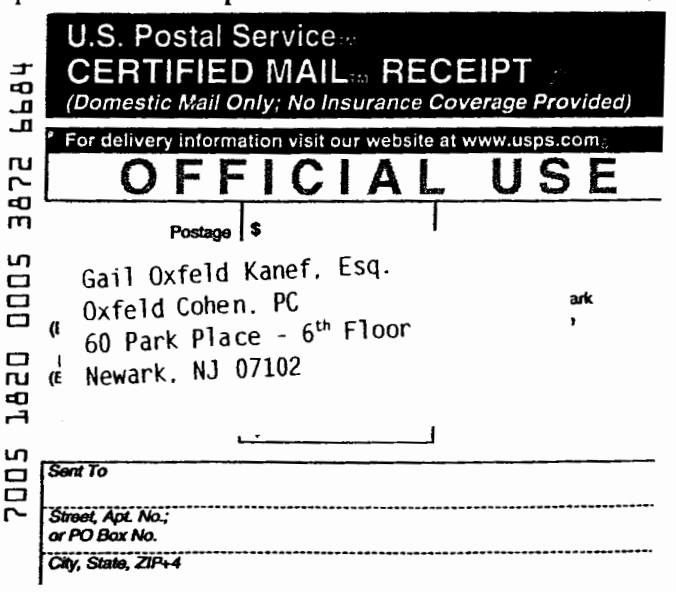
matter. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. Thus, because the Legislature considers Lowenstein-Mase's offense so significant, the State Board of Examiners believes that the only appropriate sanction in this case is the revocation of her teaching certificates.

Accordingly, on May 11, 2009, the Board of Examiners voted to revoke Lori Lowenstein-Mase's Teacher of Elementary Education and Teacher of the Handicapped certificates. On this 22nd day of June 2009 the Board of Examiners voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Lowenstein-Mase's certificates be effective immediately. It is further ORDERED that Lowenstein-Mase return her 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: 6/25/09
Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-28.

RRH:MZ:



,141-10M

OAL DKT. NO. EDU 6722-05
AGENCY DKT. NO. 194-8/05

TATIANA CHARAPOVA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Petitioner asks for reconsideration of a decision issued by the Commissioner on June 20, 2006, reversed by the State Board of Education on August 1, 2007, and affirmed by the Appellate Division of Superior Court on July 21, 2008. The State Supreme Court denied certification on October 20, 2008. The ultimate disposition of the case was dismissal – based upon untimeliness – of petitioner's claim that she was not rehired after a reduction in force (RIF) due solely to her age and national origin. It was the former State Board of Education that dismissed Charapova's petition, but – since the State Board no longer performs an appellate function – it now falls to the Commissioner to respond to petitioner's motion. See *N.J.S.A.* 18A:6-9.1 and 9.2.

N.J.A.C. 6A:3-1.15(b) allows applications for reconsideration of decisions, providing that they are filed within ten days of the issuance of said decision. Since the rulings of the forums which reviewed and adjudicated petitioner's case were all made in 2008, the instant

application is clearly out of time. Moreover, the motion fails to meet the standards outlined in *N.J.A.C.* 6A:3-1.15(b)(2).

Petitioner has not, in accordance with *N.J.A.C.* 6A:3-1.15(b)(2)(ii), presented any material "newly-discovered evidence" that was not previously discoverable by due diligence. No newly ascertained misrepresentations or misconduct by respondent's representatives – which could not have been previously known – are now presented by petitioner, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(iii).[1] Indeed, petitioner's current motion papers track very closely the documents that supplemented the petition she submitted on September 25, 2008.

Finally, no new developments in legal precedent are offered by petitioner in support of her motion, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(iv), and no cognizable "mistakes" – as referenced in *N.J.A.C.* 6A:3-1.15(b)(2)(i) – have been shown to have been made by respondent or the triers of fact in the various forums which have reviewed this case. Accordingly, the Commissioner denies petitioner's motion for reconsideration of the dismissal of her petition, which alleged that discrimination was the improper basis for the 2005 non-renewal of her employment contract with respondent.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/10

Date of Mailing: 5/13/10

[1] A substantial portion of petitioner's motion refers to alleged improprieties by her union representatives and counsel. Such allegations cannot support claims against the respondent school district.

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

April 8, 2010

Tatiana Charapova, ***pro se***
206 Onizuka Court,
Somerset, NJ 08873
(908) 812 - 8247
cgm35535@aol.com

2010 APR 12 A 11:04

OFFICE
OF THE COMMISSIONER
OF EDUCATION

Bret Schundler
Acting Commissioner
Department of Education
State of New Jersey
PO Box 500
Trenton, NJ 08625-0500

Dear Commissioner Schundler:

Kindly accept this letter brief as notification of my appeal of the matter begun against the Edison Township Board of Education June 2, 2005 to the Board of Education President Mr. Barry Miller. (Exhibit 1) Assistant Superintendent Dr. Maryann Banks' letter on June 14, 2005 was notification of my health benefits have being terminated July 2, 2005. (Exhibit 2)

While I was encouraged by then Superintendent Carol Toth's change in my status on Ms. Gina Foxx's final evaluation of me from Not Recommended to Recommended, I did not then understand why if I was on the RIF list and now Recommended to be rehired I would have my insurance terminated. (Exhibit 3)

The Edison Teacher's Education Association President Myron Fouratt's actions were confusing to say the least. Mr. Fouratt appeared to be removed from my situation even at one time falling asleep as was speaking of the harassment I experienced under Ms. Foxx. The President of ETA said that he couldn't help me because there were no laws in Edison to protect me as non tenured teacher, and non citizen during that time. After my conversation with Mr. Tarr Mr. Fouratt over sudden provided me with these papers and warned me not to open my mouth because then I would be done in NJ. (Exhibit 4)

As you will recall the NJEA did not provide representation in moving my matter forward to the Commissioner of Education; I was told by Mr. Mellk to go to Civil Rights and by Mr. Klausner to EEOC. I was confused; my colleagues encouraged me to move forward on my own. All these confusions caused me to take further action myself with letters to then Commissioner William Librera (stamped date of receipt July 7, 2005) and to Acting Governor Richard J. Codey (response July 8, 2005). (Exhibit 5)

In my 25 year teaching career I have always been successful. In Edison my two prior principals and my ESL supervisor were more than satisfied with my teaching and the results of my students. Even at this time I cannot imagine how this could have been permitted to occur.

I am not an attorney but I know that Mr. Mellk has not been consistent in his advice or in his representation of me. Mr. Mellk never requested any papers and it has come to my attention that the dates of August 5 and 22 are being used by Mr. Mellk and Ms. Barrone. Since I continue to be very confused and continue to be unsure of Mr. Mellk's opinion

since he has failed to contact me despite my continued attempts; I have decided that I would once again ask for you Commissioner to reconsider my case.
It continues to be my belief that I was never provided with a notice of termination nor the reasons for such a determination; in point of fact my status was changed by Superintendent Toth to Recommended and despite the fact that not one but two openings occurred I was not recalled from the RIF list. (Exhibit 6)
On April 19, 2005 I received a Reduction in Force notice, which is defective notice Edison Board of Education gives for purposes of N.J.A.C. 6A:3-1.3(i) of the termination of my employment. As a matter of Due Process RIF notice issued to comply with N.J.S.A. 18A:27-10 cannot constitute notice of a board action pursuant to N.J.A.C. 6A:3-1.3(i). (Exhibit 7)
Former Commissioner Davy made her decision about RIF and my timely Petition on June 20, 2006 (Exhibit 8).
In correspondence with Kathleen Duncan Director of Controversies and Disputes, Ms Duncan stated that the issue of my letters to Governor Cody and Commissioner Librera being considered as the date of the Appeal would be your determination. Ms. Duncan did state that these letters were not among the documents considered in my Appeal of Judge Dubin's decision to dismiss my case because it not filed in a timely manner. Kindly accept my apologies for failing to provide these documents to Department of Education. The entire ordeal has been almost crippling for me. While I have continued to teach as an adjunct professor in county colleges, I am an educator and it is my desire to continue to work for the Edison community with children.
I have enclosed exhibits for your review. I will be more than happy to provide any other documents that your office requests.

Sincerely,

T. Charapova

Tatiana Charapova

EXHIBITS #

1. June 2, 2005
   Letter to Mr. Barry Miler
   President of Edison Township Board of Education
2. June 14, 2005
   Assistant Superintendent
   Dr. Maryann Banks' Response
3. April 11, 2005
   Board of Education
   Rice Letter
4. May 25, 2005
   Carol Toth
   Final Evaluation changed to Recommended
5. July 8, 2005
   Acting Governor
   Richard J. Codey's Respond
   July 7, 2005 My letter to Commissioner
   William Librera
   July 8, 2005 Respond from the
   Commissioner of Education
6. August 22, 2005
   Board of Education Agenda
   September 2, 2005
   My letter to the Edison ETA Mr. Fouratt
7. April 19, 2005
   Carol Toth
   April 19, 2005
   Reduction in Force & Signature page
8. Former Commissioner Davy decision about RIF and my timely Petition on June 20, 2006

#142-10

OAL DKT. NO. EDU 6385-09
AGENCY DKT. NO. 155-7/09

COLLEEN K. COVERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, 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 determines that he cannot approve the parties' proposed settlement as currently configured. Specifically, term number 5 of this agreement – in pertinent part – specifies "In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Commissioner for a willful violation of any term of this Agreement. In the event that either party is required to commence an action in law or equity to enforce its rights under Agreement and it prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attorneys fees and costs in addition to any damages which may be recoverable." It must be emphasized that awarding of penalties, damages or attorney fees as a consequence of one of the parties' breach of this agreement is outside the jurisdictional

purview of the Commissioner of Education and must, rather, be sought from the Superior Court of New Jersey. Consequently, in order for the Commissioner to consider approving the parties' proposed agreement, term number 5 must be eliminated or reconfigured.

Accordingly, this matter is hereby remanded to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/17/10

Date of Mailing: 5/17/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6385-09

AGENCY DKT. NO. 155-7/09

COLLEEN K. COVERT,

Petitioner,

v.

BOARD OF EDUCATION
OF THE BOROUGH OF RUMSON,
MONMOUTH COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Dennis McKeever, Esq. for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: April 21, 2010 Decided: April 21, 2010

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 20, 2009, 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.

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.

April 21, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

/bdt

SETTLEMENT AGREEMENT

This settlement agreement ("Agreement") is being entered into between Petitioner, Colleen K. Covert ("Ms. Covert"), and Respondent, Rumson Board of Education ("Board"), with regard to Colleen K. Covert v. Rumson Board of Education & Kathleen Dec, Intervenor, OAL Dckt. No.: EDUOA 06385-2009S, Agency Ref. No.: 155-7/09 having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. Effective April 1, 2010, Ms. Covert will be returned to a full-time secretary position. Ms. Covert shall receive her pro-rated sick and vacation days for the period of time that she was a part-time secretary. Ms. Covert agrees to waive any claim to back-pay as part of this settlement. The parties acknowledge that as of April 1, 2010 Ms. Covert will have 14 years, 0 months, 11 days seniority in the position of secretary. It is expressly understood by and between the parties that Ms. Covert will be initially assigned to the Child Study Team. The parties acknowledge that the Board, at all times, retains the right to reassign Ms. Covert.

2. The consideration described in Paragraph 1 above shall constitute the entire monetary settlement of the matters encompassed by this Agreement.

3. In exchange for the promises and undertakings of the Respondent, Rumson Board of Education, as set forth in Paragraphs 1 and 2 above, Petitioner agrees:

RECEIVED
2010 APR 21 P 2: 20
STATE OF NJ
OFFICE OF ADMIN LAW

A. To execute a General Release and Waiver ("General Release") to the Respondent in the form annexed. Petitioner expressly acknowledges that this Agreement and the General Release and Waiver are intended to extinguish and to waive all claims which she may have against any person or entity identified as a releasee in the General Release and Waiver

resulting from anything which has happened up to the date of the execution of the General Release and Waiver and which were or could have been asserted, including those claims unknown to her and claims for medical expenses, attorneys fees and costs. Petitioner hereby acknowledges that the execution of this Agreement and the General Release and Waiver which accompanies it shall absolutely bar any such claim, action or suit against any releasee identified in the General Release and Waiver. This release specifically excludes any pension based or workers compensation claims. Ms. Covert is unaware of any factual basis for such claims.

B. Petitioner agrees and promises to cause her attorney to file a Stipulation of Dismissal with Prejudice with respect to her claims and causes of action with the Commissioner of Education in this action.

4. All documents and information obtained during discovery in this case shall be deemed "confidential." The parties and their counsel agree that no such documents or information shall be provided or disclosed to or shared with any third party for any purpose whatsoever. This provision shall not apply to third parties and to documents previously filed with the Commissioner of Education, but this shall not permit Petitioner or Petitioner's counsel to provide copies of such documents to third parties. Petitioner and her counsel further agree that none of them will use or will permit to be used in any other action or matter any information about the Respondents in this action which they obtained as a result of, during the course of or in connection with their involvement in this action. Petitioner shall not voluntarily assist third parties in the pursuit of litigation against Respondent.

5. The parties agree that any breach of any obligation under this Agreement will constitute a breach of this Agreement. In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Commissioner for a willful violation of any term of this Agreement. In the event that either party is required to commence an action in law or equity to enforce its rights under this Agreement and it prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attomeys fees and costs in addition to any damages which may be recoverable.

6. It is understood that neither the execution of this Agreement nor any other action taken by the Respondent in connection with this settlement constitutes an admission by the Respondents or any other person or entity identified in the General Release and Waiver as a releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to the employment of Petitioner was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Respondent specifically disclaims any liability to Petitioner or any other person. The parties have entered into this Agreement solely to compromise disputed claims. No findings of any kind have been made or issued by the Commissioner on the merits of the claims in this action and neither party purports to be the prevailing party in this action.

7. The parties to the within lawsuit agree not to make disparaging statements concerning each other or to defame each other in any manner to any person or entity. The parties also agree not to authorize any person or entity to make any disparaging statements about each other to any person or entity.

8. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed to be the drafter or

provider of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party.

9. This Agreement and the General Release and Waiver referred to herein set forth the entire agreement between Petitioner and the Respondents. This Agreement supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

10. Petitioner acknowledges that she has consulted with her attorney regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; that the terms of this Agreement and the General Release and Waiver have been explained to her by her attorney; and that she has represented to her attorney that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Petitioner has also acknowledged that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

11. Any notice or other communication under this Settlement Agreement shall be in writing and shall be considered given when mailed by regular mail or delivered personally, to the parties at the following addresses:

To Petitioner:

Keith Waldman, Esq.
Selikoff & Cohen
700 East Gate Drive
Mount Laurel, New Jersey 08054

To Respondents:

Dennis McKeever, Esq.
Lindabury, McCormick, Estabrook
& Cooper
53 Cardinal Drive, P.O. Box 2369
Westfield, New Jersey 07091

or at such other address as a party may specify by notice to the other.

14. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Settlement Agreement.

15. Conditioned upon the entry of an initial decision and the Commissioner's approval of this Settlement Agreement without modification, the parties will submit a stipulation of dismissal with prejudice and without costs.

16. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals.

The foregoing terms and provisions are hereby agreed to and accepted:

Dated: _____

_____
Colleen K. Covert

Dated: _____

_____
Keith Waldman, Esq.
Selikoff & Cohen
Attorney for Petitioner

Rumson Board of Education

Dated: 3·26·2010

By: _____

Dated: _____

_____
Dennis McKeever, Esq.
Lindabury, McCormick, Estabrook & Cooper
Attorney for Respondent

14. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Settlement Agreement.

15. Conditioned upon the entry of an initial decision and the Commissioner's approval of this Settlement Agreement without modification, the parties will submit a stipulation of dismissal with prejudice and without costs.

16. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals.

The foregoing terms and provisions are hereby agreed to and accepted:

Dated: March 16, 2010

Colleen K. Covert

Dated: 4-12-10

Keith Waldman, Esq.
Selikoff & Cohen
Attorney for Petitioner

Rumson Board of Education

Dated: _____

By: _____

Dated: 4-12-10

Dennis McKeever, Esq.
Lindabury, McCormick, Estabrook & Cooper
Attorney for Respondent

#144-10E

OAL DKT. NO. EDU 4187-10
AGENCY DKT. NO. 83-4/10

ANTHONY W. BROCCO, II,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

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) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ, for the reasons well and thoroughly set forth in the recommended Order, 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.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons expressed therein, and this matter shall continue at the OAL with expeditious proceedings on the merits as contemplated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/10
Date of Mailing: 5/20/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 4187-10
AGENCY DKT. NO. 83-4/10

ANTHONY W. BROCCO, II,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,
Respondent.

Matthew B. Wieliczko, Esq., for petitioner (Zeller & Wieliczko, attorneys)

Paul H. Green, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: May 3, 2010 Decided: May 4, 2010

BEFORE **DENNIS P. BLAKE,** ALJ:

STATEMENT OF THE CASE

The parties agree with the accuracy of the transmittal forwarded to the Office of Administrative Law dated April 28, 2010, which reads as follows:

Emergent relief requested. Petitioner seeks immediate enforcement of rights under settlement approved by commissioner. Matter deemed appropriate as a contested case pursuant to N.J.A.C. 6A:3-3.1(b) by virtue of both subject matter and prior determination of remand by Superior Court.

PROCEDURAL HISTORY

On September 10, 2009, the Commissioner of Education approved a Settlement Agreement which was embodied in an OAL Decision Approving Settlement dated July 2, 2009. Petitioner filed a verified complaint and order to show cause in Superior Court on February 16, 2010. On April 12, 2010, Hon. Mary Colalillo, JSC, granted respondent's motion to transfer the matter to the Commissioner of Education. On April 28, 2010, the Commissioner transmitted the petition to the Office of Administrative Law. The matter was scheduled for hearing on May 3, 2010, heard on that date and the record closed.

FACTUAL AND LEGAL DISCUSSION

Petitioner seeks to enforce two provisions of the Stipulation of Settlement which was approved by the Commissioner of Education on September 10, 2009. This Stipulation had the effect of withdrawing tenure charges filed against the petitioner and reinstating him with no further action to be taken. Paragraph three of the Settlement reads as follows:

Reassignment

Upon approval of this settlement by the Commissioner, the Board shall immediately reinstate the respondent and reassign respondent to a teaching position within the scope of his certificate and endorsement at the District's Beck Middle School; Provided, however, that in the event a staff position vacancy within the scope of respondent's certificate and endorsement occurs at the District's Rosa Middle

> School prior to September 1, 2009, then respondent will be assigned to such position instead. (See petitioner's petition to enforce rights Exhibit A, page 2).

Paragraph five embodies the second issue to be addressed in this hearing. That reads as follows:

> **Applications for extra curricular assignments**
>
> Upon approval of this agreement by the Commissioner, and continuing thereafter, respondent shall have the same right as all other district staff to apply for and potentionally be appointed to any coaching or extra-curricular positions in the District. The Board makes no guarantee or representation that respondent will be appointed to any extra-curricular position for which he makes application. (Ibid at page three)

Petitioner argues in this petition that respondent violated the settlement agreement by failing to appoint him to an alleged vacancy that occurred at the Rosa Middle School prior to September 1, 2009. Petitioner was not advised of the existence of this alleged vacancy prior to September 1, 2009, and alleges that he should have been and, further, that the assignment should have been his. However, the settlement document was not approved by the Commissioner of Education until September 10, 2009, ten days after the operative day for the reassignment to Rosa Middle School. Thus, I **FIND** that a question of fact exists with respect to the ability of respondent to assign petitioner to any alleged vacancy at Rosa Middle School at a time beyond the operative date noted in the settlement document. Additionally, respondent argues that a vacancy did not existence for a position within the scope of petitioner's certificate. It argues that it merely effected an intra-school transfer between two teachers which did not result in a vacancy. Respondent argues that a vacancy would have been created only if a teacher requested reassignment or resigned. Here, respondent argues that it merely transferred two teachers at Rosa, both of whom remain on Rosa's staff. Based on these submissions by counsel, I **FIND** that a question of fact does exist with respect

whether or not an actual vacancy did occur within the time parameters set forth in the settlement agreement.

With respect to the application for extra-curricular assignments, petitioner argues that the respondent has acted in bad faith in refusing to appoint petitioner to any extra-curricular assignment, even a voluntary, no-pay assignment. Petitioner argues that such a refusal violates the settlement as it deals with such extra-curricular assignments. However, respondent points out that it is within its rights under the settlement agreement since the section dealing with applications for extra-curricular activities concludes,; "The Board makes no guarantee or representation that respondent (sic) will be appointed to any extra curricular position for which he makes application."

The legal standard for the issuance of an Emergent Relief Order as requested by petitioner in this matter is covered by N.J.A.C. 1:6A-.12.1(e) which would grant petitioner emergent relief only if the following criteria are satisfied:

1.) The petitioner will suffer irreparable harm if the requested relief is not granted;
2.) The legal underlying the petitioner's claim is settled;
3.) The petitioner has a likelihood of prevailing on the merits of the underlying claim;
4.) When the equities and the interests are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In this matter, petitioner argues that he will suffer irreparable harm if the settlement agreement is not enforced. He bases this on two arguments: 1. That he is entitled to an appointment to the allegedly vacant position at Rosa Middle School, and 2. respondent has acted in bad faith in not assigning him to extra-curricular activities. Even assuming that petitioner was entitled to an appointment to the Rosa Middle School, he has failed to establish in any way that he has suffered irreparable harm by

not getting that assignment. He acknowledges that he is working full time within the scope of his certificate. Thus, he has not suffered any financial loss. Moreover, he has not established in any fashion any other deprivation that stems from his placement in another building. Thus, he clearly has failed to prove irreparable harm from the continuation of his assignment at the Beck Middle School.

With respect to whether or not petitioner's claim for relief as sought in this petition is settled, reference to the lack of proof of irreparable harm, the question of the effective date of the settlement agreement and the lack of a guarantee of extra-curricular appointments makes it clear that his legal right to any such relief is not settled. Thus, prongs two and three of the emergent relief standard have not been established, since the same evidentiary issues prevent a finding that he is likely to prevail on the merits of the underlying claim. Lastly, I **FIND** that petitioner has not established that when the equities and the interest of the parties are balanced in this matter that he will suffer greater harm than the respondent. Indeed, at this hearing, he has not established any harm that he is suffering other than his preference for working at another building within the district.

CONCLUSIONS OF LAW

Based on the foregoing, I **CONCLUDE** that petitioner's request for emergent relief in this matter must be denied. However, based on petitioner's argument that without a ruling on the merits in this matter within the immediate future there will be no resolution to his case prior to the 2010/2011 school year, I request that the clerk's office schedule a hearing in this matter as soon as possible.

ORDER

I hereby **ORDER** that petitioner's request for Emergent Relief in this matter is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (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.

May 4, 2010

DATE

DENNIS P. BLAKE, ALJ

/mamf

EXHIBITS

For petitioner:

P-1 Tenure charge dated September 16, 2008

For respondent:

A OAL Decision June 30, 2009
B Decision of the Commissioner
C Commissioner's reply to Order to Show Cause
D Action Agenda December 18, 2007
E Action Agenda January 27, 2009
F Action Agenda May 26, 2009
G Action Agenda May 26, 2009
H Action Agenda June 23, 2009
I Action Agenda July 28, 2009
J 2009-2010 School Calendar
K Special Action Agenda September 8, 2009
L Action Agenda September 22, 2009
M E-mail dated August 26, 2009
N E-mail dated September 21, 2009

WITNESSES

For petitioner:

NONE

For respondent:

NONE

#145-10

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SANTO DAVID LINTON, CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY.	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

In March 2010, the petitioning charter school served an Order to Show Cause upon respondent, requiring him to show cause why an order should not be entered suspending his certificate – pursuant to *N.J.S.A.* 18A:26-10 – for resigning his position as a full-time social studies teacher without providing the notice required by his contract. 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.

May 20, 2010

AGENCY DKT. NO. 50-3/10

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SANTO DAVID LINTON, CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY.	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Brenda C. Liss (Riker, Danzig, Scherer, Hyland and Perritti, LLP)

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on March 17, 2010, by way of an Order to Show Cause served by petitioner (Central Jersey College Prep Charter School) upon respondent (Santo David Linton), requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with petitioner. By notice dated March 18, 2010, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent, and directed respondent to answer within 20 days.

No answer having yet been received, the Bureau sent respondent a final notice on April 13, 2010 – via regular and certified mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The notice sent by certified mail was returned by the postal service as unclaimed; however, the notice sent by regular mail was not returned, and no answer to the Order to Show Cause has been filed as of this date.

Having reviewed the affidavit submitted by the petitioner in this matter – which states that respondent resigned mid-year on one day's notice, with no prior indication that such action was contemplated and no provision for continuation of student instruction until a replacement was found – and noting that respondent has not denied the allegations therein, the Commissioner deems such allegations deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/10
Date of Mailing: 5/20/10

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

146-10

A LITTLE CLASS, INC. AND KIM NOTTE, :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD EDUCATION, :

RESPONDENTS. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners challenged the respondent Board's decision not to renew a preschool program contract with A Little Class, Inc., as well as the Department's approval of the Board's non-renewal decision. The Board moved for summary decision, asserting that it had facilities to educate the thirty Neptune preschool children previously attending A Little Class's program and that it could do so in a more fiscally and administratively efficient manner.

The ALJ found that: there were no genuine issues of material fact, and the matter was ripe for summary decision; the Board's decision to non-renew petitioners' contract was based upon legitimate financial and administrative considerations and complied with the mandates of the School Funding Reform Act (SFRA) and its implementing regulations; there is substantial evidence to support the findings on which the non-renewal decision was based; accordingly, the respondent's decision was not arbitrary, capricious or unreasonable; and the Department appropriately based its approval on the Board's demonstrated ability to serve all of its preschool children in district facilities and the resulting savings in preschool education aid. The ALJ granted the Board's motion for summary decision and dismissed the petition.

The Commissioner concurred with the ALJ, finding no cause to disturb either the Board's determination not to renew the contract at issue or the Department's approval thereof, and adopted the Initial Decision of the OAL as the final decision in the matter.

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

May 20, 2010

146-10

OAL DKT. NO. EDU 8132-09
AGENCY DKT. NO. 135-6/09

A LITTLE CLASS, INC. AND KIM NOTTE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE 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 petitioners' exceptions and the replies of the Neptune Township Board of Education (Board) and Department of Education (Department), each duly filed in accordance with *N.J.A.C.* 1:1-18.4.

In their exceptions, petitioners urge the Commissioner to reject the decision of the Administrative Law Judge (ALJ) on grounds that it: 1) upholds, without explanation, a Department determination based on palpably erroneous factual conclusions as to cost efficiency; 2) reduces the quality and diversity of preschool education in Neptune in violation of applicable law; 3) improperly relies on evidence beyond the scope of the permissible record; and 4) creates a "cost to absorb" test that is neither justified by regulation nor relevant to the Department determination under review. (Petitioners' Exceptions at 1-2)

Specifically, petitioners contend that the decision to terminate their contract cannot be found to be supported by sufficient credible evidence in the record so as to satisfy

the standard (correctly) set forth by the ALJ, reiterating their consistent stance that the Department's decision affirming the Board's action was fatally flawed because it relied on "information unrelated to reality" – that is, on a comparison of the respective State aid subsidies payable for in-district versus private providers, which it "mistook" for the per pupil costs of Neptune's program versus that of petitioners – rather than on actual or budgeted costs. (Petitioners' Exceptions at 2-5) They further renew their contention that the only reasonable conclusion to be drawn from the sole actual cost figure on record for the Board's program – the 2007-08 per pupil cost of $16,701.00 as stated in the Department's School Report Card – is that petitioners can educate Neptune's preschoolers more economically and efficiently than can the Board. (*Id.* at 5-6)

Petitioners additionally reiterate that termination of their contract is contrary to the spirit of regulations emphasizing high quality education through competition and use of a mixed delivery system, and that it will, in fact, reduce the quality of education available to Neptune preschool students. Asserting that the Board, the Department and the ALJ "have all taken the position that elimination of a great education is acceptable because the district can provide an education that, while inferior, is good enough," petitioners proffer that the Department's decision does not even reference quality of education – notwithstanding that their program undisputedly scored higher (6.4 out of a possible 7.0) than the Board's (5.67 out of 7.0) on the 2008-09 Early Childhood Environment Rating Scale (ECERS-R) evaluation representing the average of 43 items indicative of the quality of education – and they urge wholesale rejection of any implication that "a preschool education only needs to meet a certain [arbitrarily selected] standard of quality above which differences in quality can be ignored." (Petitioners' Exceptions at 6-7)

Petitioners also object, as they did before the ALJ, to any consideration being accorded to either the Department's statements in the present proceeding regarding program quality or the Board's late-coming representation – which was not before the Department when it rendered its decision – that the only additional costs associated with Board absorption of the students previously attending petitioners' program would be the salaries and benefits of two teachers and two paraprofessionals, estimated at $200,000 or $6,666.67 per pupil. According to petitioners, the Board's figure ignores the costs of transportation, meals, supplies and additional facility burdens, and is "nothing more than an arbitrary number" found nowhere in the record and created by the Board "as a last ditch effort to support the unsupportable." Petitioners contend that the Department's decision approving the Board's action rested solely on a comparison of State aid figures and must be reviewed as such, and that the Initial Decision should not have "improperly expanded the record, created its own rationale and rubber stamped the arbitrary, capricious and unreasonable termination of [petitioners'] contract." (Petitioners' Exceptions at 7-9)

Finally, petitioners assert that the "cost to absorb" standard embodied in the Initial Decision is nowhere to be found in applicable law, and that acceptance of it would also be counterproductive as a matter of policy. Petitioners explain that adding a small group of students to a large, high-cost facility may, indeed, have a minimal impact on the facility's overall costs; however, if "cost to absorb" is the measure by which such changes are judged, smaller facilities can one by one be consumed by a larger facility even if comparison of their actual budgets reveals that the smaller schools are more efficient and that greater savings would result from elimination of the larger school. Ignoring actual costs per pupil in favor of comparisons based on the cost to a large in-district school of consuming a private provider or

smaller school, petitioners opine, will increase the ultimate cost of preschool education while simultaneously eliminating school choice. (Petitioners' Exceptions at 9-10)

In reply, the Board counters that the rules governing nonrenewal of preschool program contracts at *N.J.A.C.* 6A:13A-9.3 provide solely for the Board's written notice of nonrenewal and the provider's written notice of dispute therewith – with additional information to be submitted only if requested by the Department – and make no provision for establishment of a record through discovery, production of documents, hearings or other like procedures – clearly contemplating that such a record, if necessary, will be developed on appeal to the Commissioner. The Board further asserts that the record thus developed supports its determination to terminate petitioners' contract on grounds of costs savings, and is devoid of any papers, discovery or affidavits supporting petitioners' position that the referenced difference in ECERS-R scores evidences a reduction in the quality of education; in this latter regard, the Board additionally notes that no affidavits or other competent evidential materials were offered to challenge the affidavit of Director of Early Childhood Education Ellen Wolock attesting that both petitioners and the Board provided quality programs and that the Board's fiscal practices and classroom quality were sound. Finally, the Board contends that petitioners do not identify the regulation(s) the ALJ purportedly failed to apply in accepting the Board's "cost to absorb" argument, nor do they cite the authorities on which they rely for their own position as required by *N.J.A.C.* 1:1-18.4(b)(3) when taking exception to an ALJ's conclusions of law. (Board's Reply at 1-4)

The Department, in turn, reiterates that its determination to affirm the Board's decision not to renew petitioners' contract cannot be held arbitrary and capricious, since the record on which it was based – itemized in full in the Certification of Ellen Wolock

(Exhibit R-3) – provided no justification for denial of the Board's request and demonstrated to the Department's satisfaction that: 1) petitioners' and the Board's programs were both of sound quality, 2) there was ample in-district classroom space within which to serve the 30 students at issue, and 3) the Board could serve these students more efficiently based on statutory Preschool Education Aid (PEA) amounts. [1] (Department's Reply at 2-4) In this latter regard, the Department reiterates that petitioners persist in misunderstanding the School Funding Reform Act of 2008 (SFRA), *P.L.* 2008, *c.* 260, which prescribes that a board is entitled to PEA in an amount determined by multiplying standardized per pupil amounts derived from actual budgets submitted by in-district programs and private providers – in this instance, $12,092 in 2009-10 for all Monmouth County in-district programs and $13,593 for all Monmouth County private providers – by the projected general education preschool enrollment, and provides no mechanism for recoupment based on individualized costs other than adjustment in the subsequent budget year to reflect actual enrollment as of October 15 of the year for which aid is given; thus, if the Board educated petitioners' 30 students in-district, the State would save approximately $45,030. (*Id.* at 4-6)

Upon review, the Commissioner is unpersuaded by petitioners' exceptions and adopts the Initial Decision as set forth below.

Initially, the Commissioner rejects petitioners' contention that the ALJ decided this matter on an improperly expanded record. Petitioners assert that their burden lies solely in refuting the reasons for approval specifically stated in the Department's written letter to the Board, so that the Department and Board cannot be permitted to build a record on appeal in an

[1]The Department also asserts that it did not present an after-the-fact supplement to its reasoning upon review of the Board's application, but rather a fuller explanation thereof. The Department further adds that it does not, when reviewing nonrenewal requests, engage in a balancing test of which provider has the better program, but whether a request is appropriate in light of all the existing circumstances. (Department's Reply at 6-7)

attempt to fabricate *post facto* justifications for their actions. The Commissioner finds, however, that no such attempt has occurred in this instance; to the contrary, the Department has done nothing more than identify the documents and information it took into consideration when reviewing the Board's request and provide a detailed explanation of the process and rationale by which it arrived at its stated conclusions,[2] while the additional cost information provided by the Board was offered not as retroactive justification for its decision to nonrenew petitioners' contract, but specifically in response to petitioners' central claims – made before both the Department and the OAL and properly considered by the ALJ based on the record developed pursuant to *N.J.A.C.* 1:1-12.5 – that comparison of actual costs, rather than PEA amounts, is the correct measure of efficiency to be applied in this matter, and that the Board's actual costs are significantly higher than their own. (See Brief and Appendix in Support of Motion for Summary Decision at 20-21; also Exhibits J-1 at 3, P-1 at 8, P-4 at 3.)

The Commissioner further rejects petitioners' contention that it was improper or unreasonable for respondents to rely on PEA amounts to conclude that nonrenewal of petitioners' contract would result in cost savings. As respondents correctly observe, the Board is required to provide universal preschool and as such is entitled under the SFRA – independent of its actual program costs – to a fixed amount of State aid to support preschool programs, with any difference between petitioners' actual tuition charge and the private provider aid amount returnable to the district without recoupment by the Department; moreover, the documents considered by the Department (notably Exhibit R-7) support the Board's representation that its 2009-2010 preschool program budget did not exceed the

[2] In this regard, see also *Board of Education of the City of Elizabeth, Union County v. New Jersey State Department of Education, Office of Early Childhood Education*, Commissioner Decision No. 180-08, decided April 21, 2008, affirmed App. Div. April 29, 2008, #A-4063-07T2.

amount of such aid. Consequently, in this instance, PEA amounts and the per pupil cost of a budgeted in-district program are effectively the same, so that the Board was neither mistaken nor unreasonable in contending – and the Department neither mistaken nor unreasonable in concluding – that a substantial sum would be saved by allowing the Board to serve students in-district so that its aid would be based on the in-district amount of $12,092 per pupil rather than the private provider amount of $13,593.

With respect to petitioners' objection to the ALJ's purported adoption of an unfounded and unacceptable "cost to absorb" standard, the Commissioner finds that the Initial Decision neither creates any such standard nor turns on this factor as suggested by petitioners, instead merely summarizing (at 4) the Board's calculation – introduced, as noted above, not as justification for the decisions on appeal, but in response to petitioners' continued press for "actual" versus "unreal" numbers – as part of its background discussion and basing its conclusions (at 5-7) on the justifications actually provided by the Board and Department. However, notwithstanding that neither the Board nor the Department relied on "cost to absorb" in the decisions herein on appeal, its introduction into this proceeding as a result of petitioners' claims compels the Commissioner to observe that: 1) petitioners' contention that consideration of this factor will increase program costs in the long run is purely speculative – unsupported by anything in the evidential record[3] and belied by the fact that the Department considers the totality of circumstances in reviewing each individual request for nonrenewal of a provider contract; and 2) the circumstances reviewed in this matter – including the existence of State-built and funded facilities having unused space and

[3] The Commissioner concurs with respondents that petitioners' reliance on the per pupil cost set forth in the School Report Card is misplaced, since that amount reflects comprehensive pre-K through 12 program costs district-wide, and additionally predates enactment of the SFRA and its related accounting practices.

an established program already successfully serving the vast majority of the district's preschool population within a sound administrative and operational framework – support the reasonableness of any conclusion that it would be more efficient to integrate petitioners' students into the existing district program than to continue paying the sum of 30 individual tuitions to a private provider and being responsible for the substantial administrative oversight required of districts utilizing such providers to deliver public preschool services.

Finally, the Commissioner cannot agree with petitioners' assertion that the Board's nonrenewal of their contract must be overturned because it reduces the quality and diversity of preschool education in the district. The Board did not base its request to nonrenew on the quality of petitioners' program – which, as has been stated repeatedly throughout this proceeding, is not in question – and the record is clear that the Department was well acquainted with both petitioners' and the Board's programs and judged both to be of sound quality based on experience and a variety of measures; petitioners offer no support whatsoever for their contention that, in itself alone, a difference in 2008-09 ECERS-R scores made it unreasonable or unlawful for the Department not to have weighed relative program quality in assessing the Board's request – particularly where the scores at issue (5.67 and 6.4, respectively) both fall within the "very good" range between 5 (good) and 7 (excellent). Additionally, since the promulgation in June 2008 of regulations implementing the SFRA and eliminating the former prohibition against the Board's duplication of programs or services otherwise available in the community, lack of delivery through a mix of private and public providers could no longer serve, as it did in the past, as a basis on which the Department could properly deny the Board's request to nonrenew petitioners' contract.

Consequently, like the ALJ, the Commissioner finds no cause to disturb either the Board's determination not to renew its contract with petitioners or the Department's approval thereof, both decisions having been established in this proceeding as in all respects reasonable, lawful and supported by competent evidence.

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

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/10
Date of Mailing: 5/20/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
SUMMARY DECISION
OAL DKT. NO. EDU 8132-09
AGENCY DKT. NO. 135-6/09

A LITTLE CLASS, INC. AND
KIM NOTTE,
Petitioners,
v.
NEPTUNE TOWNSHIP BOARD OF EDUCATION,
NEW JERSEY DEPARTMENT OF EDUCATION, AND
OFFICE OF EARLY CHILDHOOD EDUCATION,
Respondent.

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

James T. Hundley, Esq., for respondent Neptune Township (Hundley and Parry, attorneys)

Melissa T. Dutton, Deputy Attorney General, for respondent New Jersey Department of Education and Office of Early Childhood Education (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: April 1, 2010 Decided: April 13, 2010

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE

This matter arises from respondent Neptune Board of Education's (Neptune) decision not to renew a preschool program contract with A Little Class Inc. (petitioner), a private provider, and respondent Department of Education, Division of Early Childhood's (Department) approval of Neptune's non-renewal decision.

PROCEDURAL HISTORY

On June 29, 2009, petitioners filed an application for emergent relief with the New Jersey Department of Education. On the same day, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On July 8, 2009, the application for emergent relief was denied. The factual findings are adopted herein (J-1).

On February 9, 2010, Neptune filed a motion for summary decision. On February 26, 2010, the petitioners filed a reply brief. On March 3, 2010, the Department filed a response. On March 10, 2010, oral argument was heard in the OAL, Trenton (Hamilton Township). After the hearing the parties requested additional time to submit additional documentation. On March 26, 2010, Neptune filed a certification. On April 1, 2010, petitioners filed a response and the record closed.

STATEMENT OF FACTS

Petitioners have been engaged in the education of preschool children since 1982 and are a private provider of preschool education in Neptune Township. Kim Notte is the President and Executive (P-1).

Since the 2001-2002 school year, Neptune has contracted with the petitioners to provide a quality preschool education for approximately thirty of the resident children of Neptune Township since the inception of the Abbott Preschool Program in Neptune in September 2001 (P-1). The last contract between the petitioners and Neptune ran from

July 1, 2008 through June 30, 2009 (P-2).

Neptune attempted to not renew the contract with the petitioners for the 2007-2008 and 2008-2008 school years, but each year the Department of Education issued a determination that the Board's non-renewal violated N.J.A.C. 6A:10A-2.2, which prohibited the duplication of services and ordered the Board to continue to contract with petitioners for the 2007-2008 school year (P-1).

On February 12, 2009, and April 28, 2009, Neptune notified petitioners that it would not renew its contract for the 2009-2010 school year, alleging that the regulations (N.J.A.C. 6A:13A-3.1) require districts to contract with the most cost efficient preschool education providers (P-3, P-4).

On June 16, 2009, the Department affirmed Neptune's decision not to renew the contract with petitioners on the basis that Neptune has demonstrated the ability to serve all of its preschool children in district facilities, and that Neptune can serve its preschool students more efficiently than the petitioners (R-1). The Department agreed with Neptune's assertion that the cost per student in Neptune was $12,092 for the 2009-2010 school year as opposed to the petitioners' cost of $13,593. Petitioners assert that their cost is $12,587 per pupil (P-1, P-5). They further assert that Neptune's per pupil cost is far in excess of $12,092 (P-1).

Neptune gives several reasons for their decision. First, Neptune stated that the 2009-2010 preschool budget for the private providers is $13,593 per pupil, while Neptune is authorized to spend $12,092 for preschoolers, representing a $1,500 per pupil savings. Second, there are savings having Neptune administer and supervise the program. Third, Neptune now has the capacity to house all eligible preschoolers and no longer needs to rely on private providers for space outside the district school buildings. Fourth, there were added financial and administrative burdens on Neptune of overseeing petitioners' fiscal records and the educational burden of ensuring that teachers and teacher assistants meet regulatory standards. Fifth, Neptune has in place accountability measures and an administrative structure for their Neptune personnel to

ensure effective oversight of the quality of the preschool program, the staff's credentials, and the timely implementation of improvement measures.

Neptune asserts that it would cost far less to bring the thirty Little Class students in-district. They have new facilities and two classrooms available. They would place fifteen students in each classroom. Since the facility is already open and operating, the only additional cost would be the salaries and benefits for two teachers and two paraprofessionals, estimated to be $200,000. This would amount to a cost of $6,666.67 per student. Alternatively, petitioners' cost to Neptune, based on their figure of $12,587, would be $377,608 (R-2). Neptune further asserts that more expense is required to administer this program.

Ellen Wolock is the Director of the New Jersey Department of Education, Division of Early Childhood Education. She has been directly involved in the review and determination regarding Neptune's request not to renew its preschool program contract with petitioners for the 2009-2010 school year as well as the 2007-2008 and 2008-2009 years (R-3).

She reviewed numerous documentation and consulted with the District's Early Childhood Supervisor, Kathleen Thompson. The quality of petitioners' program was not in question and their 2008-2009 Master Teacher ECERS-R total was above a 6.0. The Neptune score was 5.67 (R-5). The total overall ECERS-R score represents an average of the scores of the forty-three items included in the instrument. A one rating indicates inadequate quality, three indicates minimal quality, five indicates good quality, and seven indicates excellent quality (R-3).

She and her staff believed that the petitioners and the District both provided a quality program. She concluded that the District provided a quality program based on the following: 1) the District's overall 2008-2009 Master Teacher ECERS-R score of 5.67(R-5); 2) the Early Learning Improvement Consortium Report provided by Dr. Holly Seplocha from William Paterson University (R-6); 3) the District's Five-Year Preschool Program Plan, which established that the District would be able to meet the needs of its

students without contracting with the petitioners (R-4); and 4) the District's 2009-2010 District Budget Planning Worksheet (R-7), which confirmed that the District had budgeted for two additional teachers and two additional teacher aides to ensure that the District would be employing the required staff to serve the students from Petitioners.

She further indicated that the program quality was not initially discussed because it had already been determined that both programs were of sound quality. She did not believe the quality of education was an issue.

Petitioners assert that the in-district provider is more costly on a per pupil basis than they are. Petitioners further assert that they provide a superior education as compared to that of Neptune, and provide greater services to a portion of the Neptune Township community (P-5).

CONCLUSIONS OF LAW

The facts in this matter are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

On October 8, 2009, the Department adopted regulations requiring school districts to implement high-quality preschool programs as a condition of receipt of preschool education aid under the School Funding Reform Act (SFRA). N.J.S.A. 6A:13A-1.1 to -11.3. A school district may offer a high-quality preschool program within a mixed delivery system that includes in-district, private provider and local Head Start agency settings. N.J.A.C. 6A:13A-3.1(c)(9).

Thus, a school district may choose to contract with private providers and local Head Start agencies to provide high-quality preschool services. N.J.A.C. 6A:13A-9.1. A school district must annually execute the preschool program contract provided by the DOE with all contracting private providers and local Head Start agencies. N.J.A.C.

6A:13A-9.1(c). The school district shall notify any private provider or local Head Start agency, the Department of Education, Division of Early Childhood Education and the Department of Children and Families, Office of Licensing in writing on or before May 1 of each contract year if the school districts intends not renew the preschool program contract for an additional one-year term. N.J.A.C. 6A:13A-9.3(a)(1)(i). Any school district notification of non-renewal shall follow the protocol established by the Division of Early Childhood Education and detail justifiable reason(s) for non-renewal of the preschool program contract. Ibid. The Department shall affirm or deny the non-renewal decision, and the non-renewal decision may be appealed to the Commissioner of the DOE. N.J.A.C. 6A:13A-9.3(iii)-(vii).

In a case in which a school district makes a discretionary decision, the 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. Parsippany-Troy Hills Educ. Assoc. v. Bd. of Educ. of Twp. of Parsippany-Troy Hills, 188 N.J. Super. 161, 167 (App. Div. 1983), certif. denied, Parsippany-Troy Hills Educ. Assoc. v. Bd. of Educ. of Twp. of Parsippany-Troy Hills, 94 N.J. 527 (1983). Under this standard, three factors must be considered: (1) whether Neptune's actions violated the SFRA's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which non-renewal decision was based; and (3) whether, in applying the legislative policies to the facts, Neptune clearly erred by reaching a conclusion that could not reasonably have been made on a showing of the relevant facts. In Re Warren, 117 N.J. 295, 296-7 (1989) (citing Campbell v. Dep't of Civil Service, 39 N.J. 556, 562 (1963)); Edison Twp. Bd. of Ed. V. Edison Twp. Principals and Supervisors Ass'n, 304 N.J. Super. 459, 463-4 (App. Div. 1997) (citing In Re Musick, 143 N.J. 206, 216-17 (1996)).

Neptune's non-renewal decision was not arbitrary, capricious, or unreasonable. Instead, Neptune's decision was justified and complied with the mandates of the SFRA and its implementing regulations. The non-renewal was in accordance with the express legislative policy of the SFRA and there is substantial evidence to support the findings on which the non-decision was based. The purpose of the SFRA is to provide students

in poor urban school districts with a thorough and efficient education. N.J.S.A. 18A:7F-44. Neptune provided several reasons not to renew the contract with the petitioners based upon financial and administrative considerations in order to provide its students with a thorough and efficient education. Therefore, I **FIND** that Neptune did not act in an arbitrary, capricious, or unreasonable manner and that its non-renewal decision was justified.

The Department considered Neptune's February 12, 2009, letter to the petitioners, the petitioners' February 23, 2009, letter disputing the non-renewal decision, Neptune's April 28, 2009, letter to the petitioners providing reasons for the non-renewal decision, and the petitioners' May 10, 2009, response letter attaching its 2009-2010 Budget Planning Worksheet, the 2007-2008 School Report Card for Neptune's Early Childhood Center, a list of districts with preschool students attending private provider programs, and a Child Care Center License. The Department based its approval on Neptune's demonstrated ability to serve all of its preschool children in district facilities. The Department did not find that Neptune could not provide a thorough and efficient education to its preschool students. There were no facts presented to dispute the certification from Ellen Wolock that Neptune provided a quality education to their students.

DECISION AND ORDER

Based on the foregoing, the Neptune Board of Education's motion for summary decision is **GRANTED.** Petitioners' appeal is hereby **DISMISSED**.

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

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

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

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

April 13, 2010
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: April 13, 2010

Date Mailed to Parties: April 13, 2010

cmo

APPENDIX

LIST OF EXHIBITS

For Petitioners:

P-1 Affidavit of Kim Nolte

P-2 Contract for 2008-2009 School Year

P-3 Letter from Neptune, dated February 12, 2009

P-4 Letter from Neptune, dated April 28, 2009

P-5 Letter from petitioner, dated May 10, 2009

For Respondent:

R-1 Letter from DOE, dated June 16, 2009

R-2 Neptune Budget Analysis 2009-2010

R-3 Certification from Ellen Wolock

R-4 Five Year Preschool Plan

R-5 Neptune ECERS Score

R-6 Report from Dr. Holly Seplocha

R-7 2009-2010 Budget Planning Worksheet

#147-10R

OAL DKT. NO. EDU 10684-08
(EDU 12196-06 ON REMAND)
AGENCY DKT. NO. 447-12/06

RECORD PARTIALLY SEALED

IN THE MATTER OF THE TENURE HEARING OF FREDERICK W. CLAYTON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

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 concerns raised by the Administrative Law Judge (ALJ) and Commissioner in rejecting the parties' prior proposal.

Upon review of the revised agreement and record on remand, the Commissioner, like the ALJ, now finds the parties' proposed settlement consistent with established standards for settlement of tenure matters. *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, 1990, codified at *N.J.A.C.* 6A:3-5.6(a).

Accordingly, the Initial Decision of the OAL recommending approval of the settlement agreement is adopted as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.*

* In this regard, the parties are again reminded that, except to the extent they are sealed by order of the ALJ or Commissioner – as has been a portion of the record in this case pursuant to the ALJ's order of April 23, 2010 – tenure proceedings are a matter of public record pursuant to New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, as is the following employment information:

> An individual's name, title, position, salary, payroll record, length of service, date of separation *and the reason therefor*, and the amount and type of any pension received ***. (emphasis added) *N.J.S.A.* 47:1A-10

A copy of this decision – together with respondent's original certificate and his affidavit relinquishing same (Exhibit C) – shall be transmitted forthwith to the State Board of Examiners for action pursuant to *N.J.A.C.* 6A:9-17.11.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/10

Date of Mailing: 5/21/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10684-08
(ON REMAND OF 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.

Nicholas J. Repici, Esq., for the petitioner (Genova, Burns & Vernoia, attorneys)

Brian J. Manetta, Esq., for the respondent, (Mets, Schiro & McGovern, attorneys)

Record Closed: March 30, 2010 Decided: April 23, 2010

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

The prior procedural history of this tenure removal matter as set forth in my November 9, 2009, Order denying approval of settlement pursuant to N.J.A.C. 6A:3-5.6 and N.J.A.C. 1:1-19.1, is incorporated herein by reference and attached hereto as exhibit C-1. After former Commissioner Lucille E. Davy, issued her December 17, 1009, Decision on Motion (C-2), adopting my order as a Final Decision, the matter was remanded for further hearing or for the parties to submit a settlement in accordance

with the former Commissioner's directive. In her Decision on Motion, the former Commissioner noted:

> Consequently – finding that the proposed settlement's only real benefit to the Board and public is avoidance of the uncertainty, expense, disruption and potential for embarrassment that nearly always accompany tenure proceedings on charges of unbecoming conduct, particularly those touching on students – the Commissioner finds the minimum condition necessary for its approval is relinquishment by the respondent, pursuant to N.J.A.C. 6A: 9-17.11, of all certificates issued to him by the Board of Examiners.

Although the former Commissioner indicated in her decision that "nothing (t)herein is intended to preclude continued bifurcation of the tenure charges" as the Administrative Law Judge previously hearing this matter had decided, I advised counsel that as the presiding judge over a tenure case I was not in favor of any bifurcation. As a result, the matter proceeded to hearing on all the certified tenure charges on January 20, 2010. The petitioner's key witness who is retired and living in California was not available to testify until March 2, 2010. During the continued hearing of March 2, 2010, the parties advised they had reached a settlement, subject to approval, that would meet the former Commissioner's settlement criteria, i.e., a relinquishment of all certificates issued to him by the Board of Examiners.

Counsel has submitted a fully executed settlement agreement with five exhibits attached. Exhibit A consists of a copy of the tenure charges. Exhibit B consists of respondent's answer to the tenure charges. Exhibit C consists of the respondent's affidavit submitted in accordance with N.J.A.C. 6A:3-5.6(e) and N.J.A.C. 6A:17.11 and the original, and only, certificate issued by the Board of Examiners. The final exhibits, although not delineated as such, consist of the certification of David Shafter, Interim School Business Administrator/Board Secretary of the Board of Education of the city of Camden, annexing an extract from the minutes of the meeting of the Board of Education held on March 9, 2010, approving the within 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. Additionally, I note that on March 2, 2010, after the petitioner completed the case in chief, the respondent advised he decided to not defend the within matter any further but to resign and relinquish the only certificate issued him by the Board of Examiners. The respondent was then placed under oath and submitted to voir dire on the voluntariness of his decision. Based upon his testimony before me, I **FIND** and **CONCLUDE** the respondent fully understood his decision, was not under any duress and had not been promised anything further than what is included in the attached settlement, the essential terms of which were placed on the record on March 2, 2010.

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 satisfies the former Commissioner's minimum condition necessary as indicated in her December 17, 2009, Decision on Motion, 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]

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

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

[1] Further, I have reviewed the OAL file and have issued a separate Order Partially Sealing the Record to incorporate: exhibits B-F, inclusive, of the tenure charges which consisted of student records for the class of 2002-2006; and the Data Forensic Analysis of Camden Board of Education Floppy Disks completed by Latent Technology Group LLC on November 7, 2007. (C-3).

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

April 23, 2010

DATE

ANA C. VISCOMI, ALJ

Date Received at Agency: APR 28 2010

Date Mailed to Parties: APR 28 2010

/lam

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FOR COURIER DELIVERY
655 FLORIDA GROVE ROAD
WOODBRIDGE, NEW JERSEY 07095

March 25, 2010

VIA OVERNIGHT MAIL

The Honorable Ana C. Viscomi, A.L.J.
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

Re: I/M/O Tenure Hearing of Frederick Clayton, Camden City B.O.E.
OAL Docket No. EDUTH 12196-2006

Dear Judge Viscomi:

This firm represents Frederick Clayton in the above-referenced matter. Enclosed please find a fully-executed Settlement Agreement, with Exhibits A through C attached, for your consideration. Also enclosed are the relevant minutes of the March 9, 2010 Camden City Board of Education Special Meeting approving the settlement and the certification of Mr. David Shafter, Interim School Business Administrator.

Please note that Exhibit C attached to the agreement is Mr. Clayton's original Certification issued by the Board of Examiners.

Thank you for your attention to this matter. If you have any questions or concerns, please contact our office at the above number.

Respectfully submitted,

METS SCHIRO & MCGOVERN, LLP

Brian J. Manetta

BJM/sw
cc: Frederick Clayton
Nicholas J. Repici, Esq.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 9th day of March, 2010 between the Camden City Board of Education (hereinafter, "the Board" or "the Employer") and Frederick W. Clayton (hereinafter referred to as "Clayton" or "the Employee") (hereinafter collectively referred to as "the parties").

WHEREAS, Clayton is employed by the Employer as a tenured Guidance Counselor; and

WHEREAS, the Board proffered tenure charges against Clayton on or about October 5, 2006; and the pending appeal at the Office of Administrative Law ("OAL"), specifically Docket No.: EDUTH 12196-2006; and

WHEREAS, the Board certified seven (7) charges against Clayton, alleging the following: 1) Clayton was guilty of neglect of duty for failing to maintain the official transcripts of students at Brimm Medical Arts High School ("Brimm"); 2) Clayton was guilty of conduct unbecoming a Board employee for failing to carry out his responsibility of maintaining the accuracy of student report cards; 3) Clayton was guilty of conduct unbecoming for making, directing, contributing, or in any other way permitting his office to maintain a second, fraudulent set of student transcripts; 4) Clayton was guilty of conduct unbecoming for directing, contributing, or in any other way permitting his office to forward the second set of transcripts to colleges and universities; 5) Clayton was guilty of fraud, deceit and misrepresentation for applying, accepting, and maintaining the position of Principal at Brimm despite not holding the requisite Principal's Certificate; 6) Clayton was guilty of insubordination for failing to report to a scheduled meeting with the Principal at Brimm; and 7) Clayton is guilty of insubordination for his failure to cooperate with the internal investigation with respect to the allegations of student

grade changes, transcript discrepancies and production of the second set of student transcripts; and

WHEREAS, the Statement of Charges is attached hereto as Exhibit A; and

WHEREAS, on or about December 15, 2006, Clayton filed an Answer and Affirmative Defenses to those charges, denying the factual allegations set forth by the Board; and

WHEREAS, a copy of Clayton's Answer and Affirmative Defenses is attached hereto as Exhibit B; and

WHEREAS, on December 17, 2009, Commissioner of Education, Lucille E. Davy, issued a final administrative decision deny approval of the settlement initially proposed by the parties' in this matter, finding that the settlement failed to comply with the established standards for the settlement of tenure matters as set forth by In re Cardonick and N.J.A.C. 6A:3-5.6. See In re Clayton, Agency Dkt No. 447-12/06, OAL Dkt No. 12196-06 on Remand, OAL Dkt No. Edu 10684-08, Comm'r Dec. on Motion, 415-09M (Dec. 17, 2009); and

WHEREAS, in her decision, Commissioner Davy held that "the minimum condition necessary for [settlement] approval is relinquishment by [Clayton], pursuant to N.J.A.C. 6A:9-17.11, of all certificates issued to him by the Board of Examiners." Id. at 6; and

WHEREAS, in accordance with the terms of this Agreement, as set forth below, Clayton desires to voluntarily relinquish any and all certificates issued to him by the Board of Examiners pursuant to N.J.A.C. 6A:9-17.11; and

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the Board and Clayton agree as follows:

1. **TERMS**

a. Clayton's employment with the Board shall terminate effective immediately upon the full execution of this Agreement by the parties (the "termination date"). Simultaneous with Clayton's execution of this Agreement, Clayton shall deliver an irrevocable letter of resignation. While the parties recognize that the Board certified tenure charges against Clayton, those charges have not been fully adjudicated and Clayton's resignation shall be recorded by the Board as a resignation in good standing;

b. The Board agrees to withdraw the tenure charges pending against Clayton, specifically those pending with the Commissioner of Education docketed as follows: Agency Dkt No. 447-12/06, OAL Dkt No. 12196-06 on Remand, OAL Dkt No. Edu 10684-08;

c. Clayton hereby agrees to voluntarily relinquish any and all certificate(s) issued to him by the New Jersey Board of Examiners. Attached hereto as Exhibit C is Clayton's executed affidavit of voluntary relinquishment, along with all certificates issued to him by the Board of Examiners. Clayton's affidavit of voluntary relinquishment and his certificates shall be forwarded to the Board of Examiners by the Commissioner of Education upon the Commissioner's approval of the Agreement in accordance with N.J.A.C. 6A:3-5.6(e) and N.J.A.C. 6A:9-17.11;

d. Within 30 days of the approval of this Agreement by the Commissioner of Education, the Board agrees to pay Clayton $13,000.00 for his accumulated sick time in accordance with Article 12(e) of the parties' collective bargaining agreement. While Clayton is entitled to the maximum payment of $15,000.00 allowed under Article 12(e) for his accumulated sick time, he nevertheless agrees to the reduced sum of $13,000.00 in full and final settlement of this matter;

e. Except as explicitly set forth in Paragraph 1(d) above, Clayton agrees that he is not entitled to any payment of monies owed to him or any other benefits, including payment for any sum which he may have otherwise claimed entitlement to under a collective negotiations agreement or memorandum of agreement between the Board and his union.

2. **MUTUAL RELEASE**

a. Clayton, for himself and his heirs, executors, representatives, assigns, and all others claiming by or through any of them, hereby waives, remises, releases and forever discharges any and all claims, disputes, grievances, demands, actions, causes of action, and/or claims for damages, losses, expenses, fees, or other relief of any kind or nature whatsoever, either in law or in equity, whether direct or indirect, whether asserted or unasserted, and whether known or unknown, which Clayton, and/or her heirs, assigns, representatives, executors and any others claiming by or through him, have, may have had, or may hereinafter have against Board, its predecessors, successors, and affiliates and/or any of their respective past or present Board members or representatives or agents (collectively hereinafter the "Board Releasees"), which arise out of, result from or relate in any manner to Clayton's employment with the Board, his termination thereof, the execution of this Agreement, or by reason of any other matter whatsoever occurring prior to the execution of this Agreement, whether or not relating to employment, excepting therefrom any action for the enforcement of the terms of this Agreement. Clayton specifically waives, releases and forever discharges any and all claims arising from or relating to his employment with the Board based on any act, event or omission occurring before he executes this Agreement including, but not limited to, any claims which could be asserted now or in the future, under: common law, including, but not limited to, breach of express or implied duties, wrongful termination, defamation, or violation of public policy; any policies,

practices, or procedures of the Board; any federal or state statutes or regulations including, but not limited to, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Civil Rights Act of 1866 and 1871, the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., the Americans With Disabilities Act, 42 U.S.C. §12101 et seq., the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq., Equal Pay Act, 29 U.S.C. §206 et seq., Worker-Adjustment Retraining Notification Act, 29 U.S.C. §2101, et seq., National Labor Relations Act, 29 U.S.C. §151 et seq., Older Worker's Benefit Protection Act, 29 U.S.C. §621 et seq., New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq., the Family and Medical Leave Act, §2601 et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8; any contract of employment, expressed or implied; any provision of the United States or New Jersey Constitutions; any provision of any other law, common or statutory, of the United States, the State of New Jersey or any other state.

b. Clayton agrees never to commence against the Board, or any other of the Board Releasees, any action based upon any claims which are the subject of this Agreement; provided, however, that nothing in this Agreement prevents him from filing, cooperating with, or participating in any proceeding before the Equal Employment Opportunity Commission or a state or local fair employment practices agency, except that he acknowledges and understands that he may not be able to recover any monetary benefits in connection with any such claim, charge or proceeding.

c. Clayton represents that there are no pending lawsuits, charges, or administrative proceedings, or other claims of any nature whatsoever by him against Board, pending in any state or federal court, or before any agency or other administrative body.

d. The Board, for itself and its heirs, executors, representatives, assigns, and all others claiming by or through it, hereby waive, remise, release and forever discharge any and all claims, which the Board, and/or its heirs, assigns, representatives, executors and any others claiming by or through it have or may have had against Clayton which arise out of, result from or relate in any manner to Clayton's employment with the Board, or otherwise, excepting therefrom any action for the enforcement of the terms of this Agreement. This Agreement shall not release claims for matters arising prior to or after the execution of this Agreement which are unrelated to Clayton's employment with Board

4. **NON-DISPARAGEMENT**

The Board and Clayton promise not to discredit or detract from the reputation of each other or libel or defame each other to any person(s) or entity(s) in any form of communication or media, including, but not limited to, oral, written, electronic, or digital forms, audio or visual communications or recordings, and printed materials. A breach of this paragraph is a material breach of this Agreement.

5. **CONSULTATION WITH ATTORNEY**

Clayton has consulted with his attorney with respect to this Agreement and reviewed with his attorney all the terms and conditions of this Agreement prior to executing this Agreement. Clayton agrees that he has received competent legal counsel and representation from his attorney.

6. **COMPLETE AGREEMENT**

This Agreement contains the entire agreement between Clayton and the Board with respect to the subject matter and supersedes all prior agreements or understandings dealing with

the same subject matter. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY**

Should any provision of this Agreement be declared or determined by the Commissioner of Education or any court or administrative agency 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 to be part of this Agreement.

9. **CLAYTON ATTESTS**

Clayton represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Clayton 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 including but not limited to the Board.

10. **REVIEW AND REVOCATION**

Clayton understands and agrees that: (i) he shall have up to twenty-one (21) days from March 5, 2010, the date that he received this Agreement, to consider and sign it, and that he may take the entire 21-day period to do so; (ii) any changes to this Agreement, whether material or immaterial, will not restart the running of the 21-day period; (iii) if he does sign this Agreement, he may revoke it within seven (7) days after signing it by submitting a written notice to the

Board, addressed to the attention of Nicholas J. Repici, Esquire, Genova, Burns & Vernoia, 2 Riverside Drive, Suite 502, Camden, New Jersey 08103, in such a manner that it is actually received within the 7-day period; and (iv) this Agreement will not become effective or enforceable until the end of this 7-day revocation period.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Frederick W. Clayton, executed the foregoing Agreement this 9th day of March, 2010.

FREDERICK W. CLAYTON

CAMDEN CITY
BOARD OF EDCUCATION

EXHIBIT A

STATEMENT OF CHARGES

I, Luis Pagan , Assistant Superintendent of Schools, do herewith charge that Mr. Frederick W. Clayton, employed by the Camden City Board of Education ("CCBOE") as Guidance Counselor from September 1, 1991 to August 18, 2003, as Acting High School Principal from August 18, 2003 to December 11, 2003, and again as Guidance Counselor from December 11, 2003 to present, is guilty of: 1) neglect of duty; 2) conduct unbecoming a Board employee; 3) insubordination; 4) fraud, deceit and misrepresentation; and, 5) other conduct unbecoming an employee so as to require his employment with the Board of Education of the City of Camden be terminated.

More particularly, it is charged that:

CHARGE NO. 1

Mr. Clayton, as Guidance Counselor at Brimm Medical Arts High School ("Brimm"), is guilty of neglect of duty for failing to carry out his responsibility of maintaining the official transcripts of the student body at Brimm. As Guidance Counselor, Mr. Clayton was the primary custodian of the official transcripts of the school's student body. Clayton failed to carry out his duty of maintaining the accuracy of said transcripts by allowing a continuous pattern of grade changes and other recording discrepancies to occur with respect to the transcripts during his tenure.

In accordance with CCBOE policy and procedure, official student transcripts are produced by a central computer system every August. See Certification of Assistant Superintendent Luis Pagan ("Pagan Certification"), Exhibit A. The official transcript lists a student's courses with the corresponding grades the student received for those particular

courses. Pagan Certification, *supra*. A comprehensive review of official student transcripts for Brimm's Classes of 2002, 2003, 2004, 2005, and 2006 reveals that nearly 200 grade changes and/or other discrepancies occurred in violation of CCBOE policy and procedure during Mr. Clayton's tenure with Brimm.

A review of the Class of 2002's official transcripts, alone, revealed 33 grade changes/discrepancies for the 1998-99 school year, 48 grade changes/discrepancies for the 1999-2000 school year, and 35 grade changes/discrepancies for the 2000-01 school year. See RECORDS OF CLASS OF 2002, Exhibit B.

A cumulative review of the Classes of 2002, 2003, 2004, 2005, and 2006 official transcripts revealed the following:

- Approximately 110 grade changes/discrepancies for the 2001-02 school year. See RECORDS OF CLASS OF 2002, GRADE 12, Exhibit B; See RECORDS OF CLASS OF 2003, GRADE 11, Exhibit C; See RECORDS OF CLASS OF 2004, GRADE 10, Exhibit D; See RECORDS OF CLASS OF 2005, GRADE 9, Exhibit E.
- Approximately 62 grade changes/discrepancies for the 2002-03 school year. See RECORDS OF CLASS OF 2003, GRADE 12, Exhibit C; See RECORDS OF CLASS OF 2004, GRADE 11, Exhibit D; See RECORDS OF CLASS OF 2005, GRADE 10, Exhibit E; See RECORDS OF CLASS OF 2006, GRADE 9, Exhibit F.
- Approximately a minimum[1] of 62 grade changes/discrepancies for the 2003-04 school year. See RECORDS OF CLASS OF 2004, GRADE 12, Exhibit D; See RECORDS OF CLASS OF 2005, GRADE 11, Exhibit E; See RECORDS OF CLASS OF 2006, GRADE 10, Exhibit F.

- Approximately 2 grade changes/discrepancies for the 2004-05 school year.[2] See RECORDS OF CLASS OF 2005, GRADE 12, Exhibit E; See RECORDS OF CLASS OF 2006, GRADE 11, Exhibit F.

Thus, Mr. Clayton failed in carrying out his duty of maintaining the official transcripts of the student body at Brimm. The above-referenced act is only one example of Clayton's neglect of duty as an employee in the Camden School District, which warrants his dismissal from his employment with the Camden School District.

CHARGE NO. 2

Mr. Clayton, as Guidance Counselor at Brimm, is guilty of neglect of duty for failing to carry out his responsibility of maintaining the accuracy of student report cards. As Guidance Counselor at Brimm, Mr. Clayton was the primary custodian of the student body's permanent records. Each Student's report card is placed in his/her permanent record. See Pagan Certification, *supra*. The grades on a student's report cards should mirror the grades on that student's official transcript. Id.

During Mr. Clayton's tenure with the Camden School District, numerous grade changes were made to students' report cards. Said grade changes were not made in accordance with Board policy and procedure, which provides: "In the event any grade is subsequently changed or modified, the teacher shall be so informed at that time. Whoever makes such a change shall clearly identify himself/herself by placing his/her name next to that grade on all records of that grade." See Exhibit G.

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[1] Grade 9 records were not reviewed in the analysis of the 2003-04 grade change/discrepancies calculations.
[2] Grades 9 and 10 were not reviewed in the analysis of the 2004-05 grade change/discrepancies calculations.

From the 1998-99 school year to the 2003-04 school year, there were nearly 200 grade changes and/or other discrepancies on student report cards in the student body's permanent records at Brimm. See Exhibits B - E, *supra*. The grade changes were not made in accordance with CCBOE policy and procedure, as there is no indication of who made the hand-written grade changes.

Thus, Mr. Clayton failed in carrying out his duty of maintaining the accuracy of student report cards and permanent records. The above-referenced act is only one example of Mr. Clayton's neglect of duty of as an employee in the Camden School District which warrants his dismissal from his employment with the Camden School District.

CHARGE NO. 3

Mr. Clayton is guilty of conduct unbecoming for making, directing, contributing, or in any other way permitting his office to maintain a second, fraudulent set of student transcripts during his tenure at Brimm.

During Mr. Clayton's tenure at Brimm his office maintained two sets of student transcripts. As indicated above, students' official transcripts are generated by the CCBOE central computer system every August and placed into the students' permanent records. See Pagan Certification, *supra*. An internal investigation into allegations of grade changes at Brimm revealed that a second set of transcripts were being produced and recorded for Brimm students. See Pagan Certification, *supra*. This second set of transcripts, labeled Medical Arts High School Record ("MAHSR"), was being produced and stored on an independent computer which was not connected to Brimm's central computer system. Id.

Nearly 200 discrepancies exist between the MAHSR and the students' official transcripts. See Exhibit B - F, *supra*. In the substantial majority of the cases where the discrepancies exist, the grades listed on the MAHSR were higher then the grades listed on the students' official transcript. Id. Additionally, the courses listed on the MAHSR often did not reflect the actual courses in which students were enrolled. For instance, regular level courses may have been listed on a student's official transcript, but the course would appear as an honors or advanced placement course on the MAHSR. See Pagan Certification, *supra*.

For these reasons, Mr. Clayton is guilty of conduct unbecoming for making, directing, contributing, or in any other way permitting his office to produce and record the MAHSR. The above-referenced act is only one example of Mr. Clayton's conduct unbecoming of an employee in the Camden School District which warrants his dismissal from his employment with the Camden School District.

CHARGE NO. 4

Mr. Clayton is guilty of conduct unbecoming for directing, contributing, or in any other way permitting his office his office to forward the MAHSR transcripts to colleges and universities under the guise of official student transcripts.

In accordance with CCBOE policy and procedure, when a college or university requests a student's transcript, that student's official transcript label in his or her permanent record is to be photocopied and forwarded to the requesting institution. See Pagan Certification, *supra*. The internal investigation conducted in this case revealed that Brimm officials were sending the MAHSR transcripts to colleges and universities under the guise of official student records,

despite the fact that grades and courses on the MAHSR did not accurately reflect the grades and courses on students' report cards and official transcripts contained within their permanent records. Id.

Mr. Clayton is guilty of conduct unbecoming for allowing these fraudulent documents to be sent to institutions of higher education under the guise of official student transcripts. The above-referenced act is only one example of Mr. Clayton's conduct unbecoming of an employee in the Camden School District which warrants his dismissal from his employment with the Camden School District.

CHARGE NO. 5

Mr. Clayton is guilty of fraud, deceit and misrepresentation for applying, accepting, and maintaining the position of Principal at Brimm despite the fact that he did not hold the requisite Principal's Certificate. A vacancy existed for the position of Principal at Brimm for the 2003-04 school year. Mr. Clayton applied for the position. At that time, Mr. Clayton made numerous representations to the Camden City Superintendent of Schools that he held the necessary Certification to hold the position of a high school principal within the State of New Jersey.

On or about August 18, 2003, Mr. Clayton was appointed Principal of Brimm. Subsequent to his appointment, the Superintendent made numerous requests to Mr. Clayton that he produce his Principal Certificate. Nevertheless, Mr. Clayton failed to do so. Because his Principal Certificate was never produced, the CCBOE rescinded Mr. Clayton's title as Principal on or about December 11, 2003.

Mr. Clayton is guilty of fraud, deceit and misrepresentation for knowingly and willfully applying and accepting the Principal position at Brimm despite the fact that he was not licensed to do so. The above-referenced act is only one example of Mr. Clayton's fraudulent conduct as an employee in the Camden School District which warrants his dismissal as an employee with the Camden School District.

CHARGE 6

Mr. Clayton is guilty of insubordination for failing to report to a scheduled meeting with the Principal at Brimm on November 3, 2004. The meeting was schedule to discuss Mr. Clayton's action, against the Principal's directive, where he changed a students schedule by placing her in Geometry despite the fact that the student did not pass Algebra I, which is a prerequisite for that course. See Exhibit H.

Mr. Clayton is guilty of insubordination for his failure to appear at the scheduled meeting with Brimm's principal. The above-referenced act is only one example of Mr. Clayton's insubordination as an employee in the Camden School District which warrants his dismissal as an employee with the Camden School District.

CHARGE 7

Mr. Clayton is guilty of insubordination for his failure to cooperate with the internal investigation with respect to the allegations of student grade changes, transcript discrepancies, and production of the MAHSR.

After allegations of grade changes at Brimm, the Superintendent of Schools directed Assistant Superintendent Dr. Fred Reiss and Assistant Superintendent Luis Pagan to investigate the matter. In or about August 2004, Dr. Reiss and Mr. Pagan went to Brimm to conduct

interviews of several individuals including Guidance Counselor Frederick Clayton. See Pagan Certification, *supra*. Mr. Clayton was given notice that Dr. Reiss and Mr. Pagan would be conducting interviews on that particular date, and that Mr. Clayton's presence was required. Id. Nevertheless, at the time interviews were being conducted, Mr. Clayton could not be found on school property despite that fact that he had signed-in for duty that morning. Id.

Mr. Clayton willfully and deliberately avoided Dr. Reiss and Mr. Pagan in an effort to thwart the investigation. The above-referenced act is only one example of Mr. Clayton's insubordination as an employee in the Camden School District, which warrant his dismissal as an employee with the Camden School District.

LUIS PAGAN
ASST. SUPERINTENDENT OF SCHOOLS

Sworn and subscribed by and before me on
this 6th day of October 2006

Notary Public

MARIA J. DIAZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires JAN 2008

STATEMENT OF EVIDENCE

Documentary evidence in support of the charges against Mr. Frederick W. Clayton is to be found in the various memoranda and other materials prepared and/or compiled by the Camden Board of Education. It should be noted that other documentation exists which support these charges beyond the exhibits attached hereto.

LUIS PAGAN
ASST. SUPERINTENDENT OF SCHOOLS

Sworn to and subscribed by and before me on
this 6th day of October, 2006.

MARIA J. DIAZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 3/[illegible]/2009

NOTARY PUBLIC

EXHIBIT LIST – TENURE CHARGES: FREDERICK CLAYTON

Exhibit A	Certification of Assistant Superintendent Luis Pagan
Exhibit B	Records of Class of 2002
Exhibit C	Records of Class of 2003
Exhibit D	Records of Class of 2004
Exhibit E	Records of Class of 2005
Exhibit F	Records of Class of 2006
Exhibit G	Collective Bargaining Agreement between Camden City Board of Education and Camden Education Association, Article IV, Section E
Exhibit H	Memorandum from Principal Joseph D. Carruth to Frederick Clayton Dated November 3, 2004

EXHIBIT B

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Respondent, Frederick Clayton

IN THE MATTER OF THE TENURE HEARING OF FREDERICK CLAYTON, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO.

ANSWER TO TENURE CHARGES

Respondent, Frederick Clayton, residing at 3756 Lankenau Road, Philadelphia, PA 19131, by way of answer to the Statement of Charges certified to the Commissioner of Education, says:

The general allegations unbecoming conduct and misbehavior are denied. Petitioner is left to its proofs.

CHARGE NO. 1: As to the allegations in the first unnumbered paragraph of Charge No. 1, Respondent admits that he was and is a Guidance Counselor at Brimm Medical Arts High School ("Brimm"). The remaining allegations of this paragraph are denied and Petitioner is left to its proofs.

As to the allegations of the second unnumbered paragraph of Charge No. 1, Respondent admits that student transcripts are produced by Petitioner on a centralized basis each year, utilizing grades provided by the teaching staff and administrators at Brimm. Denied that the centrally-maintained student transcripts are always accurate. Denied that Respondent was in any way responsible for any illegitimate grade change or that he was the source of any grading discrepancy. The remaining allegations of this paragraph are denied and Petitioner is left to its proofs.

As to the allegations in the third unnumbered paragraph of Charge No. 1, Respondent lacks information sufficient to form a belief as to what if any review was conducted by Petitioner and what, if anything, that review disclosed. In addition, Respondent notes that Petitioner's production of redacted information in Exhibit B to the charges deprives him of an opportunity to be confronted with the evidence against him so that he may meet the allegations and formulate his defense. This response serves as a denial and Petitioner is left to its proofs.

As to the allegations in the fourth unnumbered paragraph of Charge No. 1, Respondent lacks information sufficient to form a belief as to what if any review was conducted by Petitioner and what, if anything, that review disclosed. In addition, Respondent notes that Petitioner's production of redacted information in Exhibits C through F to the charges, inclusive, deprives him of an opportunity to be confronted with the evidence against him so that he may meet the allegations and formulate his defense. This response serves as a denial and Petitioner is left to its proofs.

As to the allegations in the fifth unnumbered paragraph of Charge No. 1, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of conduct that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

CHARGE NO. 2: As to the allegations in the first unnumbered paragraph of Charge No. 2, Respondent admits that he was and is a Guidance Counselor at Brimm and that if the Board maintained accurate transcripts and student records, including report cards, the grades would match. The remaining allegations of this paragraph are denied and Petitioner is left to its proofs.

As to the allegations of the second unnumbered paragraph of Charge No. 2, these allegations are denied and Petitioner is left to its proofs. In addition, Respondent specifically denies that Exhibit G is a duly-promulgated Board policy, though it is an excerpt from a collectively negotiated agreement.

As to the allegations in the third unnumbered paragraph of Charge No. 2, Respondent lacks information sufficient to form a belief as to what if any review was conducted by Petitioner and what, if anything, that review disclosed. In addition, Respondent notes that Petitioner's production of redacted information in Exhibits B through E to the charges, inclusive, deprives him of an opportunity to be confronted with the evidence against him so that he may meet the allegations and formulate his defense. This response serves as a denial and Petitioner is left to its proofs.

As to the allegations in the fourth unnumbered paragraph of Charge No. 2, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of conduct that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

CHARGE NO. 3: As to the allegations in the first unnumbered paragraph of Charge No. 3, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the second unnumbered paragraph of Charge No. 3, Respondent lacks information sufficient to form a belief as to what if any investigation was conducted by Petitioner and what, if anything, that investigation disclosed. In addition,

Respondent notes that Petitioner's production of redacted information in Exhibits B through E to the charges, inclusive, deprives him of an opportunity to be confronted with the evidence against him so that he may meet the allegations and formulate his defense. This response serves as a denial and Petitioner is left to its proofs.

As to the allegations in the third unnumbered paragraph of Charge No. 3, Respondent lacks information sufficient to form a belief as to the truth of these allegations. In addition, Respondent notes that Petitioner's production of redacted information in Exhibits B through E to the charges, inclusive, deprives him of an opportunity to be confronted with the evidence against him so that he may meet the allegations and formulate his defense. This response serves as a denial and Petitioner is left to its proofs.

As to the allegations in the fourth unnumbered paragraph of Charge No. 3, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of conduct that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

CHARGE NO. 4: As to the allegations in the first unnumbered paragraph of Charge No. 4, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the second unnumbered paragraph of Charge No. 4, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the third unnumbered paragraph of Charge No. 4, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of conduct that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

CHARGE NO. 5: As to the allegations in the first unnumbered paragraph of Charge No. 5, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the second unnumbered paragraph of Charge No. 5, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the third unnumbered paragraph of Charge No. 5, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of condu that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

CHARGE NO. 6: As to the allegations in the first unnumbered paragraph of Charge No. 6, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the second unnumbered paragraph of Charge No. 6, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of conduct that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

CHARGE NO. 7: As to the allegations in the first unnumbered paragraph of Charge No. 7, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the second unnumbered paragraph of Charge No. 7, Respondent denies these allegations and Petitioner is left to its proofs.

As to the allegations in the third unnumbered paragraph of Charge No. 7, Respondent denies these allegations and Petitioner is left to its proofs. In addition, Respondent objects to the conclusory statement that the enumerated charge is "only one example" of conduct that warrants his dismissal. Due process requires that Petitioner clearly set forth specifications as to all charges against Respondent so that he may have a meaningful opportunity to defend himself and not have to defend himself against a "moving target."

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

Petitioner has failed to comply with the procedural requirements of the Tenure Employees' Hearing Law, *N.J.S.A.* 18A:6-10, *et. seq.* Among other things, the charges contain redacted exhibits and conclusory allegations that deprive Respondent of fair notice of the charges against him, deprive him of an opportunity to meet and rebut the accusations and his accusers, and fail to clearly set forth specifications as to all charges.

SECOND SEPARATE DEFENSE

Through its administrators and staff, the Board has failed to maintain adequate security for student transcripts and records and has failed to maintain accurate transcripts and records and substantially all of the claimed facts giving rise to Petitioner's allegations flow from Petitioner's own systemic failures.

THIRD SEPARATE DEFENSE

Respondent was not insubordinate in failing to meet with administrators concerning the allegations giving rise to the tenure charges. Upon information and belief, at the time that the administrators were attempting to meet with Respondent, the allegations were already the subject of a threatened or pending criminal investigation and, in the absence of an offer of transactional and use immunity from the County Prosecutor or the Attorney General, Respondent was fully justified in respectfully refusing to participate in an administrative investigation under circumstances where the same alleged incident also formed the basis for threatened criminal charges. *See, e.g., Banca v. Town of Phillipsburg*, 181 *N.J. Super.* 109 (App. Div. 1981); *Garrity v. New Jersey*, 17 *L.Ed.* 2d 562 (1967).

FOURTH SEPARATE DEFENSE

Given mitigating circumstances, the charges, if proven, do not warrant termination or reduction in salary.

WHEREFORE, Respondent requests that the Commissioner of Education issue an order dismissing the instant charges.

SELIKOFF & COHEN, P.A.
Counsel for Respondent, Frederick Clayton

BY: _____
KEITH WALDMAN

Dated: 12-15-06

I certify that the within Answer was filed in accordance with the requirements of *N.J.A.C.* 6A:3-1.5.

SELIKOFF & COHEN, P.A.
Counsel for Respondent, Frederick Clayton

BY: _____
KEITH WALDMAN

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Respondent, Frederick Clayton

IN THE MATTER OF THE TENURE HEARING OF FREDERICK CLAYTON, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO.

PROOF OF MAILING

I, KATHLEEN A. ZIEGER, hereby certify as follows:

1. I am a secretary employed by the law firm of Selikoff & Cohen, P.A.

2. On December 15, 2006, I served one (1) copy of Respondent's Answer to Tenure Charges on the following via United Parcel Service Overnight–Monday delivery at the last known address being:

Dr. Garnell V. Bailey, Acting Business Administrator
Camden Board of Education
Central Administration
201 N Front St 7th Fl
Camden NJ 08102-1935

Nicholas J. Repici, Esq.
Genova, Burns & Vernoia
One Port Center
2 Riverside Dr., Suite 502
Camden, NJ 08103

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 wilfully false, I am subject to punishment.

Kathleen A Zieger
KATHLEEN A. ZIEGER

Dated: December 15, 2006

EXHIBIT C

The State of New Jersey

Department of Education

State Board of Examiners

CERTIFICATE

This is to certify that

FREDERICK CLAYTON

has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey as indicated below:

TYPE	ISSUED	EXPIRES	DESCRIPTION	CO.	DIST.
REG.	10/91	-	STUDENT PERSONNEL SERVICES		

****

John Ellis
Commissioner of Education

Ida B Graham
Secretary, State Board of Examiners

00091576 05

NJDEF030200790

METS SCHIRO & MCGOVERN, LLP
P.O. Box 668
Woodbridge, New Jersey 07095
(732) 636-0040
Attorneys for Respondent,
Frederick Clayton

IN THE MATTER OF THE PUPIL PERSONNEL SERVICES CERTIFICATE OF FREDERICK W. CLAYTON	**BEFORE THE NEW JERSEY STATE BOARD OF EXAMINERS** **CIVIL ACTION** **AFFIDAVIT OF FREDERICK W. CLAYTON**

I, FREDERICK W. CLAYTON, being of full age, being duly sworn, depose and say:

1. I am the holder of a Pupil Personnel Services Certificate.

2. I agree to relinquish to the New Jersey State Board of Examiners the certificate identified in paragraph No. 1 above. The original certificate is attached hereto.

3. I understand the relinquishment of my teaching certificate will be deemed a revocation and will have the same force and effect as a revocation, with all the attendant consequences, as set forth in N.J.A.C. 6A:9-17.8.

4. I consent to the revocation of the certificate that I am surrendering.

5. In consenting to the revocation of my certificate, I agree to waive any and all hearings to which I am entitled pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9-17.7, and I further agree that I will not oppose the revocation of my certificate.

6. I understand that I may never reapply to the New Jersey State Board of Examiners for certification for employment in the public schools of this state pursuant to N.J.S.A. 18A:6-38.

7. I acknowledge that in signing this agreement I have secured the advice of an attorney and I understand the terms of this agreement.

8. I understand that the relinquishment of my certificate shall not take effect until the State Board of Examiners has voted to accept it.

FREDERICK W. CLAYTON

Sworn and Subscribed
before me this 9 day
of March, 2010

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Angel M. Martinez, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Oct. 7, 2013
Member, Pennsylvania Association of Notaries

My commission expires OCT 7, 2013

CERTIFICATION

I, **MR. DAVID SHAFTER, 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, MARCH 9, 2010**, 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 MARCH 2010

DAVID SHAFTER,
Interim School Business Administrator/Board Secretary

MOTION was made by Mr. Spencer and seconded by Mrs. Wilson to adopt Resolution #227-SY'09-Resolution of the Camden City Board of Education Authorizing a Contract With Amy Wachspress For Grant Writing Services For A Total Award Not To Exceed $24,850.00 Motion was carried by the following vote: **YES-MS. ADAME, MS. BLACKSHEAR, MS. COSCARELLO, MR. SPENCER, MRS. WILSON, MRS. DUNBAR-BEY AND MS. DAVIS, PRESIDENT.**

NEW JERSEY SCHOOL BOARD ASSOCIATION PRESENTATION:

New Jersey School Board Association Overview of Type 1 Districts
By Mr. Michael Kaelber, NJSBA Legal Department

BOARD OF SCHOOL ESTIMATE REPRESENTATIVE(S) VOTE:

The floor was opened for nominations for two (2) Board Members to serve on the Board of School Estimate.

The Board nominated the following three (3) Board members to serve on the Board of School Estimate: Ms. Sara T. Davis, Ms. Barbara A. Coscarello and Mrs. Martha F. Wilson.

MOTION was made by Mrs. Susan Dunbar-Bey to close nominations. Motion was carried by the following vote: **YES-MS. ADAME, MS. BLACKSHEAR, MS. COSCARELLO, MR. SPENCER, MRS. WILSON AND MS. DAVIS, PRESIDENT**.

BOARD SOLICITOR: Let the record reflect that the Board's will was for whoever got the majority or the most votes will be the representatives on the Board of School Estimate. This is the process that the Board implemented and the two (2) representatives will be referenced in the vote in which this is the procedure that the Board wishes to exercise.

The selected Board Members received the following votes: Davis – 4; Coscarello-3 and Wilson-2; therefore, the Representatives to the Board of School Estimate are Ms. Davis and Ms. Coscarello.

IMPORTANT ANNOUNCMENTS:

MRS. LINNELL WRIGHT, ASSISTANT SUPERINTENDENT, gave two important announcements regarding the revised school calendar and the snow make up days as well as the Haiti Relief Fund Celebration, which will be held on Monday, March 22, 2010 from 12:30 pm to 1:30 pm., location to be determined.

CLOSED SESSION:

TO DISCUSS THE TENURE MATTER OF THE CAMDEN CITY BOARD OF EDUCATION VS. FREDERICK CLAYTON:

MOTION was made by Mr. Spencer and seconded by Mrs. Dunbar-Bey to go into Closed/Executive Session at 8:22 pm to discuss the tenure matter of CBOE vs. Frederick

ABSTAINED: MS. ADAME

DISCUSSION ON THE 2010-2011 SCHOOL BUDGET

Mr. David Shafter, Interim School Business Administrator/Board Secretary gave the first presentation of the 2010-2011 School Budget.

ADJOURNMENT

MOTION was made by Ms. Coscarello and seconded by Mrs. Dunbar-Bey to adjourn at 10:06 p.m. Motion was carried by the following vote: **YES-MS. ADAME, MS. BLACKSHEAR, MS. COSCARELLO, MR. SPENCER, MRS. WILSON, MRS. DUNBAR-BEY, AND MS. DAVIS, PRESIDENT.**

Respectfully Submitted,

MR. DAVID SHAFTER
Interim School Business Administrator/
Board Secretary

148-10

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD FLYNN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ASBURY PARK, MONMOUTH COUNTY.	:	

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and insubordination against respondent, a Learning Disabilities Teacher-Consultant, for physical altercations with students. The State of New Jersey also filed criminal charges against respondent arising out of the same facts which led to the tenure charges. Subsequently, respondent pled guilty to the third degree crime of endangering the welfare of a child, and consented to the forfeiture of his position as a teacher and the relinquishment of the two instructional certificates he held. Based on the foregoing, the Board filed a motion to withdraw the tenure charges in accordance with the requirements of *N.J.A.C.* 6A:3-5.6.

The ALJ found and concluded that the withdrawal meets the standards of *N.J.A.C.* 6A:3-5.6, and that – as a result of the Order of Forfeiture of Public Office pursuant to *N.J.S.A.* 2C:51-2a(2), respondent's affidavit consenting to relinquishing his certificates, and the State Board of Examiners Order of Revocation – the tenure matter is now moot. Accordingly, the ALJ granted the Board's motion to dismiss the tenure charges.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings 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.

May 21, 2010

148-10

OAL DKT. NO. EDU 10691-09
AGENCY DKT. NO. 295-10/09

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD FLYNN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ASBURY PARK, MONMOUTH COUNTY.	:	

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 such review, the Commissioner concurs with the Administrative Law Judge that the tenure charges filed by the Asbury Park Board of Education have been mooted by respondent's forfeiture of public employment and relinquishment of his teaching certificates, so that no purpose would be served by further proceedings in this matter.

Accordingly, the Initial Decision of the OAL – granting the Board's motion to dismiss the tenure charges – is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/21/10
Date of Mailing: 5/21/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING PETITIONER'S
MOTION TO WITHDRAW
TENURE CHARGES
PURSUANT TO N.J.A.C. 6A:3-5.6
OAL DKT. NO. EDU 10691-09
AGENCY DKT. NO. 295-10/09

IN THE MATTER OF THE TENURE HEARING OF EDWARD FLYNN, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.

Douglas J. Kovats, Esq., for School District of Asbury Park, petitioner (Kenney, Gross, Kovats & Parton, attorneys)

Marcie L. Mackolin, Esq., for Edward Flynn, respondent (Chamlin, Rosen, Uliano & Witherington, attorneys)

Record Closed: March 19, 2010 Decided: April 29, 2010

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

Petitioner certified tenure charges of conduct unbecoming and insubordination against the respondent Learning Disabilities Teacher-Consultant (LDTC) on or about

October 14, 2009. The charges were filed with the Commissioner on October 19, 2009, and transmitted to the Office of Administrative Law (OAL) on November 4, 2009, for an expedited hearing pursuant to N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-10.1. The State of New Jersey also filed criminal charges against the respondent herein arising out of the same facts and circumstances which led to the tenure charges; i.e., physical altercation with students. On September 28, 2009, defendant Edward Flynn appeared before the Honorable Ronald L. Reisner, J.S.C. in connection with State of New Jersey v Edward C. Flynn, Jr., MON-L-09-00870. In addition to pleading guilty to the third degree crime of endangering the welfare of a child, contrary to the provisions of N.J.S.A. 2C:24-4a, Flynn consented to forfeiture of his position as a teacher with the Asbury Park Board of Education and forfeiture from ever holding any office or "position of honor, trust, or profit under the State of New Jersey or any of its administrative or political subdivisions." (C-1). Flynn also executed an affidavit consenting to relinquishing to the State Board of Examiners the two certificates he holds: Teacher of the Handicapped and LDTC, respectively. (C-2). This was presented to the Board of Examiners at its meeting of January 7, 2010, and the Board ordered the revocation of Flynn's certificates effective immediately.[1] (C-3). Respondent herein was represented by counsel of record in the criminal proceeding and in the matter of the teaching certificates.

Based on the foregoing, the petitioner filed the within motion to withdraw the tenure charges in accordance with the requirements of N.J.A.C. 6A:3-5.6, asserting that based upon the forfeiture and revocation of the certificates, the tenure charges need not be pursued by the petitioner. No opposition has been filed.

Having considered the submission of counsel, I **FIND** and **CONCLUDE** that the withdrawal meets the standards of N.J.A.C. 6A:3-5.6. I also note that as a result of the Order of Forfeiture of Public Office pursuant to N.J.S.A. 2C:51-2a(2) (C-1), respondent's affidavit (C-2), and State Board of Examiners Order of Revocation (C-3), the within tenure matter is now moot.

[1] Although the Order was entered on January 7, 2010, it was not available on the State Board of Examiners' website and petitioner's counsel was not able to provide a copy until March 18, 2010.

Petitioner's motion to dismiss the tenure charges in accordance with N.J.A.C. 6A:3-5.6 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.

April 29, 2010

DATE

Ana C. Viscomi

ANA C. VISCOMI, ALJ

Date Received at Agency: MAY 5 2010

Date Mailed to Parties: MAY 5 2010

/lam

APPENDIX

LIST OF EXHIBITS

C-1 Order of Forfeiture of Public Office Pursuant to N.J.S.A. 2C:51-2

C-2 Affidavit of Edward C. Flynn, Jr.

C-3 State Board of Examiners Order of Revocation, DKT. No. 0910-118

FILED
SEP 28 2009
RONALD LEE REISNER, J.S.C.

LUIS A. VALENTIN
MONMOUTH COUNTY PROSECUTOR
COURT HOUSE
FREEHOLD, NEW JERSEY 07728-1789
732/ 431-7160

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION (CRIMINAL)
CASE NO. 09-00870
ACCUSATION NO.

CRIMINAL ACTION

STATE OF NEW JERSEY, :

Plaintiff, :

V. :

EDWARD C. FLYNN, JR., :

Defendant. :

FORFEITURE OF PUBLIC OFFICE
PURSUANT TO N.J.S.A. 2C:51-2

This matter having been opened to the Court on this date by Monmouth County Prosecutor Luis A. Valentin, Assistant Monmouth County Prosecutor Maria M. Franceschini appearing, and Charles Uliano, Esq., attorney for Defendant Edward C. Flynn, Jr., upon notice to and in the presence of Defendant Edward C. Flynn, Jr.; and

Defendant Edward C. Flynn, Jr., having appeared before this Court on this date and entered a plea of guilty to the third degree crime of Endangering the Welfare of a Child, contrary to the provisions of N.J.S.A. 2C:24-4a as charged, and the Court having received an adequate factual basis from Defendant Edward C. Flynn, Jr., to substantiate the charge; and

Defendant Edward C. Flynn, Jr., having consented, as a material condition of the plea agreement, to the entry of this Order; and

The Court having found that Defendant Edward C. Flynn, Jr., has been convicted under the laws of this State of an offense involving dishonesty and/or of a crime of the third degree or

C-1

above under N.J.S.A. 2C:51-2a(1), and/or of an offense involving or touching his public office position or employment under N.J.S.A. 2C:51-2a(2);

It is on this 24 day of September, 2009 ORDERED, pursuant to the provisions of N.J.S.A. 2C:51-2a(1), N.J.S.A. 2C:51-2a(2), N.J.S.A. 2C:51-2b(1) and N.J.S.A. 2C:51-2b(2) and N.J.S.A. 2C:51-2d as follows:

(1) Defendant Edward C. Flynn, Jr., herewith has forfeited his position as a teacher with the Asbury Park Board of Education, and

(2) Defendant Edward C. Flynn, Jr., having been convicted under the laws of this State of an offense involving or touching his public office, position or employment is forever disqualified from holding any office or position of honor, trust or profit under the State of New Jersey or any of its administrative or political subdivisions.

RONALD L. REISNER, J.S.C.

I hereby consent to the form and entry of the within Order.

Edward C. Flynn, Jr., Defendant

MARCIE L. MACKOLIN, ESQ., for:
Charles Uliano, Esq.
Attorney for Defendant Edward C. Flynn, Jr.

IN THE MATTER OF THE TEACHING CERTIFICATES OF EDWARD C. FLYNN, JR.)

BEFORE THE NEW JERSEY STATE BOARD OF EXAMINERS

Docket No. 0910-118

Civil Action

AFFIDAVIT OF
EDWARD C. FLYNN, JR.

Edward C. Flynn, Jr., of full age, being duly sworn upon his oath, deposes and says:

1. I am the holder of the following teaching certificates:

Teacher of the Handicapped
Learning Disabilities Teacher-Consultant

2. I agree to relinquish to the New Jersey State Board of Examiners the teaching certificates identified in Paragraph No. 1 above. The original certificates are attached hereto.

3. I understand that the relinquishment of my teaching certificates will be deemed a revocation and will have the same force and effect as a revocation, with all attendant consequences, as set forth in N.J.A.C. 6A:9-17.8.

4. I consent to the revocation of the certificates that I am surrendering.

5. In consenting to the revocation of my certificates, I agree to waive any and all hearings to which I am entitled pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9-17.7, and I further agree that I will not oppose the revocation of my certificates.

6. I understand that I may never reapply to the New Jersey State Board Examiners for certification for employment in the public schools of this State pursuant to N.J.S.A. 18A:6-38.

7. I acknowledge that in signing this agreement I have secured the advice of an attorney and I understand the terms of this agreement.

C.2

8. I understand that the relinquishment of my certificates shall not take effect until the State Board of Examiners has voted to accept it.

Edward C. Flynn, Jr.

Sworn and subscribed
before me this 28th day
of September, 2009

MARCIE L. MACKOLIN, ESQ.
NJ. Attorney at Law.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
EDWARD FLYNN, JR.	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 0910-118

At its meeting of January 7, 2010, the State Board of Examiners reviewed an affidavit Edward Flynn, Jr. had forwarded. After pleading guilty to Endangering the Welfare of a Child, the Court ordered Flynn to forfeit his teaching certificates. Flynn currently holds a Teacher of the Handicapped certificate, issued in June 1983 and a Learning Disabilities Teacher-Consultant certificate, issued in March 1990.

Flynn agreed to forfeit his certificates with the force and effect of a revocation and all attendant consequences in his affidavit to that effect to the New Jersey State Board of Examiners. At its meeting of January 7, 2010, the Board voted to accept Flynn's relinquishment with the force and effect of a revocation pursuant to *N.J.A.C.* 6A:9-17.8.

Accordingly, on this 7th day of January 2010 it is therefore ORDERED that the revocation of Edward Flynn Jr.'s Teacher of the Handicapped and Learning-Disabilities Teacher-Consultant certificates be effective immediately.

Robert R. Higgins, Secretary
State Board of Examiners

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.A.C.* 6A:4-1.3(b).
Date of Mailing: 1/13/10

C-3

OAL DKT. NO. EDU 3831-10
AGENCY DKT. NO. 74-4/10

D.L. AND C.L., on behalf of minor child, S.L.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE TOWNSHIP OF VERNON, SUSSEX COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that emergent relief cannot be granted in this matter, as petitioners have failed to demonstrate their entitlement thereto in accordance with *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6(b). However, in so doing, the Commissioner modifies the ALJ's analysis as set forth below.

Initially, the Commissioner fully agrees that there has been no showing by petitioners that the legal right underlying their claim is settled, that they have a likelihood of success on the merits of their underlying appeal, and that the balance of interests and equities under the circumstances rests in their favor.

However – while it does not affect the outcome of this matter because applicants for emergent relief must satisfy *all* of the requisite criteria – the Commissioner cannot agree that petitioners' application additionally fails to meet the threshold criterion of irreparable harm. The Commissioner finds instead that petitioners *have* met such standard, notwithstanding that participation in extracurricular activities is a privilege rather than a right, since the opportunity to

participate in such events cannot be regained once lost and dismissal of an emergent application for failure to meet this criterion would effectively insulate the school district's actions from any meaningful review.[1]

Accordingly, for the reasons set forth therein as modified above, the Commissioner adopts the recommended Order of the OAL denying petitioners' application for emergent relief because it fails to meet the requisite criteria. This matter shall continue at the OAL, with proceedings to ensue as necessary to bring it to conclusion.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5|25|10

Date of Mailing: 5|27|10

[1] In this regard, the Commissioner is fully cognizant of the well-established principle that a prohibition from extracurricular activities does not, in and of itself, rise to the level of irreparable harm necessary to warrant extraordinary relief. 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 activity 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. The Commissioner has consistently recognized this distinction in more recent rulings on emergent applications seeking restoration of privilege; see, for example, *S.L., on behalf of minor child, D.L. v. Board of Education of the Township of Verona, Essex County,* decided by the Commissioner September 7, 2007; *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; *M.R., on behalf of minor child, J.R. v. Board of Education of the Town of Kearny, Hudson County*, decided by the Commissioner May 30, 2008; *Samantha Walsh v. Board of Education of the Monmouth Regional High School District, Monmouth County*, decided by the Commissioner June 20, 2008; *M.L., on behalf of minor child, S.L. v. Board of Education of the Township of Ewing, Mercer County*, decided by the Commissioner June 15, 2009; *M.N., on behalf of minor child, R.N., v. State-Operated School District of the City of Newark, Essex County*, decided by the Commissioner June 16, 2009; *Michael Buonasorte, Jr. v. Board of Education of the Mainland Regional High School District, Atlantic County*, decided by the Commissioner June 19, 2009; *David Doll v. Board of Education of the Borough of Pitman, Gloucester County,* decided by the Commissioner June 22, 2009; *Steven E. Tomlin, Jr. and Diane Hogan v. Board of Education of the Lower Cape May Regional School District, Cape May County*, decided by the Commissioner June 22, 2009; *Robert Nabel v. Board of Education of the Township of Hazlet*, decided by the Commissioner June 24, 2009; *William Nash v. Board of Education of the Town of Kearny, Hudson County,* decided by the Commissioner March 23, 2010.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 03831-10
AGENCY DKT. NO. 74-4/10

D.L. AND C.L. ON BEHALF OF
MINOR CHILD, S.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF VERNON, SUSSEX COUNTY,
Respondent.

Sergio R. Pastor, Esq., for petitioners

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

BEFORE **RICHARD McGILL**, ALJ:

S.L. was removed from the varsity baseball team of Vernon Township High School (VTHS) for the 2010 season as the result of incidents of misconduct during the 2009-2010 school year. S.L.'s parents, D.L. and C.L. (petitioners), seek emergent relief in the form of reinstatement of S.L. to the baseball team. The Board of Education of the

Township of Vernon (respondent) opposes petitioners' request for reinstatement of S.L. to the VTHS varsity baseball team.

Petitioners filed their petition with the Commissioner of Education on April 20, 2010, invoking the Commissioner's authority to hear and determine controversies under the school laws pursuant to N.J.S.A. 18A:6-9. In conjunction with the petition, petitioners filed a motion for a stay or emergent relief pursuant to N.J.A.C. 6A:3-1.6.

The matter was transmitted to the Office of Administrative Law on April 26, 2010, for determination as a contested case. On April 29, 2010, respondent filed papers responsive to petitioners' motion for emergent relief. Oral argument in regard to petitioners' motion for emergent relief was conducted on April 30, 2010, at the Office of Administrative Law in Newark, New Jersey.

Petitioners filed their motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

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 first consideration is whether S.L. will suffer irreparable harm if the requested relief is not granted. Petitioners maintain that S.L. is talented as a baseball player and

that participation on the baseball team will give him the opportunity to earn a scholarship to college. According to petitioners, removal of S.L. from the baseball team will deny him this opportunity and cause irreparable harm.

The difficulty with petitioners' argument is that the Commissioner of Education has repeatedly held that students do not suffer irreparable harm when they are prohibited from participating in extracurricular activities such as interscholastic sports. E.g., Elmwood Park Borough Board of Education v. New Jersey State Interscholastic Athletic Association, 94 N.J.A.R. 2d (EDU) 106, 109 (1994); Board of Education of the City of Camden v. N.J. State Interscholastic Athletic Association, 92 N.J.A.R. 2d (EDU) 182, 188 (1992); Board of Education of the City of Trenton, Mercer County v. NJSIAA, 91 N.J.A.R. 2d (EDU) 158, 160 (1991). It follows that removal of S.L. from the VTHS varsity baseball team will not cause irreparable harm to S.L. within the meaning of N.J.A.C. 6A:3-1.6(b)1.

The second consideration is whether the legal right underlying petitioners' claim is settled. One difficulty with respect to this consideration is that the original petition as prepared by the parents does not set forth specific legal theories. Moreover, this factor is intertwined with the third consideration, i.e., the petitioners' likelihood of prevailing on the merits of the underlying claim.

Nonetheless, two legal theories can readily be inferred from the petition. The first legal theory is that the removal of S.L. from the VTHS varsity basketball team was arbitrary, capricious and unreasonable. It is well established that a school district may not engage in action which is arbitrary, capricious or unreasonable. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 295-96 (App. Div. 1960). Within this determination with respect to petitioners' request for emergent relief, it will be necessary to determine whether petitioners have established a likelihood of prevailing on the merits.

Another legal theory readily discernible from the petition is that S.L. was denied due process of law in that petitioners were not notified of an incident on March 26, 2010,

and S.L. was not given a hearing. With respect to the constitutional right to due process of law, the threshold question is whether students have a federally protected property interest in extracurricular activities. In Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988), aff'd 868 F.2d 90 (3rd Cir. 1989), the court stated as follows: "New Jersey is not alone in recognizing that students do not have a federally protected property interest in extracurricular activities. The great majority of state and federal courts which have considered this issue have reached a similar conclusion." Id., at 408. On appeal, the majority in the Third Circuit Court of Appeals did not address the question whether a student has a federally protected property interest in extracurricular activities. Rather, the Court decided that the procedures which the student received in regard to a ten-day suspension from school were adequate to satisfy due process requirements with respect to a sixty-day suspension from the football program. The dissent addressed in the question whether a student has a federally protected property interest in extracurricular activities and described the state of the law as follows: "The question of whether a student has a protectable interest in his continuing participation in extracurricular activities has been faced by numerous courts with differing results." Id., at 97.

More recently, in Wooten v. Pleasant Hope School Dist., 139 F. Supp. 2d 835 (W.D. Mo. 2000), aff'd 270 F.3d 549 (8th Cir. 2001), the Court stated as follows: "The prevailing view in most jurisdictions is that no federally-protected property interest exists in a student's participation in extracurricular activities." Id., at 840. As recently as 2006, a Court held that the opportunity to participate in extracurricular activities is not a federally-protected property interest. Perry v. Ohio High Sch. Ath. Ass'n, 206 U.S. Dist. LEXIS 74080 at 13 (Oct. 11, 2006).

In view of the above, there is no settled legal right underlying petitioners' claim that S.L. was denied due process of law. Further, as noted above, the petition does not set forth specific legal theories in support of the request for relief. It follows that aside from the claim that the removal of S.L. from the VTHS varsity baseball team was arbitrary, capricious and unreasonable, petitioners have no settled legal theory to support the request for emergent relief.

The third consideration is whether petitioners have a likelihood of prevailing on the merits of the underlying claim. In this matter, the only settled legal theory of petitioners' case is that the removal of S.L. from the VTHS varsity baseball team was arbitrary, capricious and unreasonable. With respect to this contention, respondent presented certifications which show that S.L. engaged in various instances of misconduct in school generally in the form of the use of vulgar, disrespectful and insubordinate language toward teachers and staff. This behavior was contrary to the VTHS General Athletic Team Rules and Regulations, which require that athletes conduct themselves in a manner that reflects credit upon their families, school team and coaches. Further, violations of the code of conduct may result in suspension or dismissal from the athletic team. The certifications indicate that S.L. has violated this policy on multiple occasions. Petitioners' submissions do not discredit the manner in which the situation was handled by respondent's personnel. Under the circumstances, petitioners have failed to demonstrate a likelihood of prevailing on the merits of the claim. It follows that petitioners do not satisfy the third condition for emergent relief.

In regard to the equities and interests of the parties, S.L.'s problem stems from his own misconduct by using vulgar language to a teacher in the classroom. Respondent has a clear interest in maintaining order in the classroom. S.L.'s interest in playing on the baseball team does not tip the balance of the equities and the interests of the parties in his favor. Under the circumstances, petitioners do not satisfy the fourth condition for emergent relief.

In view of the above, I **CONCLUDE** that the emergent relief requested by petitioners must be denied. Accordingly, it is **ORDERED** that petitioners' motion for emergent relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of

Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 7, 2010
DATE

RICHARD McGILL, ALJ

jb

OAL DKT. NO. EDU 9409-09
AGENCY DKT. NO. 130-6/09

JOSEPH DELESKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Stipulation of 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.[1] The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|27|10

Date of Mailing: 5|27|10

[1] It is noted that the record in this matter contained a resolution of the Warren County Technical School Board of Education approving this settlement and authorizing its Board President, Brad Bartow, to execute the agreement on its behalf.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09409-09
AGENCY DKT. NO. 130-6/09

JOSEPH DELESKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE
WARREN COUNTY TECHNICAL SCHOOL, WARREN COUNTY
Respondent.

Sanford R. Oxford, Esq. for petitioner (Oxfeld Cohen, attorneys)

Allen P. Dzwilewski Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Zitomer attorneys)

Record Closed: April 20, 2010 Decided: April 26, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 13, 2009 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 on the attached settlement agreement. The Warren County Technical School Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated April 22, 2010.

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 26, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 4-28-10

Mailed to Parties:

APR 28 2010
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/rr

SCHWARTZ SIMON EDELSTEIN
CELSO & ZITOMER LLC
44 Whippany Road
Morristown, NJ 07960
(973) 301-0001
Attorneys for Warren County Technical
School Board of Education

WARREN COUNTY TECHNICAL SCHOOL BOARD OF EDUCATION

-and-

WARREN TECH EDUCATION ASSOCIATION

PERC Docket No. 2009-320

STIPULATION OF AGREEMENT AND RELEASE

WHEREAS, the parties to the above matter are desirous of resolving the issues set forth therein as they relate to Joseph Delesky (see, generally Second Count);

NOW THEREFORE, in consideration of the following and valuable consideration, it is agreed by and between the parties hereto as follows:

1. The District will, in compromise, pay Delesky $10,000.00 in full satisfaction for any and all current and back pay claims and emoluments, including sick days, health benefits, mileage reimbursement, etc. This sum will be paid within 30 days of Board approval of the herein Agreement.

2. Upon the execution by the Association and Delesky of this Agreement and approval by the Board, the Association and Delesky will withdraw with prejudice the above matter currently pending before the Public Employment Relations Commission. Delesky will also withdraw with prejudice his appeal pending before the Commissioner of Education and Office of Administrative Law, Agency Reference No. 130-6/09 and OAL

Dkt. No. EDU 09409-09 regarding cessation of his employment by the Board. In so doing, Delesky also relinquishes any and all recall rights to return to the Board's employment.

3. Delesky shall submit a letter of resignation dated June 30, 2009, which resignation the Board shall accept. In so doing, Delesky recognizes that he is relinquishing any and all recall rights to return to the Board's employment.

4. The foregoing shall constitute full and complete settlement regarding any and all claims of whatever nature the Association and Delesky have or may have against the Board of Education, the School District, its officers and employees regarding these PERC and Commissioner of Education matters and constitutes a Release to the benefit of the Board and District and all its employees and officers regarding same through the date of this Agreement.

5. In consideration for the terms detailed above, the Association and Delesky hereby forever waive and release all legal and/or equitable claims they have or may have against the Board, its officers and/or employees under State law relating to the issues currently pending before PERC and the Commissioner of Education, and any and all other claims against the Board, its officers and/or employees relating in any way, either directly or indirectly, limited to the issues addressed in these matters and this Agreement.

6. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the Board, its officers and employees and shall not be referred to in any subsequent proceeding by any party other than to enforce the express terms of this Agreement. In the event that this Agreement is not fully executed and approved by all parties hereto, this Agreement shall become null and void and shall neither constitute an admission of any party, nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

7. The Association and Delesky agree that this Agreement and Release and their terms are and will remain confidential to the full extent permitted by law and that they will not voluntarily disclose its terms or otherwise discuss the settlement either directly or through their representatives; except that John Ropars of the NJEA is familiar with the terms of this settlement. Ropars, likewise agrees to keep its terms confidential.

8. The covenants and agreements herein contained shall bind and inure to the benefit of the parties hereto and their respective heirs, representatives, successors and assigns.

9. This Agreement represents the entire agreement between the parties hereto, and it will not be modified, in whole or part, except by a mutual, written agreement.

10. The Association and Delesky acknowledge that they have entered into this Agreement freely, willingly and voluntarily, without duress or coercion and with the opportunity to consult with counsel or other advisor(s) of their choosing and option and that they fully understand its terms and conditions. They acknowledge that they did in fact consult with Sanford R. Oxfeld, Esq. prior to executing this Agreement and Release.

11. Nothing stated herein shall act or serve as an admission of either party that their positions and/or claims regarding the herein matters were anything less than legitimate and valid.

12. It is understood and agreed that this Agreement is subject to the review and approval of the Board of Education and the herein Agreement shall not be effective as to the School District without the specific approval of the Board of Education. This

Agreement will be presented to the Board with a recommendation for approval at its March 10, 2010 meeting or as soon thereafter as possible.

3/6/10
Dated

Edward S. Yanusinsky, President, WTEA
Warren Tech Education Association

3/6/10
Dated

Joseph Delesky

For the Board:

3-24-10
Dated

Bradley Bartow
Board President

Attested:

Edmund Zalewski
Board Secretary

{00453560; 1}

162-10L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BRET SCHUNDLER
Commissioner

May 25, 2010

Ellen Hale, DAG
NJ Department of Law & Public Safety
Division of Law, Education Section
P.O. Box 112
Trenton, NJ 08625-0112

Rosemarie Cipparulo, Esq.
Weissman & Mintz, LLC
One Executive Drive
Suite 200
Somerset, NJ 08873

Dear Counsel:

Pursuant to *N.J.A.C.* 6A:3-5.6, I have reviewed the Department of Corrections' certified tenure charges and the proposed settlement agreement presented to me by the parties under caption of *In the Matter of the Tenure Hearing of Christopher Bound, New Jersey Department of Corrections, New Jersey State Prison,* Agency Dkt. No. 21-2/10.

Upon such review, I find the proposed settlement consistent with established standards governing settlement of tenure matters, as set forth in *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, I hereby approve the settlement and dismiss the tenure matter, subject to the parties' compliance with the terms of the settlement.

Sincerely,

Bret Schundler
Commissioner

c: State Law Library

Mailed May 27, 2010

PAULA T. DOW
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)633-7786

2010 MAY 19 A 2:02

In the Matter of the Tenure Hearing of Christopher Bound, Department of Corrections

Agency Dkt. No.: EDU 08561-2009S

STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), represented by PAULA T. DOW, Attorney General of New Jersey, Ellen M. Hale, Deputy Attorney General, appearing; and Christopher Bound, a tenured employee of the NJDOC represented by Rosemarie Cipparulo, Esq., appearing; by way of this Stipulation of Settlement say:

WHEREAS, the Department initiated the filing of tenure charges against Mr. Bound, having filed the charges with the Commissioner of Education on or about February 1, 2010; and

WHEREAS, Mr. Bound was charged with Conduct Unbecoming a Teacher as defined in N.J.S.A. 18A:6-10; N.J.A.C. 6A:3-5.1, N.J.A.C. 4A:2-2.3(a) and Human Resources Bulletin 84-17, as amended, C-11 conduct unbecoming an employee; and

WHEREAS, the tenure charges alleged that on December 11, 2009,

Mr. Bound failed to report that an inmate was using a computer without authorization, observed the inmate delete a file, and also observed the inmate place a disk in a paper clip box. Although Mr. Bound later retrieved and secured the disk on December 11, 2009, he failed to report the incident to his supervisor until December 15, 2009, which was in violation of the safety and security regulations and policies at the New Jersey State Prison;

WHEREAS, the NJDOC sought the suspension of Mr. Bound for thirty (30) days without pay for the above set of charges;

WHEREAS, Mr. Bound disputed the charges;

WHEREAS, Mr. Bound has not yet served any suspension time;

WHEREAS, the petitioner has concluded that it may be time consuming and expensive to prove the tenure charges against Mr. Bound;

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Bound;

WHEREAS, Mr. Bound entered into the agreement with a full understanding of his rights;

WHEREAS, Mr. Bound is not owed any pay, counsel fees or any other costs associated with this matter;

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. Bound admits to the charges and underlying conduct as set forth above.

2. As the penalty, Mr. Bound shall be suspended ten (10) days without pay. The suspension time shall be scheduled consistent with Operational needs and at the management's discretion. The suspension will be completed and served consistent with Department Policy.

3. Mr. Bound's personnel record shall reflect a 10-day suspension without pay.

4. This Agreement shall be part of Mr. Bound's official personnel file and his 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.

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. Bound 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 ten days to be without pay is equitable in

exchange for eliminating the expense, time and uncertainty connected with a contested tenure hearing.

7. This Agreement shall 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:

Christopher Bound — Dated: 4/22/2010

Rosemarie Cipparulo, Esq. — Dated: 5/13/2010
Weissman & Mintz, LLC
Attorney for Bound

For the Department of Corrections:

Kenneth Green, Director — Dated: 5/12/10

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: Ellen M. Hale — Dated: 5/14/10
Deputy Attorney General

163-10

OAL DKT. NO. EDU 894-09
AGENCY DKT. NO. 28-2/09

T.C., on behalf of minor child, C.L.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH 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: 5/27/10

Date of Mailing: 5/27/10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 894-09

AGENCY DKT. NO. 28-2/09

T.C. o/b/o minor child, C.L.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

T.C., petitioner pro se

James T. Hundley, Esq., for respondent (Hundley & Parry, attorneys)

Record Closed: April 19, 2010 Decided: April 30, 2010

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

This matter was transmitted to the Office of Administrative Law (OAL) on March 24, 2009, 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 case management conference was held on May 18, 2009, after which the parties further conferenced on July 27, 2009. The matter was re-scheduled for February 10, 2010.

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) It was received at the OAL on April 19, 2010, at which time 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 hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 30, 2010

DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:

Date Mailed to Parties:

/mamf

HUNDLEY & PARRY, P.C.
35 Pilgrim Pathway
P. O. Box 488
Ocean Grove, New Jersey 07756
Phone: (732) 775-3100
Fax: (732) 775-3103
Email: JTH6950@hotmail.com
Attorneys for Respondent

4-19-10

T.C. on behalf of minor child, C.L.G.	:	**STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE** LAW
Petitioner		
- vs -	:	**AGENCY REF. NO. 28-2/09 OAL DKT. NO. EDUOS00894-2009S**
NEPTUNE TOWNSHIP BOARD OF EDUCATION,	:	
	:	**STIPULATION OF SETTLEMENT**
Respondent	:	

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I. Recitals

1.01 Whereas, Petitioner T.C. is the mother of minor child, C.L.G.; and

1.02 Whereas, on or about September, 2008, Petitioner T.C. enrolled her daughter C.L.G. as a pupil in the Respondent Board's preschool program based upon the Neptune Township Public School District domicile of pupil C.L.G.'s father B.G., and

1.03 Whereas, the Respondent Board subsequently determined pupil C.L.G.'s father B.G. was not domiciled in the Neptune Township Public School District within the meaning of **N.J.S.A. 18A:38-1** and **N.J.A.C. 6A:10A-2.2;** and

1.04 Whereas, on January 28, 2009, Respondent Board adopted a resolution approving the removal of pupil C.L.G. from the District's preschool

program; and

1.05 Whereas, on or about February 17, 2009, Petitioner T.C. filed an appeal of the Board's January 28, 2009 pupil removal determination; and

1.06 Whereas, on or about March 12, 2009, Respondent Board filed an Answer to Residency Appeal and Counterclaim for Tuition pursuant to **N.J.A.C. 6A:22-6.2**; and

1.07 Whereas, during the course of this litigation, Petitioner T.C. established her residency and domicile in the Neptune Township Public School District; and

1.08 Whereas, Respondent Board has determined that pupil C.L.G. currently resides with her mother, Petitioner T.C., in the Neptune Township Public School District; and

1.09 Whereas, the parties are desirous of settling this matter.

Now, therefore the parties agree as follows:

II. Settlement Terms

2.01 Pupil C.L.G. will continue to be enrolled as a pupil in the Neptune Township Public School District while residing with her mother, Petitioner T.C., during all times Petitioner T.C. is a resident of and domiciled in the Neptune Township Public School District.

2.02 Petitioner T.C. hereby dismisses the Residency Appeal filed in this matter, with prejudice.

2.03 Respondent Board hereby dismisses its Counterclaim For Tuition filed in this matter, with prejudice.

2.04 The parties consent to the terms of this Stipulation of Settlement being

incorporated into any Initial Decision and/or Finial Decision entered in this matter.

THE BOARD OF EDUCATION
OF THE TOWNSHP OF NEPTUNE,
MONMOUTH COUNTY,
RESPONDENT/COUNTERCLAIMANT

Dated: April 15, 2010

By: _____
JAMES T. HUNDLEY, ESQ.

RESPONDENT T.C.

Dated: April 15, 2010

_____

ELIZABETH EDUCATION ASSOCIATION, ROSE CARRETO AND MARIA DEJESUS DIAS,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning education association asserted that the respondent Board has maintained class sizes in excess of the limits provided in *N.J.A.C.* 6A:13-3.1, and filed a motion for summary decision. The Board avered that the matter is not ripe for summary decision, and further asserted that the petitioners lack standing to bring their claims.

The ALJ found that: the matter was ripe for summary judgment; Elizabeth is a "high poverty" district within the intent of *N.J.A.C.* 6A:13-3.1, and therefore subject to the class size requirements of the regulation; during the 2008-09 and 2009-10 school years, numerous district class sizes exceeded the regulatory limits, thereby failing to address the mandated needs of the district's "at risk" students. The ALJ concluded that the Board's contention that petitioners lack standing is meritless, and ordered that the Board immediately comply with the requirements of *N.J.A.C.* 6A:13-3.1 relative to class size.

The Commissioner concurred with the ALJ that petitioners have standing in this matter and adopted the Initial Decision as the final decision in this matter, finding unpersuasive the Board's exception arguments regarding extenuating fiscal constraints.

This synopsis is not part of 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 27, 2010

OAL DKT. NO. EDU 1637-09
AGENCY DKT. NO. 380-12/08

ELIZABETH EDUCATION ASSOCIATION, ROSE CARRETO AND MARIA DEJESUS DIAS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioners' reply thereto[1] – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

The Board first excepts to the Administrative Law Judge's (ALJ) reliance in her decision upon 2008-09 enrollment data provided by the petitioners. This reliance was improper, it argues, because such data should have been excluded as moot since it deals with a school year which has already passed and the ALJ cannot rule prospectively. More significantly, it maintains, this data should have been excluded because the instant petition was filed on December 24, 2008, well into the start of the 2008-09 school year and, as such, deals with a school year which was in progress and is, therefore, irrelevant in determining whether the Board is currently in violation of class size mandates. (Board's Exceptions at 2)

[1] It is noted that petitioners' 22-page reply exception submission – transmitted to the agency via facsimile – included a copy of the 12-page Initial Decision in this matter. As the Initial Decision of the OAL is **always** a part of the record before the Commissioner, attachment of this document to subsequent submissions of the parties is superfluous and unnecessary.

Next the Board urges that the ALJ erroneously relied on the certification provided by Kathleen Wolfe as this certification was not submitted with petitioners' motion papers but, instead, was included with its reply to the Board's brief. Consequently, the Board did not have an opportunity to review and respond to this certification in its opposition to petitioners' motion papers. (*Ibid.*)

Continuing, the Board disagrees with the ALJ's ruling that this matter was ripe for summary decision because it avers a number of issues of material fact remain as to whether the Board has classes over the regulatory size limit. In this regard it argues:

> While the Respondent does not dispute that it provided the Petitioners with documentation showing that some of its class rosters appear to be over the size limit, as the Respondent emphasized in its opposition papers, there is an ever-existing fluctuation of students in and out of the school district at any given time within the school year that make such rosters unreliable for purposes of calculating the number of students in every class within the entire district. In addition, the attendance records the Respondent attached to its opposition papers, records which the Judge failed to consider, demonstrate that a class roster does not provide an accurate assessment of the average class size in a school year, especially with respect to the middle schools and high schools, where classes are taught in "periods" throughout the day, as opposed to one teacher having the same class for an entire day.
>
> Further, the New Jersey Administrative Code 6A:32-8.2 provides that school enrollment should be calculated by the "sum of the days present and absent of all enrolled students when schools were in session during the year, divided by the number of days schools were actually in session," something that was not done in this case. (Board's Exceptions at 4)

Finally, the Board maintains that the ALJ failed to consider the economic ramifications to the District – in this time of significant budget cuts – of compelling immediate compliance with class size limitations. (*Ibid.*)

In response, petitioners propose that the ALJ's reliance on 2008-09 class size data was entirely proper, notwithstanding the passage of time. They charge that the Board conveniently overlooks that the instant appeal was filed during the 2008-09 school year because

of excessively large classes. This class size trend continued in the 2009-10 school year and establishes the Board's clear violation of the regulation over the course of several academic years. (Petitioner's Reply Exceptions at 2)

As to the Board's objection to the certification of Kathleen Wolfe – petitioners offer that this document was submitted in response to respondent's opposition to summary decision which included certifications of Ms. Morgan and Assistant Superintendent Olga Hugelmeyer wherein they admit that class sizes were and are over the class size limit. The purpose of Ms. Wolfe's certification, they posit, was merely to provide a firsthand illustration of how excessive class sizes negatively impact the classroom atmosphere and a teacher's ability to perform his or her duties. (*Id.* at 2-3)

Petitioners dismiss as "preposterous" the Board's contention that this matter was not ripe for summary decision "based on the alleged 'material fact as to whether the Respondent has class sizes that are actually over the limit.'" To the contrary, it points out:

> As reflected in the class size data produced by the Board, it is undisputed that during the 2008-09 and 2009-10 school years, district class sizes have been over the limit allowed pursuant to *N.J.A.C.* 6A:13-3.1(a). Moreover, by its own admission, the Board has acknowledged that classes are too large. The Petitioners need not prove that each and every class size in the District is excessively large in order to establish a violation of the regulation. And there is ample evidence to clearly illustrate that excessive class sizes are rampant in grades kindergarten through twelfth. Even assuming that there is an inherent fluctuation of attendance within the District, it does not, and cannot explain, nor excuse the rampant violations that persist at all grade levels, and at nearly every single school in the District. (Petitioners' Reply Exceptions at 4-5)

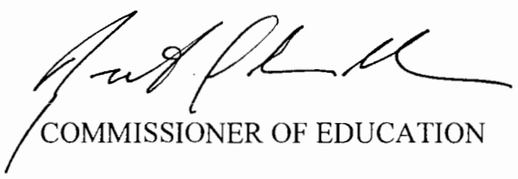
Lastly, petitioners argue, "the Board's cry for sympathy and immunity from the class size requirements is likewise without merit." Maintaining that the ALJ was insensitive to the Board's ability to comply with class size regulations due to fiscal restraints, it seeks that the instant petition be dismissed, claiming that it is not possible for it to comply. Petitioners submit

that class size regulations for high poverty districts like Elizabeth are clear on their face and the Board was and continues to be obligated to adhere to the stated requirements. Petitioners contend that the Board's own data clearly evidences that there have been and continue to be a large number of classes with an excessive number of students. They urge that the Board is responsible for complying with the regulations and neither the Court nor the Commissioner is duty bound to excuse the Board's violation simply because it claims to be under fiscal constraints. (Petitioner's Reply Exceptions at 5)

Upon his comprehensive review, and finding the Board's exception arguments unpersuasive, the Commissioner agrees with the ALJ – for the reasons presented on pages 9-12 of her decision – that petitioners have standing to bring this action. He further concurs with the ALJ that summary decision is appropriately granted to petitioners as the record clearly demonstrates that certain of the Board's class sizes during the 2008-09 and 2009-10 school years exceeded the regulatory limits of *N.J.A.C.* 6A:13-3.1.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to immediately comply with the provisions of *N.J.A.C.* 6A:13-3.1.

IT IS SO ORDERED[2]



COMMISSIONER OF EDUCATION

Date of Decision: 5|27|10

Date of Mailing: 6|01|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01637-09
AGENCY DKT. NO. 380-12/08

ELIZABETH EDUCATION ASSOCIATION, ROSE CARRETO AND MARIA G. DEJESUS DIAS,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Aileen O'Driscoll, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Nicole Morgan, Esq., for respondent

Record Closed: March 22, 2010 Decided: April 12, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioners, the Elizabeth Education Association (the Association), Rose Carreto and Maria DeJesus Dias, assert that the respondent, the Elizabeth Board of Education

(the Board), has maintained class sizes that violate the provisions of N.J.A.C. 6A:13-3.1. Petitioners have filed for summary decision, and seek an order directing that the Board comply with the requirements of the regulation. The Board urges that this matter is not ripe for summary decision, and further asserts that the petitioners lack standing to bring their claims.

PROCEDURAL HISTORY

Petitioners filed their appeal before the Commissioner of Education (the Commissioner) on December 24, 2008. The Board filed an answer and the contested case was transmitted to the Office of Administrative Law (OAL) on February 6, 2009.

Several hearing dates were adjourned due to discovery concerns, and to afford the parties an opportunity to explore settlement. During the course of several status conferences with me, the drafting of a joint stipulation of facts was discussed, as it appeared that the salient facts were not in dispute. Both parties agreed that it was likely this matter could be decided via cross-motions for summary decision.

As early as July 9, 2009, I confirmed via letter to the parties that they were working cooperatively on a comprehensive stipulation of facts. Ongoing discovery concerns remained, however, and a September 23, 2009, hearing date was adjourned until March 22, 2010.

Via letter dated February 12, 2010, I was advised by counsel for the petitioners that settlement had not been reached, nor had the parties drafted a stipulation of facts. Counsel indicated that she sought leave to file a motion for summary decision. Via letter order dated February 18, 2010, I directed counsel for petitioners to file her motion, which she did on March 2, 2010. The Board filed its opposition to the motion on March 15, 2010. The petitioners replied to the Board's opposition on March 22, 2010, at which time the record closed.

FINDINGS OF FACT

The relevant facts are not in dispute and I **FIND** as follows:

The Elizabeth School District is a "high poverty school district." N.J.A.C. 6A:13-3.1(a).[1] The Association is the collective bargaining representative for professional staff employed by the school district. Petitioners Rose Carreto and Maria DeJesus Dias are taxpayers and residents of Elizabeth. Ms. Dias had a child who attended the Elizabeth Public Schools at the time the petition was filed, but who has since graduated. Ms. Carreto is also the President of the Association and a teacher in the district.

During the fall of 2008, the Association received complaints from its membership regarding large class sizes. In an effort to explore these concerns further, the Association surveyed teachers in grades kindergarten through twelve at the start of the 2008-2009 school year. The results of that survey are contained in Exhibit B to the certification of Association Representative Al Ramey. Mr. Ramey's research confirmed large class sizes at all levels of instruction. By way of example, two kindergarten teachers at School Number 28 reported class sizes of thirty-one students. At the middle school level, Mr. Mascari, a math teacher at School Number 15, reported a class size of thirty-one students. At Jefferson Arts High School, Art Teacher Mary Callahan reported a class size of forty-three students.

The Association brought the results of its research to the attention of district administration, was unable to receive a satisfactory response to its concerns, and this petition followed. Through discovery, the Board supplied the Association with data regarding class sizes during the 2008-2009 and 2009-2010 school years. This data accompanies petitioners' moving papers, and is too voluminous to recite here in its entirety. The following excerpts are representative of the Association's concerns, however:

[1] Elizabeth was previously denoted as an "Abbott District" in accordance with the provisions of N.J.A.C. 6A:10A-1 et seq. and N.J.A.C. 6A:10-1 et seq.

2008-2009 Data

The data supplied to the petitioners by the Board reflects, in part, the following relative to class sizes in November 2008:

1. At George Washington School, (School Number 1), Jasmine Lee's kindergarten class had an enrollment of twenty-three students. (Exhibit 4 to O'Driscoll certification, p. 505.)
2. At George Washington School (School Number 1), Shawneequa Torres's first grade class had an enrollment of twenty-four students. (Exhibit 4 to O'Driscoll certification, p. 505.)
3. At Winfield Scott School (School Number 2), three kindergarten and one first grade class had enrollments of twenty-two students. (Exhibit 4 to O'Driscoll certification, p. 508.)
4. At Joseph Battin School (School Number 4), two fourth grade classes had enrollments of twenty-four students. (Exhibit 4 to O'Driscoll certification, p. 512.)
5. At Benjamin Franklin School (School Number 13), two sixth grade classes had enrollments of twenty-seven students. (Exhibit 4 to O'Driscoll certification, p. 524.)
6. At the High School, over fifty ninth grade classes had enrollments in excess of twenty-four students. (Exhibit 4 to O'Driscoll certification, pp. 564-585.)

The data supplied to the petitioners by the Board reflects, in part, the following relative to class sizes in January 2009:

1. At the High School, over fifty ninth grade classes continued to have enrollments in excess of twenty-four students. (Exhibit 3 to O'Driscoll certification, pp. 299-320.)
2. At the High School, over fifty twelfth grade classes continued to have enrollments in excess of twenty-four students. (Exhibit 3 to O'Driscoll certification, pp. 368-392.)

2009-2010 Data

The data supplied to the petitioners by the Board reflects the following, in part, in regard to class sizes in November 2009 for grades pre-K through 8:

1. At George Washington School, (School Number 1), several classes in grades one through three had more than twenty-one students enrolled. (Exhibit 2 to O'Driscoll certification, p. 279.)
2. At George Washington School, (School Number One), a fifth grade class had twenty-four students enrolled. (Exhibit 2 to O'Driscoll certification, p. 279.)
3. At Mabel G. Holmes School (School Number 5), a fourth grade class had twenty-five students enrolled. (Exhibit 2 to O'Driscoll certification, p. 282.)

Board data confirms that there were numerous classes in grades nine through twelve as of December 2009 that had more that twenty-four students enrolled. The data supplied for the 2009-2010 school year at the High School broke enrollment down by subject matter. (Exhibit 1 to O'Driscoll certification.) Class sizes in excess of twenty-four students were noted in many academic subjects. For example, at the Admiral William F. Halsey, Jr. Leadership Academy, there were two Geometry classes with enrollments of twenty-nine students. (Exhibit 1 to O'Driscoll certification, p. 234.) At Elizabeth High School there were three Latin classes with more than twenty-four students. (Exhibit 1 to O'Driscoll certification, p. 275.)

The Board submitted the certification of counsel, who readily admits that several classes were over "the class size limit." The certification alludes to "discrepancies" in the data the Board supplied to the Association, but it appears that this is a reference only to the fact that not every class size exceeds the regulatory limits. The certification of counsel, and that of Assistant Superintendent of Schools Olga Hugelmeyer, both explain the fiscal constraints which necessitated large classes, and the diligent but unsuccessful efforts by the district to uniformly bring class sizes in compliance with regulatory requirements.

The certification of district teacher, Kathleen Wolfe, outlines the problems that are created by large class sizes. Her certification furthermore confirms that large class sizes continue to date in Elizabeth. Wolfe teaches visual arts at Edison High School and currently teaches a class with twenty-five students, and another with thirty. She states that there are not enough desks for her students nor space in the classroom to accommodate additional desks. Wolfe indicates that it is difficult for her to keep track of the students in her class, and that the large class size results in discipline problems, which force her to turn her focus away from instruction to classroom management. She has no time for individualized instruction or to even provide small-group assistance.

CONCLUSIONS OF LAW

The Board seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the petitioners are entitled to judgment as a matter of law. Petitioners contend that the Board violated the requirements of N.J.A.C. 6A:13-3.1, which provides that class sizes in "high poverty" districts "shall not exceed 21 students in grades kindergarten through three, 23 in grades four and five, and 24 students in grades six through twelve." Exceptions are noted in the regulation for "some" physical education and performing arts classes, "where appropriate." The regulation further provides that if the district chooses to maintain lower class sizes in grades kindergarten through three, class sizes in grades four and five may not exceed twenty-five students. Elizabeth is a "high poverty" district within the intent of the regulation, and was previously "subject to N.J.A.C. 6A:10A and 6A:10" per N.J.A.C. 6A:13-3.1(c). It therefore was subject to the requirements of N.J.A.C. 6A:13-3.1(b) during the 2008-2009 and 2009-2010 school years.

In asserting that the Board maintains class sizes which contravene the express requirements of the regulation, the petitioners primarily rely not on anecdotal data, but rather, data supplied by the Board itself. The Board, in its opposition to the motion, merely offers explanations for its non-compliance. Those explanations reflect the harsh fiscal realities under which the district operates, rather than a willful disregard for the regulation and its requirements. Nonetheless, it is uncontroverted that numerous district class sizes during the 2008-2009 and 2009-2010 school years have exceeded the

regulatory limits.[2] I **CONCLUDE** that class sizes in the Elizabeth School District do not uniformly comply with the requirements of N.J.A.C. 6A:13-3.1.

Petitioners correctly urge that the requirements of N.J.A.C. 6A:13-3.1 are clear and unequivocal, requiring no analysis of the agency's regulatory intent. See Phillips v. Curiale, 128 N.J. 608, 618 (1992). Nonetheless, the intent behind the regulation is noteworthy, and serves to emphasize the seriousness of the Board's disregard of the regulation's express requirements. A "high poverty district" is defined by the regulation as one in which "40 percent or more of the students are 'at risk.'" N.J.S.A. 18A:7F-45 defines "at risk" students as those from households that are at or below the poverty level. In educational terms, the future of these students is "at risk," as is their ability to access an educational program that will free them from the cycle of poverty. The Department of Education has determined that smaller class sizes will create a learning environment in which these "at risk" students can achieve academic success. Accordingly, I **CONCLUDE** that it is appropriate to enter the relief sought by the petitioners and direct that the Board immediately comply with the requirements of N.J.A.C. 6A:13-3.1.

The Board's contention that the petitioners lack standing to assert the claims raised in the petition is unavailing. Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div. 2004); Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001). In order to have standing, a party "must present a sufficient stake in the outcome of the litigation, adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden County, 170 N.J. 439, 449 (2002). In New Jersey we have a "venerable tradition" of liberally applying the standing criteria. Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ., 284 N.J. Super. 427, 430 (App. Div. 1995). This approach to standing is even more liberal within the State's administrative system. Reiman and Borough of Carteret v. New

[2] Petitioners correctly note that the subsequent to the filing of its petition, N.J.A.C. 6A:13-3.1 was amended. The petitioners also correctly note, however, that these amendments created no changes to the previously prescribed class size limitations.

Jersey State Dep't of Educ., EDU 8564-04, Initial Decision (August 26, 2005), aff'd, Commissioner (December 27, 2005), <http://lawlibrary.rutgers.edu/oal/search.html>.

Both Carreto and Dias are residents of Elizabeth, and taxpayers. Their status as taxpayers suffices to give these petitioners standing to bring their claims. Our courts have recognized "a broad right in taxpayers and citizens of a municipality to seek review of local legislative action without proof of unique financial detriment to them." Kozesnik v. Montgomery Twp., 24 N.J. 154, 177-78 (1957). The Ridgewood court held that "we see no reason why this State's historic liberal approach to the issue of standing . . . should not apply to taxpayer suits challenging the quasi-legislative actions of local boards of education." Ridgewood, supra, 284 N.J. Super. at 433.

Indeed, in Paterson Eastside High School Parent/Alumni Committee v. State Operated School District of the City of Paterson, EDU 11847-06, Initial Decision (May 30, 2007), adopted, Commissioner (July 13, 2007), <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner relied on Ridgewood to uphold the standing of a parent committee and individual parent to challenge the district's appointment of a basketball coach. The status of the petitioners there, "as residents and taxpayers of Paterson who have expressed a strong interest in the workings of the high school," was deemed sufficient to give them standing to challenge the school district's actions. In Silverman v. Millburn Board of Education, 134 N.J. Super. 253 (Law Div. 1975), an analogous conclusion was reached by the court relative to a challenge brought by taxpayers to the closing of a school. The Silverman court noted that the taxpayer plaintiffs "represent their own personal interest and the public interest of the community," and thus were not "strangers to the dispute." Id. at 258.

In like measure, the petitioners here are not interlopers, but rather, have a legitimate interest in the orderly, efficient and legally sound administration of the Elizabeth Public Schools. Ms. Dias's interest could not be more direct, as her child attended the public schools, and did so at the time the petition was filed. I agree with the petitioners that the graduation of Dias's son does serve to limit her standing to bring the claims raised in the petition. Relative to Ms. Carreto, who is a taxpayer but also a district teacher, the Ridgewood court specifically upheld the standing of two individual

petitioning teachers there, citing their "professional status and involvement" in the subject matter of the litigation. Ridgewood, supra, 284 N.J. Super. at 432.

Moreover, the Association has standing to bring this claim on behalf of its membership. The Board's reliance on Bedminster Education Association v. Board of Education of the Township of Bedminster, EDU 6720-05, Initial Decision (March 23, 2006), <http://lawlibrary.rutgers.edu/oal/search.html> is misplaced. The Administrative Law Judge in Bedminster recognized a local teachers association's standing to challenge board action on behalf of district teachers, but dismissed the claims of the petition because the petitioning association could not demonstrate "a substantial likelihood of harm to its members arising from the complained of conduct." Ibid. Here, the Board correctly asserts that there is no statutory or regulatory basis for an award of damages to the petitioners. Nonetheless, the Board's non-compliance with class size requirements harms the members of the Association in very real ways. Teachers are being asked to deliver instruction in overcrowded classrooms, directly impacting their working conditions. Overcrowded classrooms furthermore may negatively impact the teaching performance of Association members, who are evaluated, in part, based on a review of "available indicators of student progress and growth toward program objectives." N.J.A.C. 6A:32-4.4. The certification of District Teacher Kathleen Wolfe emphasizes this point.

Petitioners correctly urge what where, as here, a question of significant public interest is presented even the slightest private interest suffices to establish standing. Loigman v Twp. Comm. of the Twp. of Middletown, 409 N.J. Super. 13, 27 (App. Div. 2009). Our courts have held that a petitioner's interest may be accorded proportionately less significance where it coincides with a strong public interest. N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 68 (1980). The strong public interest in quality schools is incontrovertible.

Ultimately, the standing of these petitioners can be expressed in quite simple terms, however. If the citizens, parents and teachers of Elizabeth do not have standing to question the manner in which educational services are delivered to the children of Elizabeth, then who does? Petitioners correctly state that the voices of these children

"can only be heard" through their parents, through the concerned citizens and taxpayers of the City of Elizabeth, and through their teachers. I **CONCLUDE** that the Board's contention that petitioners lack standing is meritless.

ORDER

Based on the foregoing, it is **ORDERED** that the Board immediately comply with the requirements of N.J.A.C. 6A:13-3.1 relative to class size.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 12, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

4-12-10
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: APR 13 2010

165-10

OAL DKT. NO. EDU 3636-09
AGENCY DKT. NO. 40-2/09

JENNIFER BAUER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing 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 such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The petition is hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|01|10

Date of Mailing: 6|02|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03636-09
AGENCY DKT. NO. 40 - 2/09

JENNIFER BAUER,
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 (The Murray Law Firm, attorneys)

Record Closed: April 8, 2008 Decided: April 14, 2010

BEFORE **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on April 3, 2009, 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 for January 6 and 9, 2010, but were postponed when the parties commenced developing terms and conditions for a settlement agreement. On or about March 8, 2010 the parties consented to a Settlement Agreement and executed the document, which is incorporated herein by reference and annexed hereto.

Having reviewed the contents of the attached Settlement Agreement and the Resolution of the Elizabeth Board of Education, dated March 18, 2010, 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.

April 14, 2010
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 4-16-10

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

APR 16 2010
DATE

OFFICE OF ADMINISTRATIVE LAW

KAREN A. MURRAY
LABOR COUNSEL
500 North Broad Street
Elizabeth, New Jersey 07207
(908) 436-5031

Attorney for Respondent
ELIZABETH BOARD OF EDUCATION

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2011 APR -9 A 5:07

JENNIFER BAUER, Petitioner, -v- CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY, Respondent.	**BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION** **OAL Docket No. EDUOR 3636-2009N** **Agency Ref. No. 40-2/09** **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made and entered into between the Elizabeth Board of Education (the "Board" or the "Respondent"), with offices at 500 North Broad Street, Elizabeth, New Jersey 07207 and Jennifer Bauer (the "Petitioner"), residing at 31 Middle Hill Road, Colonia, New Jersey 07067.

WHEREAS, the Petitioner was a non-tenured teacher employed by the Board during the 2008-2009 school year, who resigned from her teaching position by letter dated October 31, 2008, and who filed a Petition with the New Jersey State Commissioner of Education claiming that she is entitled to back pay for the period of December 12, 2008 through December 31, 2008; and

WHEREAS, the Board and the Petitioner have elected to settle all outstanding matters in lieu of expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and the Petitioner 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 mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The Board agrees to compensate the Petitioner for unpaid back pay covering the period of December 12, 2008 through and including December 31, 2008, for the gross amount of $3,047.34.

2. In return for compliance with this Settlement Agreement, the Petitioner hereby agrees to waive any rights that she may have, or may have had, to file any claims relative to any future 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 the Public Employment Relations Commission relative to any issues or potential issues that may have arisen or could have arisen during the course of Petitioner's employment with the Board.

3. Neither party shall be responsible for costs or the counsel fees of the other party's attorney.

4. The Board and the Petitioner further agree and understand that this Agreement is a settlement of all claims asserted in connection with the Petition in this matter. Entering into this Agreement does not constitute an admission of wrongdoing, error or omission by the Board.

5. This Agreement does not constitute a past practice or policy in the Elizabeth School District. The terms of this Agreement do not apply to any employee other than the Petitioner and may not form the basis for a claim by other employees, nor act as a bar to claims by other employees, against the Board.

6. The undersigned representatives of the Board hereby acknowledge that they have

been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

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

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

9. This Agreement may be executed in counterparts, but shall be enforceable only if executed by the Petitioner named herein and by the Board's authorized representatives.

10. All parties in this matter agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement.

11. The Petitioner has been fully apprised of her rights in connection with this Settlement, and fully understands the terms of this Settlement Agreement. Petitioner also agrees that she has been fully and fairly represented by counsel throughout this proceeding.

THE RESPONDENT, THE ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esq.
Date:

THE PETITIONER, JENNIFER BAUER

Michael T. Barrett, Esq.
Date: 3-10-10

Jennifer Bauer
Date: 03/08/10

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Jennifer Bauer have discussed a resolution of Office of Administrative Law case (OAL Docket No. EDUOR 03636-2009N; Agency Reference # 40-2/09); and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case; and,

NOW, THEREFORE BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file in the office of the School Business Administrator/Board Secretary, provided that it is fully signed by all parties.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON March 18, 2010

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

Elizabeth, New Jersey
March 18, 2010

09-159

KAREN A. MURRAY
LABOR COUNSEL
500 North Broad Street
Elizabeth, New Jersey 07207
(908) 436-5031

Attorney for Respondent
ELIZABETH BOARD OF EDUCATION

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2011 APR -9 A 5:07

JENNIFER BAUER, Petitioner, -v- CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY, Respondent.	**BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION** **OAL Docket No. EDUOR 3636-2009N** **Agency Ref. No. 40-2/09** **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made and entered into between the Elizabeth Board of Education (the "Board" or the "Respondent"), with offices at 500 North Broad Street, Elizabeth, New Jersey 07207 and Jennifer Bauer (the "Petitioner"), residing at 31 Middle Hill Road, Colonia, New Jersey 07067.

WHEREAS, the Petitioner was a non-tenured teacher employed by the Board during the 2008-2009 school year, who resigned from her teaching position by letter dated October 31, 2008, and who filed a Petition with the New Jersey State Commissioner of Education claiming that she is entitled to back pay for the period of December 12, 2008 through December 31, 2008; and

WHEREAS, the Board and the Petitioner have elected to settle all outstanding matters in lieu of expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and the Petitioner 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 mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The Board agrees to compensate the Petitioner for unpaid back pay covering the period of December 12, 2008 through and including December 31, 2008, for the gross amount of $3,047.34.

2. In return for compliance with this Settlement Agreement, the Petitioner hereby agrees to waive any rights that she may have, or may have had, to file any claims relative to any future 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 the Public Employment Relations Commission relative to any issues or potential issues that may have arisen or could have arisen during the course of Petitioner's employment with the Board.

3. Neither party shall be responsible for costs or the counsel fees of the other party's attorney.

4. The Board and the Petitioner further agree and understand that this Agreement is a settlement of all claims asserted in connection with the Petition in this matter. Entering into this Agreement does not constitute an admission of wrongdoing, error or omission by the Board.

5. This Agreement does not constitute a past practice or policy in the Elizabeth School District. The terms of this Agreement do not apply to any employee other than the Petitioner and may not form the basis for a claim by other employees, nor act as a bar to claims by other employees, against the Board.

6. The undersigned representatives of the Board hereby acknowledge that they have

been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

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

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

9. This Agreement may be executed in counterparts, but shall be enforceable only if executed by the Petitioner named herein and by the Board's authorized representatives.

10. All parties in this matter agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement.

11. The Petitioner has been fully apprised of her rights in connection with this Settlement, and fully understands the terms of this Settlement Agreement. Petitioner also agrees that she has been fully and fairly represented by counsel throughout this proceeding.

THE RESPONDENT, THE ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esq.
Date:

THE PETITIONER, JENNIFER BAUER

Michael T. Barrett, Esq.
Date: 3-10-10

Jennifer Bauer
Date: 03/08/10

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Jennifer Bauer have discussed a resolution of Office of Administrative Law case (OAL Docket No. EDUOR 03636-2009N; Agency Reference # 40-2/09); and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case; and,

NOW, THEREFORE BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file in the office of the School Business Administrator/Board Secretary, provided that it is fully signed by all parties.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON March 18, 2010

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

Elizabeth, New Jersey
March 18, 2010

09-159

OAL DKT. NO. EDU 457-10
AGENCY DKT. NO. 16-1/10

P.M. on behalf of minor child L.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement (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, with the following provisos. First, regarding the third paragraph of the Agreement, in the event that petitioner falls behind on monthly tuition payments, respondent may apply to the Commissioner – as opposed to the OAL – for an order requiring immediate payment of the full tuition amount set forth in the second paragraph of the Agreement.

Secondly, paragraph two of the Agreement makes reference to a May 15, 2010 date for the commencement of petitioner's payments to respondent. 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.

The petition is hereby dismissed, subject to compliance with the settlement terms, and providing that the petitioner has either commenced monthly installment payments or the parties have agreed upon a mutually satisfactory alternate date for effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|01|10

Date of Mailing: 6|02|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 457-10
AGENCY DKT. NO. 16-1/10

P.M. on behalf of minor child, L.O.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

Timothy E. Hoeffner, Esq., for petitioners

Jeffrey F. Belz, Esq., for respondent

Record Closed: April 12, 2010 Decided: April 13, 2010

BEFORE **SUSAN M. SCAROLA**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 23, 2010, 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 a hearing was scheduled for April 12, 2010.

On the date of the hearing, the parties conferred and reached a settlement, 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.

3. Both the claim and counterclaim have been resolved in accordance with the executed settlement.

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 13, 2010
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: APR 16 2010

Date Mailed to Parties: APR 16 2010

mph

EXHIBITS:

Joint Exhibits:

J-1 Settlement Agreement

J-1 EV
SMS 4/12/10

P.M. o/b/o L.O.	OAL Dkt. No: EDU 00457-2010
v.	Agency Ref: No.: 16-1/10
Ewing Bd. of Education	Settlement Agreement

This matter having come before the court by a petition filed by, P.M. o/b/o L.O., and the Ewing Board of Education having filed an Answer + Counterclaim, the parties have agreed to settle this matter based upon the following terms:

1.) L.O. shall remain enrolled in the Ewing School District free of tuition from this ~~date~~ foward;

2.) Without any admission by either party, P.M. agrees to pay the Ewing school district $1,500.00. This amount shall be payable in ~~nine~~ eight equal installments beginning on May 15, 2010. and payable monthly thereafter in the amount of $187.50.

3.) If P.M. is more than 30 days late on any

payment, Respondent may apply to Office of Administrative Law for an order requiring the immediate payment of any unpaid balance of the aforesaid amount. Such order shall be enforcable by filing same with the Superior Court as a judgment pursuant to the appropriate codes and statutes.

4.) Respondent does not waive ~~any~~ future right of seeking disenrollment of S.O. in the event that the Board of Education determines that there is a legal right to do so. Any such action must be based on facts occuring after today's date.

5.) The parties release any and all claims and counterclaims and dismiss the above captioned matter.

DLA Piper LLP (US)
Counsel for Petitioner

Patricia Miller, Petitioner

Jeffrey F. Belz, Attorney for Respondents

David Mikalauskas, Ewing BOE

167-10R

IN THE MATTER OF THE TENURE :
HEARING OF GILBERT ALVAREZ, :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF LAKEWOOD, OCEAN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioning school district certified tenure charges of unbecoming conduct against respondent – a tenured Spanish teacher – for alleged inappropriate behavior toward students, in which he demonstrated poor judgment, an inability to control his temper and demeanor, and insubordination; additionally, on one occasion, respondent used inappropriate language and pushed a desk in such a manner as to threaten or injure a student. The parties initially attempted to settle this matter, but – in light of the apparent seriousness of the Board's allegations and based on the extremely limited record before the Commissioner – the settlement was rejected and the matter remanded to the OAL for hearing.

The ALJ found that: respondent does not dispute that his conduct in pushing a desk into a student on December 23, 2008, was inappropriate, nor that he had trouble controlling his anger, emotions and frustrations when dealing with his students; respondent engaged repeatedly in inappropriate and unbecoming conduct for a tenured teacher, was unable to properly control and channel his frustration and anger, violated school policy by removing students to the hallway, and used physical force to push a student out of a room and to push a desk. The ALJ concluded, based on case law which he viewed to be similar in nature, that the appropriate penalty for respondent's unbecoming behavior was the forfeiture of the 120 days of pay withheld for the initial portion of his suspension; that he be suspended for an additional period of two months; that he complete training in anger management, conflict resolution, and management of disruptive students; and that he forfeit any increment that he might be entitled to during the 2009-2010 school year.

Upon careful and independent review of the record, the Commissioner – while concurring with the ALJ's findings as to the seriousness and unacceptability of respondent's conduct – rejected the penalty recommendation in the Initial Decision as he found that the impetus for and the nature of the actions taken by this respondent were substantially more serious in kind and degree from the school law decisions relied upon by the ALJ in fashioning his recommended penalty, necessitating respondent's removal from his position. Accordingly, the Commissioner dismissed respondent from his tenured teaching position with the School District of the Township of Lakewood and the matter was 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.

June 3, 2010

OAL DKT. NO. EDU 10067-09
(EDU 0736-09 ON REMAND)
AGENCY DKT NO. 36-2/09

IN THE MATTER OF THE TENURE HEARING OF GILBERT ALVAREZ, SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District and respondent requested and received extensions of time within which to file exceptions and reply exceptions, respectively, to the Initial Decision. These submissions were fully considered by the Commissioner in reaching his determination herein.

The District's exceptions first charge that – although he "correctly found that [respondent] engaged in inappropriate and unbecoming conduct, repeatedly demonstrated an inability to properly control and channel his frustration and anger, used physical force, violated school policy on several occasions, and more than once recognized that his emotions had the best of him and that he might hit someone or otherwise lose it" (Initial Decision at 27) – the Administrative Law Judge (ALJ) nonetheless declined to terminate respondent from his tenured position. Such a determination, it argues, was apparently premised on the former Commissioner's reversal as to penalty of a prior decision of this ALJ, *i.e.*, *In the Matter of the Tenure Hearing of Adam Mierzwa*, Commissioner's Decision No. 283-08, decided June 23, 2008, wherein this ALJ had concluded that the respondent's tenure should be removed

and the Commissioner determined that a lesser penalty was warranted. The District posits that the ALJ, apparently viewing *Mierzwa, supra,* and the instant matter as similar in nature, and in consideration of the Commissioner's penalty modification therein, misread this prior modification as directing a penalty less severe than removal in the instant matter. It argues that the Commissioner's penalty modification in *Mierzwa* does not dictate the result reached in this matter, as these two cases are fully distinguishable. Specifically, 1) unlike the instant matter, *Mierzwa* did not engage in physical intimidation, verbal abuse, or cursing; 2) the Commissioner in the *Mierzwa* matter accepted that his actions were partially mitigated by a lack of administrative support which is not a factor here; and 3) *Mierzwa* exhibited a lack of self-restraint on only two occasions as opposed to the instant respondent who, it avers, showed an increasingly frequent lack of self-restraint. (District's Exceptions at 2-3)

In response to this particular District exception, respondent points out that the ALJ's Initial Decision was thirty-five pages, eighteen of which meticulously and accurately summarized hearing testimony and physical evidence (pp. 3-20) and fifteen of which analyzed the relevant, applicable law, applied the facts to the law, and imposed a thoughtful, fair and just penalty (pp. 20-35). Respondent argues that the District's contention that the ALJ erred as a consequence of the Commissioner's reversal of his Initial Decision recommendation to remove tenure in *Mierzwa* makes no logical sense. To the contrary, he proffers, the ALJ's decision here 1) carefully considered the Commissioner's modification in *Mierzwa*; 2) found substantial similarities between this case and those where a penalty less than removal was imposed; and 3) reached the ultimate conclusion that tenure removal was unwarranted in the instant matter. (Respondent's Reply Exceptions at 2-5)

The District next contends that the ALJ incorrectly ruled that Dr. Gallina, the District's psychiatrist, and Dr. Tobe, respondent's psychiatrist, could not testify as expert witnesses but, rather, could only testify as to the facts because the ALJ, the District maintains, incorrectly found that respondent's mental state had not been pled in its tenure charges. In support of its accusation in this regard, the District submits that its charges against respondent stated that:

> there were alleged "on-going concerns with [Mr. Alvarez's] demeanor and performance," not limited to his use of "inappropriate language and instructional techniques," but including "less than favorable interactions with students of Mexican and/or African American heritage, often appearing disgruntled, upset, detached from staff and students and *allegedly* attempting to invade their privacy." The Tenure Charges further stated that Mr. Alvarez's cumulative file indicated that, among other things, he "fail[ed] to demonstrate professional responsibility;...fail[ed] to initiate parent contacts; and fail[ed] to monitor [students'] progress," and falsified information. (citations to charges omitted; emphasis in text)

Consequently, the District proffers, the tenure charges contained both allegations and substantial evidence of mental unfitness, requiring that expert testimony with respect to respondent's mental state should have been considered. (District's Exceptions at 8-9, quote at 9) It also suggests that the ALJ erred by refusing to consider the evaluative reports of the two psychiatrists "which further supported a finding of [respondent's] mental unfitness to serve as a school teacher." (*Id.* at 9-10)

The District further charges that the ALJ utterly disregarded the testimony that was proffered by Drs. Gallina and Tobe. Just because he believed such testimony to be "duplicative of that of other witnesses was not a reason to essentially ignore same." It maintains much of the other testimony which the ALJ did consider – such as that of four students, one parent, nine teachers and administrators and even respondent – was also "duplicative." (District's exceptions at 5)

In rejoinder, respondent tenders that not once in its tenure charges against him did the District plead that he "was mentally or psychologically unfit to teach." The only allegation pled – and as such the only allegation considered during the hearing – was conduct unbecoming. Respondent maintains that the District's "claim that its allegation in the tenure charges that there were 'on-going concerns with [Mr. Alvarez's] demeanor and performance' was sufficient to constitute pleading mental or psychological unfitness such that the doctors should have been permitted to testify as experts and have their reports considered is absurd." (Respondent's Reply Exceptions at 8-9) Respondent, he posits, is not required to intuit and decipher charges from broad and unspecific language. The language highlighted by the District in its exceptions could not serve to put any reasonable person on notice that charges of mental of psychological unfitness were being brought against him. Respondent cites to *Jenkins v. South Woods State Prison*, OAL Dkt. No. CSV 6363-04 (May 10, 2006) for the proposition that:

> [c]lear and unambiguous notice of all the charges or potential charges that may arise at the hearing is indispensable to fundamental fair and proper notice. Whether the appointing authority can meet its burden regarding charges that were never properly noticed, presented or served upon the employee is irrelevant after the hearing has concluded. The appointing authority could have amended the charges prior to the hearing, to conform the evidence and proofs to the charges intended to be offered at the hearing. Absent any amended pleadings, or other means of notice of the proposed charges to be asserted, the employee has a fundamental right to rely upon the preliminary and final notices of disciplinary action, together with any related discovery in connection thereto, in defense of the charges. (Respondent's Reply Exceptions at 9-10)

Moreover, respondent further argues, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et seq.*, specifies that "a tenured teacher may not be dismissed without written charges being filed against them, a copy of which must be provided to the employee." Additionally, *N.J.S.A.* 18A:6-11 specifically requires "that notice of the charges must be given to the employee such that they are able to prepare a meaningful defense on their own behalf." That did not happen in the instant

matter with respect to any claim of mental or psychological unfitness as nothing in the charges themselves or in the statement of evidence in support of the charges alleges mental or psychological unfitness. Furthermore, respondent offers, even if the District initially neglected to plead mental unfitness, it could have amended its pleadings prior to the hearing in this matter pursuant to *N.J.A.C.* 1:1-6.2 to correct this omission.[1] Because it failed to do so, respondent urges, it was entirely correct for the ALJ to refuse to permit the two doctors to testify as expert witnesses and refuse to allow them to proffer opinion testimony. He maintains that any attempt by the District to have the Commissioner consider expert opinion testimony from the witnesses must be rejected. (*Id.* at 11) However, even assuming, *arguendo*, that the ALJ had considered a charge of mental or psychological unfitness, respondent professes there was and is no basis to find him unfit to teach on that basis. Respondent submits that the District:

> [F]ocuses on [the ALJ's] finding that [respondent] was frustrated by his work, his disruptive students, and his inability to reach some students, to conclude that [the ALJ] erred in not finding [respondent] mentally unfit. Frustration does not make someone mentally unfit to perform their jobs. Indeed, if that were the standard, most (if not all) of us would be considered mentally and psychologically unfit to work, especially teachers in disadvantaged school districts.
>
> While [respondent] may have acted inappropriately in certain instances, there is no evidence that this stemmed from or constituted a psychiatric problem. Accordingly, as [the ALJ] correctly held,
>
> > [i]t is apparent that the rather limited history of Mr. Alvarez's demonstrations of a lack of ability to readily handle the frustrations of his work, the disruptive actions of students and the disappointments that must affect a teacher who is disturbed by the less than motivated attitude of students does not present a sufficiently egregious pattern as to warrant the removal of his tenure. (Initial Decision at 33)
>
> (Respondent's Reply Exceptions at 11-13)

[1] Note that in actuality the district would have had to go through the process of filing a second set of tenure charges.

Upon full review and consideration of the entire record in this matter – which included transcripts of the hearing conducted at the OAL on June 4, December 7, December 8 and December 14, 2009 – along with the parties' exception submissions, the Commissioner determines to adopt the Initial Decision with modification as detailed below.

Preliminarily, however, the Commissioner is compelled to clarify what appears to be some confusion in the Initial Decision and on the part of the District as to the prior Commissioner's discussion of the respondent's possible "unfitness" in rejecting the settlement agreement previously proposed by the parties in this matter. (See Initial Decision at 22; and the District's exceptions) The Commissioner's consideration of "unfitness" therein was a reference to the quintessential issue in every tenure case, that of penalty. Specifically, in rejecting the parties' proposed settlement she was speculating – in light of the District's stated allegations and the extremely limited record before her – as to the possibility that the Board's ultimately proven charges of unbecoming conduct against respondent might serve to demonstrate that he was unfit to serve as a teacher, either in this district or any other. (See *In the Matter of the Tenure Hearing of Gilbert Alvarez,* Commissioner's Decision No. 274-09, decided September 4, 2009, at 3) This discussion did not – nor was it intended to – initiate an unpleaded inquiry into respondent's mental or psychological fitness to be a teacher, *i.e.*, incapacity. Additionally, in the same vein, as the District did not choose to lodge an incapacity charge against respondent in this matter, the Commissioner is in full agreement with the ALJ's ruling – for the reasons expounded upon in respondent's reply exceptions – that Drs. Gallena and Tobe could not testify as expert witnesses with respect to respondent's mental or physical fitness in this matter but, instead, would be heard

only as fact witnesses. Similarly, consideration of their respective evaluative reports in this regard was not permissible.[2]

Turning again to the instant decision, the Commissioner finds the ALJ's recitation of testimony advanced by the witnesses and his resultant fact-finding, analysis and conclusions as to the truth of the District's allegations and the depiction of respondent's behavior as unbecoming conduct to be amply supported by the record and consistent with applicable law. The Commissioner – based on this record – is in full accord with the stated conclusions of the ALJ, specifically:

> I CONCLUDE that Mr. Alvarez engaged in inappropriate and unbecoming conduct for a tenured teacher. His repeated inability to properly control and channel his frustration and anger at the conduct, attitudes and faults of his students led him to outbursts of inappropriate language, to the use of words and phrases not proper for a teacher to utilize in a classroom setting, to the use of physical force to push a student out of a room and to push a desk that he must have known would also cause another desk with a student in it to be similarly pushed. He also violated school policy on several occasions by removing students to the hallway when such action was not permitted. And on more than one occasion, he himself appears to have recognized that his emotions had the best of him and that if he did not "cool down" or was not calmed down by another faculty member he might "lose it" and might "hit" someone, a concern whose validity may be said to have been confirmed by his actions on December 23, [2008]. (Initial Decision at 27)

The Commissioner similarly concurs with the ALJ – for the reasons presented on pp. 25-26 of his decision – that the District "has failed to demonstrate any sustainable basis for any suggestion that Alvarez is biased against African-American and/or Mexican American students."

However, while the Commissioner is in full agreement with the ALJ as to the nature of respondent's conduct, he cannot accept his recommended penalty as the appropriate

[2] The Commissioner also concurs with the ALJ's assessment of – and, therefore, his declining to elaborate on – the proffered testimony of these fact witnesses, *i.e.*, "[t]he essence of each witness's testimony was to affirm the essence of Alvarez's own testimony, that is, that he admitted certain inappropriate conduct, spoke of frustrations and expressed that he had no intent or desire to injure T.B. In the end, this evidence did not add anything significant to the proofs." (Initial Decision at 20)

one here. In determining penalty to be imposed, factors to be considered include the respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, and 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).

In fashioning his penalty recommendation here, the ALJ in his decision reviewed eight prior school law decisions which the parties had argued were analogous to the instant matter. Six of these cases dealt with respondents who were alleged to have engaged in one incident of corporal punishment. The Commissioner did not find these cases particularly instructive as he concludes – as did the ALJ – that this matter involves neither one isolated incident nor corporal punishment as that term has been developed through prior case law. It appears that the ALJ found this matter most akin to *In the Matter of the Tenure Hearing of Adam Mierzwa*, Commissioner's Decision No. 283-08, decided June 23, 2008, which at first blush might appear to be true: both matters involve respondents who failed to control their tempers, displayed poor judgment, and allowed feelings of frustration and anger to overwhelm their professional demeanor. Additionally, in both matters neither respondents' tenure in the District (approximately 4 years at the time of the filing of tenure charges), nor their performance evaluations could serve to mitigate any penalty that would otherwise be imposed against them.[3] Notwithstanding these similarities, the Commissioner finds that when looking at the impetus for

[3] It is curious, however, that – although finding these two matters analogous – the ALJ recommended a lesser penalty in the instant matter than the one ultimately imposed by the Commissioner in *Mierzwa, supra.* (*i.e.*, in the instant decision, forfeiture of 120 days pay withheld upon initial suspension, an additional suspension of *two* months, forfeiture of any increment to which he might be entitled during the 2009-10 school year and the successful completion of training in anger management, conflict resolution and management of disruptive students vs. penalty in the *Mierzwa* decision of forfeiture of 120 days pay withheld upon initial suspension, an additional suspension of *four* months while he obtains training in anger management, conflict resolution and handling difficult and disruptive students, with termination of his employment if he does not successfully complete the program.)

and the nature of the actions taken, these two matters are substantially different in both kind and degree. The record in this matter evidences that – during the period October-December 2008, in response to frustration he was experiencing as a consequence of the conduct of his unruly, inattentive and unmotivated students – Mr. Alvarez manifested physically against them, erupting out in explosive anger: yelling, engaging in outbursts of inappropriate language, using force to push a student out of his classroom and finally, on December 23, 2008, forcefully pushing a desk into another desk which had a student in it. Both his pupils and other staff members, who witnessed respondent's angry interactions with his students, reported they were scared or afraid of what he might do. In contrast, the respondent in *Mierzwa, supra*, was recognized as having a mindset that focused on a lack of administrative support and/or proper protocols as the primary factors triggering his temper flare ups. (See *Mierzwa* Initial Decision at 17) In two incidents – two years apart – the objects of this respondent's angry outbursts were administrators with whom Mierzwa felt frustration because of their alleged failure to adequately address what he perceived as dangerous situations inside and outside the school. There is no suggestion that Mierzwa engaged in threats or used physical force, violence or inappropriate language against students or staff members.

It is by now axiomatic that teaching "requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321. It is similarly without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003.

The Commissioner is satisfied that the record herein establishes that respondent acted in a manner which is wholly inappropriate for a professional educator and not commensurate with a teacher's function as a role model. Respondent failed to control his temper, exercised poor judgment, used inappropriate language with students, and allowed his feelings of frustration and anger to overwhelm his professional demeanor – all of which caused students and staff members alike to feel "afraid" or apprehensive. While in no way condoning the actions of respondent's recalcitrant students, the Commissioner observes that – as a professional educator – respondent was required to comport himself properly when faced with the inevitable difficulties and provocations experienced by most public school teachers. Rather than addressing the behavior of his students in a controlled and professional manner, respondent – through his anger and loss of control – became the focal point of the classroom disruption, ratcheting up the tumult by his own actions. Additionally, in his capacity as a role model for his students, respondent by his behavior communicated to them that anger and violence were appropriate responses to frustration.

Based on this record, the Commissioner cannot conclude that respondent's behavior is an aberration; nor can it be said that such conduct would not be repeated in the future. *See In the Matter of the Tenure Hearing of Brady, Morris School District*, 92 *N.J.A.R. 2d* (EDU) 410, 420. Indeed, respondent recognizes and admits the inappropriateness of his conduct but appears to be unwilling or unable to address the challenging situations with which he is faced in a controlled, professional manner.

Under these circumstances, the Commissioner cannot entertain the prospect of respondent's return to the District and the resultant potential for the perpetration of an unhealthy educational environment.

Accordingly, the Initial Decision of the OAL, as modified herein with respect to penalty, is adopted as the final decision in this matter. Respondent is hereby dismissed from his tenured teaching position with the School District of the Township of Lakewood. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 6|03|10

Date of Mailing: 6|03|10

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10067-09 (EDU 00736-09 Remanded)

AGENCY DKT. 36-2/09

IN THE MATTER OF THE TENURE HEARING OF GILBERT ALVAREZ, SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY.

Michael I. Inzelbuch, Esq., for petitioner

Richard A. Friedman, Esq., for respondent (Zazzalli, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: February 16, 2010 Decided: March 5, 2010

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

The Lakewood Township Board of Education filed tenure charges with the Commissioner of Education alleging that because of the unprofessional and improper manner in which Gilbert Alvarez, a tenured teacher of Spanish in the District, had acted, his tenure should be removed. Mr. Alvarez filed an Answer to the charges and the Commissioner transferred the contested case for hearing at 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. Following a prehearing conference, motions and an attempt to settle the case which resulted in a rejection by the Commissioner and a remand for hearing, the case was heard before

this judge on December 7, 8 and 14, 2009. The parties obtained transcripts and filed closing briefs and the record closed on February 16, 2010.

In the tenure charges, the Board alleges that on or about December 23, 2008, Mr. Alvarez exhibited inappropriate behavior, using inappropriate language and pushing a desk in such a manner as to threaten or actually injure a student. Additionally, the charges contend that there have been on-going concerns about Alvarez's demeanor and performance, including his alleged use of inappropriate language and "instructional techniques" with another student in October-November 2008, and that he did not fulfill certain responsibilities, such as attendance to his coaching responsibilities and to staff meetings, monitoring student progress and submitting lesson plans. Finally, it argues that his "interactions" toward Mexican-American students demonstrated hostility, or was otherwise "less than favorable." While Mr. Alvarez does not deny each and every factual element which the Board contends establishes its case, he does deny that his conduct supports any sanction against his tenure status or employment. Moreover, he denies any hostility or untoward actions towards any group of students.

Preliminarily, Mr. Alvarez asserts that because the Division of Youth and Family Services (DYFS) determined that it could not substantiate that he had engaged in child abuse in respect to the student who was in the desk that was pushed, that tenure charges cannot be brought for that incident, citing N.J.S.A. 18A:6-7a.

> 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 position is without merit. Child abuse determinations made under N.J.S.A. 9:6-8.21c. may include consideration of whether a child has been subjected to

inappropriate corporal punishment. DYFS can either substantiate the allegation or find that it is unfounded. Whether the incident in question here is even one involving corporal punishment is itself open to serious question, as even counsel for Alvarez concedes, and as will be explained below, I conclude that it does not. Further, the concerns of the Commissioner addressed in proceedings brought under the Tenured Employees Hearing Act, N.J.S.A. 18A:6-10 to 18.1, regarding the propriety of a teacher's conduct vis a vis students address issues and concerns that can be quite different than those which are the concern of DYFS. The two statutory schemes exist side-by-side and it cannot be said that the DYFS statute trumps the educational concerns that are the focus of cases under the Tenured Employees Hearing Act. It must also be said that the nature of DYFS investigatory reviews hardly permit the searching examination of conduct that occurs in tenure proceedings involving full evidentiary hearings. See, In the Matter of the Tenure Hearing of Gilbert Young, Jr., School District of the Borough of Roselle, Union County, EDU 11569-07, Initial Decision, (May 27, 2008), adopted, Comm'r (August 18, 2008)<http://lawlibrary.rutgers.edu/oal/search.html> aff'd, A-0309-08T3 (App. Div. 2009); cert. granted, October 26, 2009.

Evidence

Carla Leach, a teacher in the Lakewood Middle School, testified that on December 23, 2008, a student, T.B., appeared in her class for 9th period. He was upset, with a red face and eyes welling up with tears. He explained that Mr. Alvarez, in whose class he was during 8th period, had pushed him, and that Alvarez had said that he did not care if he lost his job. Leach sent him to the office and later filed a report. T. was the only student who had both Mr. Alvarez and Ms. Leach. Leach described T. as a student who received A's and B's in her class, but who sometimes needed redirection. Occasionally in such cases, Leach would call the boy's mother, who was a substitute in the district and was "very helpful." Leach recalled that some African-American and "Mexican" students complained to her that Alvarez yelled at them and was disrespectful. They in turn would sometimes refer to him as "Gilbert," a reference

she at first mistook to refer to a student and not to a teacher. Caucasian students did not voice similar concerns about Alvarez.

Debora Goldsmith, a health and physical education teacher at the Lakewood Middle School, testified that she coached girl's soccer and Alvarez was the co-coach. Soccer team members were in the locker room by 2:10 p.m. and on the field by 2:20-2:25 p.m. While Alvarez was to be on the field by 2:20 to 2:25, during the second year of this arrangement, 2007-2008, there were a few times when Alvarez was late for practice. Some days he did not appear until 3 p.m. He did sometimes stay late, as she sometimes did, and they would then make the 5 p.m. bus. When he did appear he was a good coach. During the third year, 2008-2009, he was late "a lot." She asked him about this and he told her that he was on the computer in the library and forgot. Ms. Goldsmith characterized Alvarez's demeanor with the members of the soccer team, which consisted of a mixed group including African-Americans and Mexicans, as "fine."

Goldsmith also recalled that she had an occasion in October 2008 to go to his classroom for something about soccer. When she arrived, she found that Alvarez was upset. He asked her to "calm him down before he hit somebody." He only said that the kids were wild.

The Board called Gilbert Alvarez as its witness. Mr. Alvarez, who at the time of his testimony was sixty years old, holds a B.A. in Spanish Literature from Queens College and has completed all but his thesis for a Masters from Kean University. He holds supervisors and principals and teaching certificates and has been employed by the Lakewood Board of Educations since September 2004, teaching Spanish to 7th and 8th graders. He was previously employed as an educator in Nassau County, New York after working for, and ultimately being laid off in, a mass layoff at Verizon.

Mr. Alvarez admitted that on December 23, 2008, he pushed a desk at which T.B. was sitting.[1] The desk and chair constitute one physical unit. He admitted that he had allowed the students in this class to act in a manner that a teacher should not

[1] T.B. had only been in the class for two weeks.

permit. He and the students argued and he let the situation go on too long. He "came down" to the student's level "too much" and then ended up pushing the desk with the student sitting in the desk.

Alvarez explained that at the start of this pre-holiday week, he had told the students that if they finished their work during Monday through Thursday, on Friday they would watch a movie as a reward for a job well done. On Friday, he set up the VHS/TV in front of the chalkboard in the front of the classroom. Children were permitted to sit where they wanted in two squares in front of the TV. One girl sat by herself, the rest of the students, all males, sat in front at two tables. After about a half hour, the students began to misbehave for a while. He asked them several times to be quiet. He asked T.B. to move to a different seat to "diffuse the situation." An argument ensued during which T.B. objected that he was being singled out. Alvarez asked that the students be quiet. He told the students that the movie was a "privilege" and "let's not lose it." Other students were also acting up. He asked that they "cease and desist." After a minute or two they acted up again. This happened about three or four times. They would calm down and then start again. They also began to chant his first name, which they appeared to think was funny. This was the first time they had done this. It was at this point, as giggling and comments continued, that he took off his glasses, put them down on his desk (which may have been heard by students) "came down," to the students' level by arguing with them, with he and they speaking harshly back and forth, particularly T.B. He asked that T.B. and the other students "please be quiet." They should not ruin the movie for everyone, it was "not right." During this "confrontation, Alvarez sent a student, C.T., out of the classroom, when he became "confrontational," "butted in" and "may have said something" while Alvarez was talking to T.B., asking that he be quiet. Alvarez agreed that the school has a policy against sending students to stand outside a classroom door and that his direction to C.T. violated that policy. After this happened, there was quiet, but the students then started to be disruptive once again. At some point T.B. said, that he could "take" Alvarez. The teacher replied, in a voice that he characterized as louder than a whisper and not intended for others to hear, that "You don't have the balls." Alvarez also said, "I don't have to take this crap," a comment that he acknowledged he should not have made, but which he also agreed

he had used in the past as a "motivational tool to communicate to the student that I am serious and mean business." Nevertheless, after he said this, he moved forward perhaps six feet and pushed the desk with T.B. seated in the chair. It moved about two to two-and-one-half feet across the linoleum floor. Alvarez insisted that this was the first time that he had used the word "crap" in the classroom and the first time that he had pushed a desk. He denied having used "fucking," but he might have used "damn." He also agreed that at some point in this "escalating" episode T.B. said that Alvarez could not "touch me" because he "would lose his job," "throwing this" in Alvarez's face. Alvarez, responding to this by telling the student he could not act as he was in the classroom, also stated that he did not care if he lost his job. He agreed that this form of "head butting" with a student was not appropriate. However, he was not in a "fighting-like mode," and at first denied that he was "that mad," or that he was mad. Yet he acknowledged that the students knew that he was mad and said "of course," I was mad." Alvarez recalled that after he pushed the desk, he told T.B. that they should go someplace and talk and that they had to take a walk, proposing that they walk down to the office. He knew that there was a shortage of security guards in the school and he had never been shown where the panic button was located that would have allowed him to seek assistance. He intended to ask another teacher to watch his room. However, at this point the bell rang and the students simply left the classroom.

Alvarez explained that he had planned an easy day for the students on this day before the Christmas holiday and the students simply would not "go along with it." They were "collectively" throwing away the opportunity that he had provided for them.

Alvarez also testified about an event, or as he recalled it, two events, involving a Black 7th grade student named D.C. Alvarez, who denied any knowledge at the time that this student was classified or had an IEP, described him as a "high maintenance" student, constantly speaking out and conversing with people around him and constantly creating reasons for not doing his work. He would interrupt the class and keep others from learning, and had been acting in that fashion since the start of the school year. In either late October or early November, D.C. was "just going on and on and on and he wouldn't finish." Alvarez raised his voice "a little" so as to be heard and told D.C. to

"'please, shut up,' like, you know, just enough, you know. 'We've heard from you for a long time. That's enough.'" He had had enough of his misconduct. Alvarez explained that the student had only sought help during a quiz when there was not to be any speaking. The directions were clearly presented. He never told D.C. to shut up on any other occasion. Alvarez believed that this event occurred on a separate day from another event where he placed D.C. outside of the classroom in the hallway. As for that time, he did not "throw" a chair in to the hallway, but "placed" it against the wall, during which there may have been a noise caused by the tile floor.

In November, Alvarez had a conference with the parents of D.C. and the child's case manager, Carol Bowers. Mrs. C. objected to his telling her son to "shut up." At this meeting, Alvarez first learned that D.C. was classified. Mrs. C. reported that his conduct at home was "more or less the same" as Alvarez described it and that D.C. just had to be refocused at times. Although Alvarez had thought that he had written up D.C. once or twice, the records do not reflect such write-ups and he apparently never did. He might not have because he felt bad for the boy's father, a police officer stationed at the High School and Middle School. He agreed that he was at fault for not advising the parents of his problems with their son, although he did speak to the father a couple of times in the school hallway. He explained that on the day that he told D.C. to shut up, the boy had been constantly not listening and was bothering people and he told him to shut up, not as a "reprimand . . . in a negative way. It was just like, 'D., come on,' you know," said, "out of frustration." Alvarez believed that while he did not directly apologize to the C.'s at the meeting, they did agree "to a resolution arrived to by all the parties at that meeting and that we would go on forward."

The respondent insisted that he did complete progress reports every week and would place these in front of the room and then give them to the students just prior to the bell. Students were responsible to give these reports to their parents. Progress reports for D.C. constantly noted that he talked excessively, got out of his seat and did not do the required work.

Alvarez denied that he had ever asked school principal Yuli to remove students from this class. But he admitted that he probably did tell her that he was having difficulty with discipline in this class or in other classes. He also probably remarked to her that the class was not taking the work seriously, comments that he characterized as "just typical teacher conversation." He explained that there was a time when sixteen students were removed from his class in 2008, but this was because there were not enough chairs for them. He denied requesting this action, but he had told the administration that he had students "standing around."

Alvarez was asked about P-9, an "Incident Description" prepared by Tina Rose Yuli on February 9, 2009, in which Yuli stated that he was "clearly exhibiting problems teaching Spanish to the overall student population as evidenced by numerous referrals, placing students outside of the room, and complaining about the students to the administration." He had done some referrals, but only recalled having referred C.T. once or twice and not T.B., who had only been in the class for two weeks before the December 23 incident. As for placing students outside the class, he only recalled having done this with C.T. on December 23 and D.C. As for complaints about his students, he explained that he did express to Yuli, informally, that the students were a "big problem," because all my classes were "Achievers", meaning that, in the school's parlance, they were students who had difficulty in class, mostly behavior problems. In fact, while he was not certain if the eighth period class in which he encountered the difficulty on December 23, was an Achievers class, at least his second and third period classes were Achievers. He told Yuli that "they're a handful and they're not easy to deal with." He agreed that students were not listening and did not "take life seriously."

Lakewood has a Caucasian student population of sixteen percent. Almost every student that Alvarez had in his classes was Black or Hispanic, not Caucasian. Indeed, the questions posed to him at hearing suggested that the Hispanic population was Mexican, but no evidence in the record demonstrates the background or country of origin of the non-Black, non-Caucasian student population. However, it is clear that there were a significant number of "Mexican" students.

Mr. Alvarez denied that he told Lakewood Education Association President Carol Cousins that he had an anger problem, but he acknowledged that he did get angry, and that he did so in class, adding, "Who doesn't." He would yell on occasion, when the students "need it." He accepted that if Ms. Goldsmith testified that he had commented to her that she needed to calm him down and that he was going to hit somebody that it is likely that he did say that. As for appearing late at soccer practice, he may have done so a few times, but he had an agreement to do so because he could not be in the locker room at 2:10 with the girls and would stay late.

Alvarez was asked about an interrogatory answer regarding his frustration as a teacher. He responded that his frustration

> stems from lack of success in affecting a positive response in the lives of my students at LMS, many of whom are socially and/or economically disadvantaged and who are classified in the classroom, the athletic field or the community at large.

To this, the witness added "not being able to do - - to - - to elicit more success from my students, not being able to convey the value and opportunity that they have to build a successful educational career." He was sure that he had conveyed this frustration in conversation with administrators.

D.C., now thirteen years old and a classified student at Lakewood Middle School who is blind in one eye, testified that his experience in Mr. Alvarez's class was "scary," due "mostly to all the yelling." He would tell the class to "shut up" and call the students "stupid." He told D.C. to "shut up" when he asked Alvarez for help and once when he asked Alvarez for a pencil. Once, when he needed help for something that he did not understand, Alvarez told him to "shut up" and when D. asked him again, the teacher told him to "get out." Alvarez opened the door and when D.C.

> was walking slow- - I was walking slow to get out of the door and I asked him, "what did I do?" He pushed me out of the door and he closed the door and I looked through and he was getting a chair and he came back in the hallway and

> threw the chair against the hallway and said, "Sit down" and he slammed the door.

The witness said that when Alvarez pushed him, he did so not "with a light tap." He was put out of Alvarez's room three other times, each time not simply because he was talking but because he asked for help, which made Alvarez mad.

Mr. C. acknowledged that sometimes he talked in class or misbehaved. It was not unusual for Alvarez to yell at the class, on an average, he would tell the class "maybe about ten" times a week, to "shut up." C. never told other teachers, his guidance counselor Ms. Bowers, or the vice principal that Alvarez was not helping him. His mother told Bowers. He did tell his parents about the push. He remained in Alvarez's class for about a week after the meeting and then was transferred to an Art class at his request.

Mrs. G.C., mother of D.C., confirmed that she had heard her son voice at least several complaints about Alvarez's yelling at the class starting with the beginning of the school year in September. In November, she learned of an incident in which her son was put out of the room and Alvarez "threw a chair." She first learned of this incident when D.C. called her from school, upset and crying so that she could not understand him. D. later related to her that he had been shoved out of the room and that Alvarez had told him that "I don't even want to look at you." Once she heard of this incident, she tried to see both points of view, but given the number of complaints, she felt that things had reached a point where she needed to understand what was going on. She contacted Ms. Yuli and Ms. Bowers about the call, and this resulted in conference with Alvarez. She had never received any call from him about any behavior problem with D., nor had she received any information on the progress reports she had prepared for teachers to fill out, which he did not fill out. At the meeting, Alvarez related that D. was talkative. She asked why he had not notified her and he told her that he did not have the time to do progress reports, either those she had prepared or as were supposed to be provided in accordance with his IEP. When she asked about his having told the kids to "shut up," he told her that

> Sometimes, the kids just, you know, you can't imagine how these kids, you know. Sometimes, they just - - they can really - - by the end of the day, these kids, you wouldn't believe. You wouldn't believe.

After she told him that while she understood how kids could get, nevertheless she and her husband never told their child to "shut up," or to "get out of our face," or "I don't want to look at you," he never denied having said any of these things. He only said that what she understood to have been a shove was not such as he recalled it. She brought up about the chair being thrown and he did not dispute that. But when he apologized, she wanted to give him the benefit of the doubt, thinking that maybe all he needed was a parent to confront him about his conduct. His was the only Spanish class available, and she felt that as a parent she should not have to make the decision whether to have her child stay in the class or be removed to another class due to the teacher's conduct. She gave Alvarez her home and cell phone numbers. However, after the meeting, things did not change and D. came home from school asking what had happened at the meeting because Alvarez was really mad at him, yelling even if he just raised his hand and telling him that he should put his hand down as he did not even want to hear from D. D. said that he should never have even said anything about the incident. Things were worse than they had been before he did. D.'s whole demeanor changed, "like he's just broken and he was actually kind of upset."

T.B., now fourteen years old, testified that on December 23, prior to Alvarez's pushing the desk, the teacher's eyes were popping, he threw his glasses toward Alvarez's desk, he looked very mad and said that he did not care if he lost his job. He then pushed an empty desk located directly to the left of the desk that T. was seated in, thereby pushing his desk against the heater, catching T.'s pinky against the heater and causing it to swell. When he told his mother about what happened, she called the school.

T.B. related that he entered Alvarez's class in December. The teacher yelled a lot and told the students to shut up almost every day. The two Caucasian students in the class, J., a male, and F., a female, never got in trouble, even though J. was one of the students who was saying "Gilbert" when T.C. was "kicked out of the room." When

Alvarez would say to shut up, he would "go to somebody's face, actually." He would point his finger at someone, and the witness demonstrated this with his finger about eighteen inches to two feet from the face of Board counsel.

T. B. acknowledged that he did not tell anyone about how Alvarez acted from the time he entered the class in early December up to December 23. He did not think that anyone would believe him. However, he felt like a "prisoner" in the class, "because he [Alvarez] was always- - used to yell a lot and always used to have to do what he says."

On cross-examination, T. described how, on December 23, after about ten minutes of watching a movie, there was some conversation amongst students about Christmas and then his friends were saying "Gilbert." He did not know what that meant, but he started to say it as well. Alvarez got "really mad." The repetition of "Gilbert" was going on for about thirty minutes, during which time T. was saying "Gilbert" for "around probably like fifteen minutes." He then clarified that during these time frames, students, including him, would intermittently say "Gilbert." The movie had by then been shut off and the students instructed to put their heads down on their desks. As for the teacher's comment that he and T. should go walk to another room, he thought that Alvarez was going to "fight" him. Although Alvarez did not say that, "it sounded like he did" and he was so mad and his veins were popping.

T. had been in trouble with Alvarez once before, when he was told to stand outside of the classroom. Other times, "every time when I would open my mouth," the teacher told him to shut up.

F.C., a fifteen-year-old female student, confirmed that as Alvarez was yelling at T.B. that he "might lose my job," he took off his glasses as he got up from his desk, went to T.'s desk, asked if T. thought he (T.) was "funny", and said, "but I bet you don't got the balls to say it again." When the desk was pushed, T. said "ow, my arm." She was a foot away from T. She also agreed that Alvarez "scared me a little" and "seemed like a person who scared people."

C.G., who gave a statement about the December 23 incident in which he characterized Alvarez as getting mad and having "exploded," testified that he turned red and started to get mad and yelled. T. looked "scared." The reference by Alvarez to taking a walk was made in a mean way. Once again, this witness said that Alvarez yelled a lot, but he also never told anyone about this. Kids made fun of Alvarez's name "daily."

Tina Rose Yuli, currently the principal of Lakewood High School, was the principal of the Lakewood Middle School for the past two years. When she arrived at that school it was in "total dysfunction," without "order or discipline," with the teachers acting in a very complaisant manner. In 2007-08, Yuli encountered problems with Mr. Alvarez. He had problems with lesson plans and missed a faculty meeting. Then, in November 2008, she was advised by a guard that D.C. had been put out of a classroom and was in the office making a call home. He explained that Alvarez was yelling at him and D. was upset, as was his mother after he called her. Yuli set up a meeting with the parents and Alvarez. There was discussion about Alvarez having told the boy to shut up in front of others, thereby embarrassing him. Alvarez admitted saying this and apologized. He admitted having touched D., but he did not "exactly" shove him. Instead, he "escorted" him out. He agreed that he had lost his patience.

Yuli had advised teachers on the very first day of the school year that they were not to put children or chairs in to the hallway. Instead, if they had trouble with a student and needed the child removed they were to contact security and could press a panic button if need be. Yuli added,

> You're not supposed to put a student out because it's considered corporal punishment that they be put out of the room and then of course they're unsupervised.

Principal Yuli was asked about the allegation that Mr. Alvarez had "less than favorable interactions with students of Mexican or African American heritage." During her first year in the Middle School, "a lot" of students would be put out of his room and "they were Mexican students." When she would question students sent to the office, they would tell her that Alvarez had told them to leave or had thrown them out and

would relate "You know, Miss, he doesn't like Mexicans." She explained that she spoke to these students about how they could be

> better disciplined in the room, how they could better behave, how they could be better prepared. We heard that a lot. I heard that a lot year one. . . . By year two the building was better organized . . . and there was absolutely no way any student would ever be out in the hall leaving the classroom or being put out, because that was something that we put a definite stop to and so year two actually Mr. Alvarez had a conversation with me and he sort of explained that he was having trouble with the class and that he felt that they weren't really serious and didn't really want to learn and he was struggling with the group and so - - A class of student on the I guess the class that we're - - speaking about, that they weren't serious and they were giving him trouble and sometimes - - he didn't think they felt they were academic enough, that they took education seriously. So I ended up moving some students out of the room during the course of that year. . . . I moved out mostly Mexican students.

Yuli was pressed by this judge as to the identity of this group of students that Alvarez was complaining about.

> Q. did he express to you specifically that he was having problems with Mexican students?
> A. He used the word "they."
> Q. They. Did he define who "they" were?
> A. He said, "they, the kids, they don't - - they don't listen" . . .They're not listening." Then he gave a few names and I'm trying to remember some of the names. It was I guess a boy named E. and another girl, S. You know, they happened to be Mexican kids. . . .

Counsel for the District proceeded

> Q. When you saw that he had a less than favorable interactions with students of Mexican or African American heritage, how do you know that?
> A. Because the kids said it. . . . They said, Miss, he doesn't like us and he doesn't like Mexicans. He puts us - - he doesn't teach us. He puts us in the back of the room. He throws us out. He picks on us.

During her first year in the school, Yuli did not really believe this talk. However, by year two she did, as the building became "much more organized and there was a whole different atmosphere . . . So it started to seem to me like there might be some - -." When she asked Alvarez about this, that is, that students reported that he did not like students because they were Mexican, that he put them in the back of the room,

> he would get a little frustrated with me and sort of say, you know, "They don't want to learn" and that "they're not prepared and they're not, you know, they're giving me a hard time and no matter what I do it's not working." He really would not admit to not liking the ethnic group, but he did - - absolutely was frustrated with the kids.

Yuli pressed the issue with Alvarez.

> I said, "The kids feel that you don't like them. They feel you have a problem with them because of their ethnicity," but he didn't admit to that.

Yuli was asked whether it might be possible that the Caucasian students in the school simply did not misbehave, but she characterized all of the students as "middle school students" who all "behave the same and we were a failing school. . . The kids were very similar in terms of their ability."

On cross-examination, Ms. Yuli acknowledged that neither D.C. nor his mother mentioned anything about a chair having been pushed or thrown out of the room into the hallway when he was sent outside the room in the November incident that led to the meeting between Alvarez and C.'s mother. However, she recalled that she "heard it was pushed out of the room." Yuli also agreed that Alvarez, who taught all of the Spanish classes at the Middle School, probably three or four classes in total, did not complain about any one class more than any other. She never reported anything about Ms. Goldsmith's complaints about Alvarez as a soccer coach because Goldsmith did not want to pursue the matter. She did write him up for missing a staff meeting and asked his colleagues if they knew where he was. She received a letter from Alvarez who explained that he had "something else to do." She never followed up with any calls to any doctors. She agreed that she never received any reports of any "racial" remarks

by Alvarez. She denied that any students were moved out of Alvarez's room due a lack of seats, as he testified had occurred.

Annette Maldonado, the principal of Lakewood Middle School who served as the assistant principal for the immediate past two school years, testified that she was aware that quite a few students were sent out of the classroom and to the main office. She would speak with them and they reported that "Alvarez doesn't like the Mexicans," always yelling and screaming at them, kicking them out of class. When she tried to counsel them to be prepared, take their seats and give respect when they were in the classroom, students would respond, "We don't give respect when it's not given to us." She reported the information about what was occurring to Mexican males to Principal Yuli, but she never wrote this information up and she never spoke to Alvarez about the issues. Maldonado asserted that students told her that Alvarez made racial remarks to them, but while she claimed to have written them down, she did not have them with her. Nevertheless, she claimed that "absolutely" these students had told her that "he dislikes or he hates Mexican." Asked to clarify if they were reporting his comments or their perceptions, she answered, "The words that came out of their mouths was, 'He doesn't like us, he doesn't like Mexicans.'" Alvarez never expressed any racial or ethnic comments about Mexican students to Maldonado.

Sharon Freeland, a special education teacher employed in the Lakewood schools for eleven years, provided in-class support in Mr. Alvarez's classroom in 2006-2007. This class, in which the students' ages ranged from fourteen to seventeen years of age, was held in the district's alternative school, attended by students with behavioral issues as well as students who had special needs. Perhaps five to ten times, Alvarez got angry and told students to "shut up." Freeland would calm Alvarez down. One day he had to leave the class and she took over for him. She did not write any reports about any of this, but did advise school Principal Weinberg. She was aware of students who complained about Alvarez.

Joann Gryszkiewicz, a retired teacher who served in the Lakewood district for forty-one years, served as a language arts teacher and a literacy coach. She currently

consults for the district. She recalled that sometime in 2005, a student ran into her room at the time the home room bell rang and was "visibly shaken." When she approached the student and began to speak to him he merely mentioned Alvarez's name. He was "kind of white" and appeared ready to cry. At this point, Alvarez "burst" into the room, without knocking or asking permission to see the student. She was "frightened", "tense that there could be something wrong happening." Alvarez was angry, red faced, "kind of clutch[ing"]his hands. His tone of voice also denoted anger. She does not recall precisely what was said, but she and another, now retired, teacher also in the room at the time "stopped him" as he was coming towards the student. Later, Alvarez apologized to the teachers and she had a "great relationship" with him thereafter.

Randy Holmes, a special education teacher for eleven years currently serving in Lakewood High School, assisted in Alvarez's classroom during the 2007-2008 school year. Alvarez was a good teacher, got along with the kids in his class, was prepared for class, and never displayed any inappropriate demeanor toward the students.

Dominic Bizzaro, now retired, and formerly an untenured teacher who was laid off by Lakewood, had served for sixteen years at the alternative school. He taught social studies and shared a classroom with Alvarez during period one for 2008-2009 and part of the previous year. He observed Alvarez teaching and encouraging students and heard no complaints from students about Alvarez. He was unaware of the basis for the tenure charges.

Nicole Sivolella, a French teacher in Lakewood Middle School for five years, had a classroom across the hall from Alvarez starting in August 2005. She described "a tough couple years before the new administration took over in 2007." She had interactions with Alvarez before the change in administration, but after this change she noted that Alvarez's attitude towards the district changed. He would complain about the students and to meeting with the new leadership. In 2007-2008, students started to complain to her that they wanted to take French because they were not learning anything in Spanish. One time a "bunch" of kids came up to her in the hallway and she

asked where they were going. They responded that they were going to the library and that "Mr. Alvarez sends all the Mexicans to the library." They told her that he "does not like Mexicans" and sends them to the library "quite often." Other times students came up to her in the hallway individually, saying that they wanted to take French, that Alvarez was a "racist" "doesn't like Mexicans" "singles us out" and "doesn't teach us." She also told an administrator that she stayed away form Alvarez, as "he scares me." This comment resulted from an incident in which he approached her in what seemed to be an agitated state, huffing and puffing and grimacing, asking her for the combination to a cabinet that was not hers. She felt that he thought that she was lying about not having the combination. He walked away, huffing and shaking his head.

Ms. Sivolella acknowledged that in that 2007-2008 school year, all teachers had "challenging" students in their classrooms, "challenging" but very workable kids. Eighty percent were Latino. She never heard what Alvarez said about Mexicans. Asked on cross-examination what specifically the students said to her about Mexican or Latino students, she answered,

> They said things like the book work is very ridiculous how he - - you know, what he was giving them to teach, that things were - - there was no supplemental information that was a little more difficult for them or because they spoke Spanish already there was no differentiated instruction.

She could recall no specifics as to what Alvarez was supposedly saying to the students about not liking Mexicans, but believed that what they were telling her about that subject was both their perception and a reflection of what he actually said to them. She did not write anything about these complaints or alert the administration.

Gilbert Alvarez confirmed that he entered Ms. Gryszkiewicz's room and that he subsequently apologized to her and the other teacher for interrupting their classroom. The student involved had been in the hallway, wearing a cap that he would not remove when asked to do so. The administration was trying to enforce a ban on wearing caps in the building. The student did finally remove the cap after several requests and then after taking five or six steps, put it back on and entered the classroom, "looking for

sanctuary." Alvarez followed and as the door was open he quickly entered behind the student to get the hat from him. He is "pretty sure" that he told the two teachers that the student was refusing to remove his cap. He acknowledged that it was a "breach of protocol" to walk into another teacher's classroom unannounced. He was mad at the student's conduct. He is "sure that he apologized on the way out of the room and may have also apologized at a later time."

As for Ms. Freeland's testimony, Alvarez had no reason to doubt her recollection of his having told students to shut up. There was less shouting than she indicated. He did get mad one day and walk out of the room when a "rough crowd" of seniors were not paying attention. He told Freeland that he was going to walk out of the room, which he could "legally" do, and was going to "cool off."

Finally, he acknowledged that, as Ms. Sivolella testified, he did send perhaps three or four students a week out of, as he recalled, mostly the fifth period class, asking that they go to the office. If security was available, he would ask for an escort, but if not, he would send them on their own.

Alvarez explained that his arrangement with Ms. Goldsmith was that he would meet the team on the practice field at between 2:30 and 2:40 p.m. after Goldsmith handled the locker room duties. He would get water if needed. He would also stay late.

Addressing the comments regarding the Mexican and African-American students, he acknowledged that he had sent students out of the classroom who "happened to be" Mexicans. He sent them to the library. They were "Hispanics" and were "very good students" who had

> pressing scholastic issues with other subjects and I considered it a waste of time to be sitting in a seventh grade remedial level Spanish class and maybe once a week I would send two or three of these good students with a pass to the library with permission of the librarian, so that they could do other work or extra work that they were really pressed for rather than a remedial Spanish that they already knew.

He denied making any derogatory remarks about any student's ethnic or racial background.[2]

Applicable Standards

Pursuant to the Tenure Act, N.J.S.A. 18A:35-1, a tenured teacher may not be removed from his position unless a school board successfully establishes by a preponderance of the credible evidence that the teacher has engaged in unbecoming conduct or other similar charges by a preponderance of the credible evidence. Matter of Polk, 90 N.J. 550 (1982); N.J.A.C. 18A:6-10. "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

[2] In addition to these witnesses, the Board presented David J. Gallina, M.D., a psychiatrist, and Alvarez presented Edward H. Tobe, D.O., also a psychiatrist. Each had interviewed Alvarez, but each testified only as a fact witness concerning statements that Alvarez made to them. They were not permitted to testify as experts, since the charges did not include any allegation of mental (or physical) unfitness. The essence of each witness's testimony was to affirm the essence of Alvarez's own testimony, that is, that he admitted certain inappropriate conduct, spoke of frustrations and expressed that he had no intent or desire to injure T.B. In the end, this evidence did not add anything significant to the proofs.

> 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.

Another expression of the role of the teacher

> 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." In re Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99; see also Parsippany-Troy Hills Bd. of Educ. v. Molinaro, 96 N.J.A.R. 2d (EDU) 268, 276.

The Tenure Charge document filed by Lakewood with the Commissioner of Education, signed by the Acting Superintendent of Schools and the Building Principal and Assistant Principal of the Lakewood Middle School, referred most prominently to the December 23, 2008 incident related above involving Alvarez's actions in the 8th period class, most particularly in regard to an unnamed student now known to be T.B. In addition thereto, the document noted alleged prior concerns about Alvarez's demeanor and performance. The document itself did not characterize these other matters of concern as distinct examples of unbecoming conduct or as evidence of any unfitness to teach. The Board's "Certificate of Determination In the Matter of Gilbert Alvarez" merely recited that the Board had probable cause to support tenure charges that were sufficient to warrant termination of employment and suspension without pay. However, when the parties attempted to settle this matter, the Commissioner of Education, in a decision rejecting the settlement and remanding the case to OAL for a hearing, referenced comments made in briefs filed by Lakewood at the OAL in which the Board's attorney referred to respondent as a "danger to students" and as one who "had a detrimental impact upon them" and noted her concern that the charges raised "serious questions not only about the propriety of a teacher's continued presence in the

district, but also about his fitness to serve in that position anywhere." In view of these comments, while the formal set of allegations did not specifically raise "unfitness" as an issue, the Commissioner has, in effect, determined that that is a matter to be considered in resolving this case. And while the Board did not characterize the issue as one of "unfitness," the allegations of the use of physical force to push desks, expressions of anger in the classroom, both verbal and physical, and the possibility of a bias against a racial or ethnic group which may have manifested itself in conduct by a teacher toward members of that group do raise concerns that are most appropriately characterized as whether the tenured employee is fit to teach. 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).

Discussion

The Board of Education has presented evidence about a number of incidents that it contends demonstrate that Mr. Alvarez engaged in misconduct and, in the words of the Commissioner, may be unfit to teach. While the primary event which clearly triggered these charges and is the main item addressed in the written charges is the December 23, 2008 incident that included the pushing of the desks, the Board charges also reference additional circumstances that the Board believes demonstrates a pattern of behaviors indicative of inappropriate conduct for a tenured teacher. While some of the evidence of such allegations, such as being late to soccer practice and missing a staff meeting, are, as they are described in the record and to be charitable, unworthy of consideration in the context of an attempt to oust a tenured teacher, others require serious review.

Initially, I **FIND** that, as is apparent from the testimony and documentary record, Mr. Alvarez does not dispute that his conduct on December 23, 2008 was inappropriate. He rather readily acknowledged that he had argued with his pupils, shouted, used language such as "balls" and "crap" that was surely inappropriate for a teacher to use in a classroom, that he had "come down" to the level of his adolescent students rather

than present the proper attitude and conduct of a teacher, that he was "mad," that he voiced his lack of concern as to whether he lost his job (albeit as he says as a tactic to gain serious attention from the student(s)), that he had shoved an empty desk which then pushed another desk (in which student T.B. was seated) into a heater, that he had pushed the desk purposely, that he had sent another student, C.T., out of the room into the hallway in violation of the school policy against placing students in the hallway (an action he acknowledged he had previously done in similar violation of policy) and that he told T.B. that they should "take a walk." He does not acknowledge using the word "fucking," and it is not clear whether he simply is unsure if T.B.'s finger was hurt when the desk was pushed or whether he disputes that any physical injury occurred. Regardless of these latter details, it is apparent that while the Board has presented multiple pieces of evidence to establish that the incident occurred, that fact, and the fundamental and legally essential elements thereof, are not actually at issue. Further, I **FIND** that there is no doubt about the fact that, prior to Mr. Alvarez "losing his cool" and descending to a level nearer that of his students than of the "in-control" teacher he should have been, most of the members of his class, given a chance to watch a movie as a reward for having done their work, allowed themselves to degenerate into a group of somewhat unruly, disrespectful adolescents who mocked and provoked their teacher and refused to quiet down and simply watch the movie. That they acted as they did is in no way condoned. However, the fact that they were unwilling to listen to Alvarez's requests to behave and continued to misbehave cannot, in the end, justify the failure of Alvarez to act in accordance with the high standard to which he is held.

The respondent strenuously argues that considering the events of December 23, and most directly the pushing of the desk as the central element thereof, that even to the degree such conduct was admittedly inappropriate and conduct unbecoming a tenured teacher, the sanction for such misconduct cannot properly be removal of tenure. He cites cases in which teachers have used force, including corporeal punishment, and yet have not lost their tenure even where found to have acted inappropriately. But the Board's charges in the current case go beyond the single event of December 23, 2008, and seek to portray a teacher who, for reasons that the Board asserts may arise from his frustration with his job and with the students he is required to try to teach, has simply lost the ability to approach his job responsibilities in a proper

professional manner. As such, the Board does not see the issue of tenure removal as focusing only on the improprieties of the December event. And while it is true that Mr. Alvarez was never charged in any disciplinary proceeding or tenure action for any of the alleged conduct preceding the December 23, 2008 incident, there is no automatic bar to consideration of these matters in regard to the propriety of his continued tenure status. Indeed, the Board has noted these matters in the tenure charges.

Although not the first chronologically, one of these other matters is the episode, or episodes, involving D.C. While Mr. Alvarez believed that he told D.C. to "shut up" on a different day from that on which he ordered him out of the room, I am persuaded that while he may have told him to "shut up" on another day, he also did so the day he removed him from the room, which appears to have been in November 2008. I **FIND** that Alvarez admits that on this particular day he placed the student in the hallway, by doing so again acting in violation of the school policy against such action. But D.C. testified that he was pushed when he walked slowly towards the door. Also, he claims that Alvarez then pushed or threw a chair into the hallway for him to sit in. While the violation of the policy itself demonstrates inappropriate conduct to some degree, given the December incident, with its own element of force and anger, the allegation of physical contact and of forceful ejection of the student and the chair may raise significant concern about the respondent's fitness.

Ms. Yuli acknowledged that that neither D.C. nor his mother mentioned anything about a chair having been pushed or thrown out of the room into the hallway. However, she recalled that she "heard it was pushed out of the room." Alvarez claimed that the chair was "placed against the wall," but the noise may have been from the chair on the tile floor and as it "struck the wall when it got put down." Based upon the evidence of Mr. Alvarez having reached a level of frustration and displeasure with D.C. over time and his having determined that the boy should be removed from the classroom, I **FIND** by the preponderance of the credible evidence that he did place his hand upon D. and use a limited degree of physical "force" to "encourage" his exit from the room when the student did not move on his own at a pace that satisfied Alvarez. It may be too much to say that he shoved him, but I **FIND** that he did not allow D. to exit on his own either. The amount of force involved was more than a gentle tap or hand on the shoulder.

Perhaps it was enough force to warrant the term "push, but likely it was less than a forceful "shove." As for the chair, I **FIND** that he placed the chair out in the hallway with some forcefulness, not gently, but to say that he threw it would be to claim too much.

Another incident which the Board presented was that testified to by Ms. Goldsmith. Her testimony of an October 2008 incident when Alvarez asked for her assistance so that he would not "hit somebody" was essentially conceded to be true by Alvarez. As such, I **FIND** that the incident occurred as described by Goldsmith. Again, the Board contends this demonstrates that as a teacher, Alvarez could not deal with the pressures and frustrations that arose from a combination of sometimes unruly, or at least less than attentive students who were, also in his view, tragically less that motivated. Again, while here no physical consequence occurred as a result of his response to these factors, the Board might well contend that was a fortuitous result of his reaching out to Goldsmith for assistance. Perhaps so, although of course any suggestion that he might actually have followed through and struck someone is purely conjecture. As for the incident described by Joann Gryszkiewicz, I **FIND** that, once again, Mr. Alvarez's conduct in bursting into her room unannounced and without knocking, to pursue a student who was violating a rule about hats and was "defiant" towards Alvarez, suggests someone who let his frustrations and his temper get the best of him, a trait that could be considered to have culminated in the December 2008 incident involving T.B. and the desk. Finally, I **FIND** that the credible testimony of Ms. Freeland, which Alvarez essentially accepted with only some contention that the shouting was less than she recalled, only confirms that the respondent has had issues with controlling his anger, emotions, and frustrations for several years.

Perhaps the most damning charge against Alvarez is that he has a "less than favorable" attitude toward Mexican-American students. In the Tenure Charges, this description is also utilized with regard to African-American students, but the evidence offered to support the allegation of some ethnic or racial disfavor on Alvarez's part is overwhelmingly in regard to students of Mexican-American heritage. The nature of this charge is interesting. The charges do not state that Alvarez is a racist, or that he holds any biased attitude toward minorities, but only that his "interactions" are "unfavorable" with certain groups of students who happen to be members of racial or ethnic

minorities, albeit in this district they are separately or at least together, substantially in the majority of the student population. No one has offered any specific direct evidence that Alvarez has ever voiced any racial epithets, or has openly expressed any racially insensitive or outright bigoted language. Yet, a number of witnesses point to their interactions with students who they claim complained to them that the teacher did not like "Mexicans," that he sent them out of his classroom, that he "singled" them out, that he did not teach them anything worthwhile in his Spanish classes, even that he was a racist. None of the students who supposedly voiced these comments testified in this hearing, and all of the information about Alvarez's actions toward them, their comments about him and their perceptions was offered as hearsay by others, hearsay that is admissible in an administrative hearing but which cannot itself serve as the basis for a material finding unless supported by competent evidence. But in light of this testimony, the Board's allegation of "unfavorable interactions" must be considered to be the result of some anti-Mexican, anti Mexican-American bias, a most serious contention. In this regard, it is fair to say that the evidence suggests that Alvarez, a proud man of Cuban heritage who has most assuredly used his brains and his own motivation to succeed, wanted and even expected that students of Hispanic heritage, including Mexican-Americans, would likewise motivate themselves to succeed, would apply themselves to their school work and would desire to achieve. It is also fair to conclude that he was frustrated by what he saw as a less than motivated group of such students. Indeed, Ms. Yuli's testimony about her having confronted Alvarez about the issue confirms that he voiced such frustrations and disappointments to her. But I **FIND** that the fact that he had such feelings, while they may explain in some part his actions as described, does not establish by a preponderance of the credible evidence that he has any bias toward Mexican-American students as such or that his actions toward them were motivated by an "unfavorable" attitude towards them as an ethnic group. It may better be seen that he had an "unfavorable attitude" toward the attitudes and actions of some students who were of Mexican heritage which he found difficult to deal with due to his concern for their advancement, and that, as apparent from the other incidents in this case, his inability to properly deal with his frustrations and anger caused him to at times act towards students in a manner that was less than appropriate and which they might have believed was motivated by some negative attitude towards them as a ethnic group.

Conclusion

Based upon the credible evidence, I **CONCLUDE** that Mr. Alvarez engaged in inappropriate and unbecoming conduct for a tenured teacher. His repeated inability to properly control and channel his frustration and anger at the conduct, attitudes and faults of his students led him to outbursts of inappropriate language, to the use of words and phrases not proper for a teacher to utilize in a classroom setting, to the use of physical force to push a student out of a room and to push a desk that he must have known would also cause another desk with a student in it to be similarly pushed. He also violated school policy on several occasions by removing students to the hallway when such action was not permitted. And on more than one occasion, he himself appears to have recognized that his emotions had the best of him and that if he did not "cool down" or was not calmed down by another faculty member he might "lose it" and might even "hit someone," a concern whose validity may be said to have been confirmed by his actions on December 23, 2009. Given these findings and conclusions, the Commissioner's question as to whether Mr. Alvarez is fit to teach must be confronted. But, at the same time, it must be recognized that now that the evidence has been fully presented and the Board has failed to demonstrate any sustainable basis for any suggestion that Alvarez is biased against African-American and/or Mexican-American students, the issue of his fitness, as well as the direct question of what sanction should be imposed, must be decided only in regard to the allegations of misconduct proven in this case and not on any unproven suspicions.

Remedy

As was noted earlier, the respondent has argued that the December 23, 2008 incident is the sole event under consideration and as such, he contends that removal of tenure cannot properly be imposed for the misconduct found to have occurred on that date. Indeed, dismissal of a tenured teacher for one incident of misconduct is warranted only where the conduct is egregious, is of such quality and character that measures short of the ultimate disciplinary sanction are simply inappropriate. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup Ct. 1943). The concept of progressive discipline, generally applicable to public employees including tenured

teachers, can be set aside where the circumstances warrant. Carter v. Bordentown, 191 N.J. 474 (2007).

Counsel for Mr. Alvarez has conceded that he is not sure whether the incident of December 23, 2008 can properly be characterized as one involving the infliction of corporal punishment. He cites Craze v. Allendale Board of Education, 1938 S.L.D. 585, in which the Commissioner of Education defined corporal punishment as "any punishment causing or intended to cause bodily pain or suffering." He notes that in this case there is no evidence that Alvarez pushed the desk in order to inflict any bodily pain or suffering on T.B. There was no direct physical contact with the student and no intent to injure. Nevertheless, he has argued that the cases involving corporal punishment can be considered in determining the proper discipline, and that these cases generally support the proposition that one instance of corporal punishment is not deserving of loss of tenure. Indeed, it is not clear that this case is about corporal punishment. A review of cases in which there has been physical contact between a teacher and a student may be helpful. They seem to reflect that the line between what is viewed as corporal punishment and what is instead considered as some other form of physical contact with students that is not within that "punishment" zone is sometimes unclear. Additionally, cases in which a teacher's conduct, which has led to anger, emotional outbursts and even physical contact with a student, and which has or may have been, at least in part, the result of the teacher's frustration and difficulty in coping with the sometimes difficult situations that they must face in carrying out their tasks are relevant to the inquiry.

The Commissioner of Education has long recognized that teachers are often faced with frustrating and difficult experiences as they attempt to carry out their vital role in society. Yet, while acknowledging that frustration is a hurdle that must met, the Commissioner has also noted that it provides no excuse of the use of corporal punishment.

> While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate

> procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old 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. . . such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. . . . Thus, when teachers resort to unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty.
>
> [In re Tenure Hearing of Appleby, 1969 S.L.D. 159, 172-173, aff'd, 1970 S.L.D. 448 (State Bd.) citing In re Tenure Hearing of Ostergren, 1966 S.L.D. 185, 186]

In Craze, supra, the teacher pulled a nine-year-old child's hair to redirect his attention when he turned around and talked while she was teaching a lesson. The Commissioner of Education considered this to have a "disciplinary flavor", relying in part on evidence of other occasions where the teacher had similarly pulled hair as proof of an intent and of a general policy to utilize corporal punishment in violation of the accepted rules and upheld her removal. However, on review the State Board of Education did not agree with the Commissioner's characterization of the event. Instead, it found that there was no corporal punishment involved, as the act was not done with the intent to inflict pain as a penalty for an infraction but merely to direct attention. Craze, supra at 588.

In In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), students were passing a pocketbook around from desk to desk. The bag came to rest on a male pupil's desk. The teacher dropped his textbook on a student's desk, proceeded to the desk of the boy on whose desk the pocketbook rested, laid his hands on the boy, and when the boy went to the front of the room and was directed to return to his seat but instead bolted from the room, chased the boy, grabbed him and both fell. The Commissioner found no justification for the use of physical force to maintain discipline or to punish infractions. However, he did not find that the teacher's conduct was "premeditated,

cruel or done with intent to inflict corporal punishment." Instead, the actions bespoke "a hasty and misguided effort to restrain" the student. Given Fulcomer's "great many years" of service, good record and an unquestioned ability to teach, removal from tenure was simply too great a penalty.

In In re Tiefenbacher, 1983 S.L.D. 1648, the teacher twisted the face of a student in the hallway following a classroom incident between the two and the student's subsequent attempt to return to the classroom. The Commissioner speaks of the "highly charged emotional atmosphere attendant to the incidents involving the teacher and student a short time before, and determined that as the teacher had an unblemished record of sixteen years of service "without exhibition of reprehensible disciplinary behavior toward his students" that removal was inappropriate. He remanded the case for consideration of lesser penalties, with the factors identified in Fulcomer as guides. These included the societal needs and interests, the offender's history, any propensity for like conduct in the future and the probable effect upon the latter of the choice of a reasonable penalty. "The question that must be answered is whether the offense was of so flagrant a nature and the prospect for the future so dim as to require the ultimate punishment available." Id. at 1653.

In In re Nogaki, 1984 S.L.D. 1986, a teacher punched each of two brothers in the chest after they refused to follow his directions. The administrative law judge found that the teacher's conduct constituted corporal punishment and the Commissioner adopted this finding. However, as there was no "premeditation, cruel or vicious action and no specific intent to inflict corporal punishment," the Commissioner found that removal was too severe a penalty for a teacher with a thirteen-year career. The event was simply not so egregious as to warrant dismissal. There was no significant harm, no showing of series of incidents, and no showing of a propensity for violence.

In In re Harrell, 1979 S.L.D. 479, the teacher slapped a student in a physical education class. Two students had been wrestling and were told to stop. They continued and then one of the boys ran to the corner of the locker room. The teacher pursued, caught and slapped the student, who fell. The teacher pulled him up, grabbed him and pushed him into line. The Commissioner concluded that this was not a case of corporal punishment. The teacher forfeited two weeks of pay.

In Matter of the Tenure Hearing of Anthony Ashley, EDU 1916-02, Initial Decision, (September 20, 2002), adopted, Comm;'r. (December 6, 2002), adopted, State Bd. of Examiners (May 7, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, a teacher kicked a female student while they were in the auditorium. She had been acting in a playful manner and had not done anything to provoke the teacher. However, she did touch a badge he was wearing. The teacher pushed the student away, told her "not to fucking touch me" and "I'll beat your ass," and kicked her. The Commissioner found this to be unbecoming conduct, conduct which was unprovoked and which included vulgar language. The teacher violently and rudely pushed and kicked the student at least one time, causing injury. The incident demonstrated a lack of self-restraint and controlled behavior. Ashley had only been a teacher for five years. He was removed from tenure.

These cases would seem to identify the intent to punish, to inflict a physical force upon a student in order to discipline, as essential to a finding that the physical contact was corporal punishment. But in the absence of such motive, where the evidence more properly supports the conclusion that the teacher lashed out in anger, sought to simply reply to a provocation, or indeed without one, sought not to discipline but to retaliate or to impose his will on a recalcitrant student whose conduct simply could not justify a physical response under any circumstances, then the action is not corporal punishment. In this case, Alvarez, in entering into a figurative "head butting" with T.B., in lowering himself to the adolescent's level, in engaging in an exchange of verbal challenges and responses, almost a form of verbal fisticuffs, seemingly abandoned the role of teacher, guide, and role model that is the essence of the teacher's status and instead became a common combatant. Pushing the desk in the midst of an angry exchange is more a lashing out than a punitive or corrective measure and similarly here, not only is there no evidence of any intention to inflict pain, there is also no element of redirecting attention, such as in the rather benign action of pulling the boy's hair while he sat in his seat and turned to talk. Here, while the pupil was seated, the raising of voices, the exchange of words, including words and phrases completely improper to the classroom setting, the threats and the challenges, all make for a totally different set of circumstances than those in the Craze case. As such, I concur with the suspicion of Mr. Alvarez's counsel. There is no element of corporal punishment in the December 23, 2008 incident.

In Tenure Hearing of Adam Mierzwa, EDU 8220-07, Initial Decision, (May 6, 2008), modified in part, Comm'r. (June 23, 2008) <http://lawlibrary.rutgers.edu/oal/search.html> a teacher was involved in attempting to break up a fight outside of the school doorway. He tussled with one of the combatants and was brought to the ground during that encounter. He then physically returned the student to the school office where he forceably seated the student in a chair, although the force used was "not extreme." In the office he was very loud and emotional, screaming to those in the office. In another instance students in his classroom were disruptive. He was angry and was frustrated by their lack of attention, motivation and apparent disinterest in learning. He had a student removed from the class and told students that they were "cowards" that he would contact the police about them and would fail them. He was emotional, agitated and verbally threatening toward the students. These events occurred about two years apart. In the initial decision, I wrote

> 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.
>
> [Id. at 29.]

The initial decision ordered that Mierzwa's tenure be removed. On review, the Commissioner accepted the findings and conclusions of the initial decision, but determined that removal was not appropriate. Agreeing that Mierzwa's conduct could not be tolerated and that his evaluations and history did not mitigate the seriousness of

his misconduct, she noted that there was no evidence that the district had attempted to have Mierzwa utilize strategies for dealing with the situations that he was confronted with involving student disruption and administrative conflict and had not implemented any specific actions to address his previous unacceptable behavior, nor that the district had included any such actions in his Individual Professional Improvement Plan. The Commissioner also noted that previous decisions involving similar matters had not generally resulted in termination. Instead of removal, she imposed a forfeiture of the 120 days pay for the period of his pre-hearing suspension, a further suspension of four months without pay, and a requirement to successfully complete a course dealing with anger management, conflict resolution and handling disruptive students.

Similarly, in Tenure Hearing of Barbara Emri, EDU 4579-00, Initial Decision, (August 30, 2002), modified in part, Comm'r. (October 21, 2002), modified in part, State Bd. of Examiners (December 3, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, the ALJ and Commissioner declined to remove a teacher who had a pattern of difficulties dealing with disruptive students, including those who failed to follow her and the school's rules, who had several instances of yelling at students causing them to cry, who yelled at administrators and pounded her fists on the table accusing them of harassment, who demonstrated a lack of sensitivity to students, including special education students, and who, although she was not deemed a racist, had used the "N" word. The Commissioner and State Board of Education essentially agreed with Judge Tylutki that forfeiture of 120 days of pay, suspension for six months, loss of certain increments, and a specifically tailored training in anger management and strategies for dealing with disruptive students was sufficient sanction for Emri's misconduct. Again, the decisions cited a lack of evidence that the District had taken any corrective action regarding Emri's several earlier incidents of inappropriate conduct.

Based upon the facts established in this case and the case law, it is apparent that the rather limited history of Mr. Alvarez's demonstrations of a lack of ability to readily handle the frustrations of his work, the disruptive actions of students and the disappointments that must affect a teacher who is disturbed by the less than motivated attitude of students does not present a sufficiently egregious pattern as to warrant the removal of his tenure. While it may not be too much to say that given some of the

comments in his evaluations and the words he had used and actions that he had demonstrated to fellow staff and students before December 2008, that he was, in a sense, an accident waiting to happen, and that the December 23, 2008 event was the accident, the culmination of the issues plaguing him, and while in fairness my opinion in Mierzwa might suggest that I would order removal, in view of the Commissioner's ruling therein, I deem it proper to order that he forfeit the 120 days of pay withheld for the initial portion of his suspension, that he be suspended for an additional period of two months, that he forfeit any increment that he might be entitled to during the 2009-2010 school year, and that he successfully complete training in anger management conflict resolution and management of disruptive students. In addition, the Board of Education shall work with Mr. Alvarez to implement any strategies or actions that will facilitate his appropriate classroom management skills, including those that may assist with dealing with the multicultural, multi-ethnic and minority nature of the student population.[3]

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

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

[3] In the interests of full disclosure, as I have previously advised the parties in this case, in either 1963 or 1964 while a high school student, I was sitting in a desk that was pushed by a teacher. I cannot recall what exactly what the triggering event for this. I may have been talking when I should not have been or the class may have been involved in some heated discussion. The teacher was outstanding and the class quite a motivated bunch. I was pushed no more than a foot or two and was not in any way injured. The event, while it became well known to students, did not result in any report about the teacher. I do not know if the teacher ever did anything similar. In 2000, after my name was mentioned in a newspaper editorial regarding a case I had decided, this teacher, now retired, contacted me for the first time in thirty-six years to congratulate me on the decision. At the end of our conversation, completely without any prompt, the teacher apologized for his action so long ago. I was amazed that the teacher remembered it. As I informed the parties, I did not believe that this experience would in any way impact my consideration of this contested case, and counsel agreed that there was no reason for me to step aside.

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

March 5, 2010
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: March 5, 2010

Date Mailed to Parties: March 5, 2010

mjm

WITNESS LIST

FOR THE PETITIONER:

Carla Leach

Debora Goldsmith

D.C.

G.C.

F.C.

T.B.

C.G.

Annette Maldonado

Nicole Sivolella

Tina Rose Yuli

Sharon Freeland

Joann Gryszkiewicz

Randy Holmes

Dominic Bizzaro

Gilbert Alvarez

Edward H. Tobe

David Gallina

FOR THE RESPONDENT:

Gilbert Alvarez

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Report of Edward H. Tobe, D.O., P.A., dated May 7, 2009

P-2 40 pages of materials from Dr. Tobe to Mr. Inzelbuch

P-3 Report of David J. Gallina, M.D., P.A., dated January 24, 2009

P-4 Curriculum Vitae of Dr. Gallina

P-5 Report of Dr. Gallina dated May 22, 2009

P-6 Incident Report of Carla Leach dated January 12, 2009

P-7 Tenure Charges sent to Gilbert Alvarez dated January 20, 2009

P-8 Seating diagram

P-9 Incident Description of TinaRose Yli dated February 9, 2009

P-10 Memorandum dated December 23, 2008 from Gilbert Alvarez to Tina Rose Yuli

P-11 (Also R-2) Agreement with D.C. dated January 15, 2009

P-12 Letter dated February 6, 2009 from Richard A. Friedman to Michael Inzelbuch

P-13 Answer to Tenure Charge dated March 10, 2009

P-14 Incident Report of Gilbert Alvarez dated December 23, 2008

P-15 Withdrawn from evidence

P-16 Not in evidence

P-17 Letter dated May 30, 2007 from Gilbert Alvarez to Mr. Falaise

P-18 Statement of T.B. dated December 23, 2008

P-19 Statement of F.C. dated January 7, 2009

P-20 Memorandum dated November 23, 2009 of Cliff Goldsmith

P-21 Statement of T.T. dated January 8, 2009

P-22 Statement of C.G. note dated

P-23 Not in evidence

P-24 Not in evidence

P-25A to G Evaluations of Gilbert Alvarez

FOR THE RESPONDENT:

R-1 Memorandum dated February 7, 2008 from Gil Alvarez to Mrs. Yli

R-2 See P-11

R-3a to g Evaluations of Gilbert Alvarez

R-4 Rebuttal of Observation of 12/17/08

170-10

IN THE MATTER OF THOMAS GUARASCIO, :

BOARD OF EDUCATION OF THE TOWNSHIP : COMM ISSIONER OF EDUCATION

OF BERKELEY, OCEAN COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Board of Education of the Township of Berkeley – violated *N.J.S.A.* 18A:12-24(c) of the Code of Ethics for School Board Members of the School Ethics Act when he voted, *inter alia*, to: reappoint his wife as a teacher in the District; reappoint the Principal, Assistant Principal and Supervisor of Elementary Education under whom his wife served; and to reappoint his wife as club sponsor for the Scrapbook Club. The Commission recommended the penalty of censure in this matter.

Upon review, the Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – concurred that censure is the appropriate penalty for the violations found. Accordingly, the Commissioner directed that respondent be censured as a school officer found to have violated the School Ethics Act.

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

June 4, 2010

170-10

AGENCY DKT. NO. 77-4/10

IN THE MATTER OF THOMAS GUARASCIO, :
BOARD OF EDUCATION OF THE TOWNSHIP : COMM ISSIONER OF EDUCATION
OF BERKELEY, OCEAN COUNTY. : DECISION
:

The record of this matter and the decision of the School Ethics Commission ("Commission") – finding that Berkeley Township Board of Education (Board) member Thomas Guarascio violated *N.J.S.A.* 18A:12-24(c), and recommending a penalty of censure – have been reviewed by the Commissioner pursuant to *N.J.S.A.* 18A:12-29 and *N.J.A.C.* 6A:3-9.1 solely for determination on the Commission's recommended penalty. Mr. Guarascio (respondent) filed timely exceptions to the Commission's recommendation pursuant to *N.J.A.C.* 6A:3-9.1 and *N.J.A.C.* 1:6C-18.3, but did not appeal the Commission's finding of violation pursuant to *N.J.A.C.* 6A:4.[1] The Commission duly replied to respondent's exceptions.

In his exceptions, respondent reiterates that nothing more than a reprimand is warranted for his "rookie mistakes" – which he has acknowledged committing – and contends that the Commission's decision fails to address all but one of the mitigating circumstances he presented for the Commission's consideration, instead imposing an "unduly harsh" penalty not supported by the factually distinguishable case law on which the decision purports to rely. (Respondent's Exceptions at 1-3) Specifically, respondent renews his stance that: 1) five of his

[1] By letter dated April 30, 2010, the complainant in this matter requested an extension of time within which to submit exceptions to the Commission's decision; he was advised, however, that no action would be taken on his request because he lacked standing to submit exceptions. *N.J.A.C.* 6A:3-9.1 and *N.J.A.C.* 1:6C-18.3 provide that only *parties* to an ethics matter are permitted to submit exceptions, and, pursuant to the March 1, 2000 holding of the State Board of Education in *In the Matter of Frank Pannucci, Board of Education of Brick Township, Ocean County* – reflected in the above-cited rules and now expressly memorialized at *N.J.A.C.* 6A:28-10.7 (see 41 *N.J.R.* 31) – once the Commission has found probable cause to credit a complaint alleging violation of the School Ethics Act, the Commission becomes the prosecutor of the complaint and the complainant is no longer a party to the matter.

six violations involve 9-0 votes that were "mere formalities" and occurred within minutes of respondent's seating on the Board; 2) in five of the six cases, respondent and the complainant (a fellow Board member) voted the same way, so that complainant could not have objected to the merit of respondent's votes; 3) five of the six votes involved a simple renewal of pre-existing positions, with no new positions created and no changes made to job status; 4) despite being a "veteran" Board member while respondent was a "rookie," the complainant never voiced his concerns to respondent prior to or at the time of the votes in question, opting instead to file a School Ethics complaint; 5) no member of the public has voiced any concern to the Commission so as to warrant a conclusion that the public trust was violated; 6) the complainant sought to withdraw his complaint, but the Commission rejected his request; 7) the fact that respondent and complainant voted the same way five of six times compels the conclusion that this matter constituted "a classic 'set-up;'" and 8) although there was a difference of opinion between respondent and complainant on one of the six votes at issue, "a simple 'peep'" at the time would have resulted in respondent's recusal and avoided any question of violation. (*Id.* at 1-2)

Respondent additionally contends that a bad precedent is being set by subjecting him to censure, since this will invite similar proceedings in other districts having "split" boards; he reiterates that, in his view, the present situation involves a veteran Board member who complained about a rookie – notwithstanding the absence of either public outcry or any attempt to prevent or stop the violations on the part of the veteran – who opted instead to keep quiet until filing a formal complaint at a moment of his own choosing. (Respondent's Exceptions at 2) Finally, respondent opines that the public reading of a resolution of censure will create "quite the spectacle" given the complainant's prior silence and the lack of any expressed concern on the part of the public, and that the posting of such resolution in the Board's public notice area, as

required by law, will have the additional effect of punishing respondent's wife, who is an innocent Board employee. (*Id.* at 3)[2]

In reply, the Commission asserts that it did, in fact, consider the mitigating factors and case law presented by respondent, but was not persuaded thereby. The Commission summarizes the findings and decisional precedents previously set forth, and adds that the factors cited by respondent over and above his inexperience as a Board member did not relieve him of his duty to abstain from all actions affecting his wife's employment. (Commission's Reply at 1-5)

Upon review, the Commissioner concurs with the Commission that censure of respondent is the appropriate penalty in this matter.

In so holding, the Commissioner is satisfied that the Commission properly considered the nature and circumstances of respondent's violations, as well as his arguments regarding mitigation, and imposed a penalty appropriate to the facts in light of prior decisional law. Like the Commission, the Commissioner finds it particularly significant that – even making reasonable allowance for several violations having occurred at respondent's first meeting as a Board member on April 30, 2008 – respondent committed two similar violations three weeks later and, in September 2008, yet another even after completing new board member training in June. Nor is the Commissioner persuaded by the fact that respondent's votes may not in most instances have altered the ultimate action taken by the Board or affected its current staffing, or by the fact that respondent was not cautioned that he was about to commit – or promptly notified that he had just committed – violations of the School Ethics Act; as the Commission has recognized, the provision violated by respondent speaks to reasonable perception of a potential for biased judgment rather than to actual outcome, and respondent cannot rely on the silence of

[2] Respondent additionally renews his request that, in the alternative, his violations be found *de minimis* so as not to warrant any penalty, invoking the current rule at *N.J.A.C.* 6A:28-10.12(a) notwithstanding that this matter arose under, and was reviewed by the Commission pursuant to, prior regulations. (See Commission's Decision at 1)

others to explain away his own failure as a school official charged with knowledge of the duties and responsibilities of his office.[3] Similarly, the fact that imposition of a censure may cause surprise to members of the public or school community previously unaware of a school ethics proceeding, or chagrin to an employee whose relationship to the sanctioned school official is the basis for a finding of violation, cannot limit the Commission's (or the Commissioner's) ability to impose the statutorily authorized penalty deemed appropriate for the violation found; to hold otherwise would compromise enforcement of the provisions of the School Ethics Act as contemplated by the Legislature and State Board.[4]

Accordingly, there being no basis on which to disturb the Commission's penalty recommendation, the Commissioner hereby directs that Thomas Guarascio be censured as a member of the Berkeley Township Board of Education found to have violated the School Ethics Act.

IT IS SO ORDERED. [5]

COMMISSIONER OF EDUCATION

Date of Decision: 6|04|10
Date of Mailing: 6|04|10

[3] In this regard, the Commissioner notes respondent's acknowledgement before the Commission, following complainant's assertion that Board candidates receive kits including the School Ethics Act and newly elected Board members receive a copy of the Code of Ethics for School Board Members prior to the reorganization meeting, that he signed the Code of Ethics statements but did not read what was handed to him and that he did not take the time at new board member training to seek clarification on the issues presented by his spouse's employment in the district. (Probable Cause Notice at 3-4; included with respondent's Exceptions as Exhibit F)

[4] The Commissioner also notes that complainant's attempt to withdraw his complaint cannot serve to mitigate penalty where a violation has been found, since, pursuant to *Pannucci, supra*, it is "not the function of the Ethics Commission...to adjudicate the rights of complainants vis-à-vis school officials"; rather, "the function of a complainant is to bring acts by school officials which may indicate a violation of the School Ethics Act to the attention of the Ethics Commission so as to protect the public's confidence," and it "is the Commission, not the complainant, which is charged in this context with acting as the guardian of the public interest." (Slip Opinion at 9)

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

IN THE MATTER OF THOMAS GUARASCIO, *BERKELEY TOWNSHIP BOARD OF EDUCATION OCEAN COUNTY*	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C40-08**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on December 11, 2008 by Stephen J. Pellecchia, alleging that Thomas Guarascio, a member of the Berkeley Township Board of Education, Ocean County, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainant thereafter submitted a request to withdraw the complaint, which was denied by the School Ethics Commission on January 27, 2009. An answer was filed on behalf of the respondent on March 6, 2009. The matter was scheduled for a probable cause determination by the Commission on December 15, 2009, at which time the Commission voted to find probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24(e) in connection with seven instances of voting. The Commission also found that the complaint was not frivolous. The Commission determined to resolve this matter on a summary basis pursuant to N.J.A.C. 6A:28-6.8(b), in that the material facts are not in dispute.[1] Pursuant to N.J.A.C. 6A:28-6.8(b), the respondent was accorded 30 days from the mailing date of the Probable Cause Notice on January 27, 2010 to submit a written statement of the reasons he should not be found in violation of the Act based on the undisputed facts set forth in the Probable Cause Notice.

On February 25, 2010, a statement was filed on behalf of the respondent. Therein, the respondent referred to his answer and his arguments why he should not be found in violation of the Act. Additionally, the respondent cited to the Commission's determinations in Dressel v. Spitzer, Monroe Township Board of Education, C10-07 (August 26, 2008) and I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10SEC, decided March 11, 2010 to support his position that he should not be found in violation of the Act. As to the question of potential penalty, the respondent again refers to his answer and the mitigating circumstances set forth therein which, respondent asserts, would support a penalty no greater than reprimand. In the alternative, and notwithstanding that this matter is being reviewed under the regulations that were in existence at the time the complaint was filed (see, footnote 1), the respondent requests that the Commission consider, based upon the circumstances in this matter, that the violations are

[1] On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed before May 18, 2009, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

de minimis, in accordance with the newly-adopted rule at N.J.A.C. 6A:28-10.12(a). (Respondent's Statement at pp. 1-2)

At its March 23, 2010 meeting, and upon consideration of the respondent's arguments, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c), as set forth below, and recommended a penalty of censure.

FINDINGS OF FACT

The following facts are deemed to be undisputed:

1. The respondent was a newly-elected Board member in April 2008 and was sworn into office on April 30, 2008. (Answer at p. 3)

2. The respondent's wife is employed by the District as a tenured sixth grade elementary school teacher. (Id. at p. 2)

3. At the Board's reorganization meeting on April 30, 2008, the respondent voted to:

   - reappoint his wife as a teacher in the District. (Id. at p. 8)

   - reappoint Berkeley Township Elementary School Principal, James D. Roselli, his wife's immediate supervisor. (Id. at p. 9)

   - reappoint Berkeley Township Elementary School Assistant Principal, Harry Colangelo, his wife's immediate supervisor. (Id. at p. 10)

   - reappoint Berkeley Township District Supervisor of Elementary Education, Dr. Dyann Declerico, a central office administrator of the respondent's wife. (Id. at p. 11.)

4. At the Board's reorganization meeting on April 30, 2008, the respondent voted to appoint Guy Ryan as Board attorney. Mr. Ryan's firm made a contribution of $2,000 to "A Better Berkeley," which was the campaign name for four candidates, including the respondent. (Id. at pp. 16-17)

5. On May 19, 2008, the respondent participated in Executive Session discussions, including a discussion which concerned the automatic renewal, pursuant to statute, of the Superintendent's contract. He voted in the affirmative in a 5-4 vote not to automatically renew the Superintendent's contract. (Id. at pp. 13-14; Complaint Exhibit F: May 19, 2008 Regular Meeting Executive Session Minutes)

6. The respondent attended training for new board members in June 2008.

7. On September 23, 2008, the respondent voted to reappoint his wife as club sponsor for the Scrapbook Club. (Id. at p. 15) She was appointed "at the hourly supplemental

contractual rate of pay." (Complaint Exhibit G: September 23, 2008 Board Minutes at p. 10)

ANALYSIS

Based on the undisputed facts set forth above, the Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) in connection with his votes as set forth in Factual Findings #3, 5 and 7. The Commission also found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(e) in connection with his vote as set forth at Factual Finding #4.

The Commission first considers whether 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;

In order to find a violation of N.J.S.A. 18A:12-24(c), the Commission must find that the respondent has either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family[2] had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment or 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or created some benefit to him or the member of his immediate family.

Actions Concerning the Respondent's Spouse

The Commission first considers the respondent's vote at the April 30, 2008 reorganization meeting to reappoint his wife, as well as the respondent's vote on September 23, 2008 to reappoint his wife as sponsor for the Scrapbook Club. The Commission has long held that a Board member may not vote on matters where he, or a member of his immediate family, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. See, I/M/O Wayne Wurtz, Paulsboro Bd. of Ed., C01-96 (May 28, 1996), Commissioner of Education Decision No. 293-96SEC, decided July 9, 1996;

[2] The School Ethics Act at N.J.S.A. 18A:12-23 defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. The Commission's regulations at N.J.A.C. 6A:28-1.2 define "spouse" as "the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33." Thus, the respondent's spouse is a member of his immediate family.

I/M/O Lorraine Dunckley, Denville Twp. Bd. of Ed., C37-01 (July 23, 2002) Commissioner of Education Decision No. 330-02SEC, decided September 6, 2002; I/M/O Alexander Sipos, Garfield Bd. of Ed., C20-99 (May 23, 2000) Commissioner of Education Decision No. 221-00SEC, decided July 10, 2000. In I/M/O Barry Levine, Egg Harbor Township School District, C31-97 (July 30, 1998), Commissioner of Education Decision No. 373-98SEC, decided August 26, 1998, the respondent Board member voted to approve a monthly bill list, which included a $148.37 reimbursement to his wife, who worked in the District. The Commission therein acknowledged that "no one advised Dr. Levine that he should either abstain from voting on the bill list or ask the Board to vote on his wife's expense reimbursement separately so that he could abstain." (Levine at slip. op. p. 2) Nevertheless, the Commission found that the respondent's spouse "clearly had a personal and financial involvement in the request such that the public might reasonably expect that Dr. Levine could not be objective in voting in favor of it."[3] (Id. at p. 3)

Similarly, the respondent's vote at the April 30, 2008 reorganization meeting to reappoint his wife as a teacher in the District, together with his vote on September 23, 2008 to reappoint his wife as sponsor for the Scrapbook Club, concerned his spouse's continued employment and appointment to the position of club sponsor for which she would be paid. Although the respondent argues that because his wife was a tenured teacher at the time of the reappointment on April 28, 2008, his vote was a "mere formality" and "harmless error," (Answer at p. 8) the Commission notes that tenure does not prohibit a Board from taking action to reduce its teaching staff members when it is advisable for reasons of economy, due to a reduction in the number of pupils, for administrative reorganization or other good cause. N.J.S.A. 18A:28-9. Thus, the Commission finds that on both occasions, the respondent took action in his official capacity in a matter where a member of his immediate family had "a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment" in violation of N.J.S.A. 18A:12-24(c).

Actions Concerning Employment Issues of the Supervisors of the Respondent's Spouse

The Commission next considers whether the respondent violated N.J.S.A. 18A:12-24(c) when, at the Board's reorganization meeting on April 30, 2008, he voted to reappoint Berkeley Township Elementary School Principal, James D. Roselli, his wife's immediate supervisor; he voted to reappoint Berkeley Township Elementary School Assistant Principal, Harry Colangelo, his wife's immediate supervisor; and when he voted to reappoint Berkeley Township District Supervisor of Elementary Education, Dr. Dyann Declerico, a central office administrator for his wife. In this connection, the Commission notes that at no time does the respondent challenge the assertions made by the complainant that Principal James D. Roselli, is his wife's immediate supervisor; that Assistant Principal Harry Colangelo is his wife's immediate supervisor; or that Dr. Dyann Declerico, as a central office administrator, is among the administrators in his wife's

[3] At the time this case was decided, N.J.S.A. 18A:12-24(c) read: "No school 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 or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." Although the wording of the statute has changed, the Commission finds its reasoning to be applicable to this matter.

chain of supervision. Rather, the respondent "vehemently denies" that voting for the reappointments of these administrators constituted a violation of N.J.S.A. 18A:12-24(c). (Answer at pp. 9-11).

In this context, the Commission also considers whether the respondent violated N.J.S.A. 18A:12-24(c) when, on May 19, 2008, he participated in an Executive Session discussion concerning the automatic renewal of the Superintendent's contract, then voted not to automatically renew the Superintendent's contract. Again, the respondent does not deny these actions, but rather contends that because his wife is a tenured teacher and member of a bargaining unit, *Advisory Opinion A30-05* (March 10, 2006) does not apply. (Id. at p. 13)

The Commission has advised that a Board member whose spouse works in the District may not participate in discussions or vote on employment issues concerning the employee's supervisors, including the Superintendent. *Advisory Opinion* A10-00 (June 27, 2000); *Advisory Opinion A30-05* (March 10, 2006). In *A30-05*, the Commission advised that Board member B, whose spouse worked as a secretary in the High School nurse's office, "would violate N.J.S.A. 18A:12-24(c) if he were to participate in employment issues regarding the principal of the High School and the Superintendent." (*A30-05* at p. 4) The Commission further advised that Board member B must recuse himself "from all discussions **and votes** with regard to those administrators." (Id., emphasis added)

Recently, in I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10SEC, decided March 11, 2010, the Commission found the respondent Board member in violation of N.J.S.A. 18A:12-24(c) when he voted on April 30, 2009 to extend the contract of the Superintendent, where his wife was employed in the District as a truant officer and reported directly to the Superintendent.[4]

In I/M/O Charles Carey, Pennsauken Bd. of Ed., C33-08 (March 23, 2010)[5], the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) by voting to approve the Superintendent's 2008-2009 salary "even where the affiliation between the respondent's spouse and the Superintendent is indirect," as his wife was a secretary in the nurse's office of the High School. The Commission therein noted that the Superintendent has general supervision over all aspects of the schools, N.J.S.A. 18A:17-20, which allows for a variety of managerial actions or decisions that could affect the employment of the respondent's spouse. See, Carey at p. 4.

In I/M/O Richard Filipek, Saddlebrook Bd. of Ed., C18-07 (June 24, 2008) Commissioner of Education Decision No. 317-08, decided July 23, 2008, the Commission found that the respondent Board member, whose spouse was employed in the District, violated N.J.S.A. 18A:12-24(c) by being present in his capacity as president of the Board and running two closed session meetings of the Board when the tenure appointment of the middle/high school principal, his wife's direct supervisor, was discussed, notwithstanding that he did not participate in the

[4] It is unclear why, in his Responsive Statement, the respondent cites to this case in support of his position that the Commission should not find him in violation of the Act.

[5] This decision is pending review by the Commissioner of Education, pursuant to N.J.S.A. 18A:12-29(c).

vote. The Commission found that the respondent had 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.

In the instant matter, the Commission finds that when the respondent voted to reappoint Berkeley Township Elementary School Principal, James D. Roselli, Berkeley Township Elementary School Assistant Principal, Harry Colangelo, and Berkeley Township District Supervisor of Elementary Education, Dr. Dyann Declerico, he was acting in his official capacity in a matter where a member of his immediate family had a "direct or indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment" in violation of N.J.S.A. 18A:12-24(c) because these administrators where in the chain of supervision for his wife. Similarly, when the respondent participated in Executive Session discussions and then voted not to automatically renew the Superintendent's contract at the Board's Meeting on May 19, 2008, he was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c) since the Superintendent has general supervision over all aspects of the schools, N.J.S.A. 18A:17-20, which allows for a variety of managerial actions or decisions that could affect the employment of the respondent's spouse.

Action Concerning Appointment of Board Attorney

Finally, the Commission considers whether the respondent violated N.J.S.A. 18A:12-24(e) when, at the Board's reorganization meeting on April 30, 2008, he voted to appoint Guy Ryan as Board attorney, notwithstanding that Mr. Ryan's firm made a contribution of $2,000 to "A Better Berkeley," which was the campaign name for four candidates, including the respondent. N.J.S.A. 18A:12-24(e) provides:

> No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. *This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties*; (emphasis added)

In order to find a violation of N.J.S.A. 18A:12-24(e), the Commission must find that a school official, or a member of his immediate family, or business organization in which he has an interest, solicited or accepted a gift, favor, loan, political contribution, service, promise of future employment, or other thing of value *based upon an understanding* that the gift, favor, loan,

contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. While the respondent readily admits that Guy Ryan's firm made a contribution of $2,000 to "A Better Berkeley," which was the campaign name for four candidates, including the respondent and at the Board's reorganization meeting on April 30, 2008, the respondent voted to appoint Guy Ryan as Board attorney (Answer at pp. 16-17), the respondent argues that N.J.S.A. 18A:12-24(e) does not apply in this instance since, at the time the campaign donation was made, he was not a "school official." Nor, according to the respondent, is there any factual support in the record to indicate that he "had 'knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence a school official in the discharge of his official duties.'" (Id. at p. 17)

Upon careful review of this provision and the cases decided there under, the Commission concurs that the plain language of N.J.S.A. 18A:12-24(e) requires that the recipient of the "gift, favor, loan, political contribution, service, promise of future employment, or other thing of value" be a school official. The Act defines "school officials" as board members, charter school trustees, administrators and employees and officers of the New Jersey School Boards Association. Thus, at the time the respondent accepted the donation, he was not a school official. Moreover, the Commission further finds that N.J.S.A. 18A:12-24(e) requires a showing that when the school official accepted the contribution, s/he did so based upon the understanding that it was given for the purpose of influencing him/her in the discharge of his/her official duties. I/M/O Meera Malik and Elizabeth Vasil, C06-98 & C08-98 (September 22, 1998)[6] No such evidence exists on this record. Accordingly, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24(e) and this charge is dismissed.

DECISION

For the reasons set forth above, the Commission finds that Thomas Guarascio violated N.J.S.A. 18A:12-24(c) in six instances. Specifically, the respondent violated N.J.S.A. 18A:12-24(c) when, on April 30, 2008, he voted to reappoint his wife as a teacher in the District; to reappoint Berkeley Township Elementary School Principal, James D. Roselli; to reappoint the Berkeley Township Elementary School Assistant Principal, Harry Colangelo; and to reappoint reappoint Berkeley Township District Supervisor of Elementary Education, Dr. Dyann Declerico. He again violated N.J.S.A. 18A:12-24(c) when, on May 19, 2008, he participated in an Executive Session discussion and then voted not to automatically renew the Superintendent's contract. Finally, the respondent violated N.J.S.A. 18A:12-24(c) when, on September 23, 2008, he voted to reappoint his wife as club sponsor for the Scrapbook Club. The Commission dismisses the allegation that the respondent violated N.J.S.A. 18A:12-24(e).

[6] While the Commission continues to take a strong position with respect to the actions of Board members once they have accepted campaign contributions, see *Advisory Opinion A23-02* (December 2, 2002), ordinarily such actions are reviewed under N.J.S.A. 18A:12-24(c).

PENALTY

The Commission recommends a penalty of censure. In weighing the appropriate penalty in this matter, the Commission has considered the respondent's answer setting forth the mitigating circumstances. Specifically, the respondent asserted in his answer that he was a new Board member in April 2008 and the votes taken at the April 30, 2008 reorganization meeting occurred within minutes of the time that he was sworn in. Neither the Superintendent nor the Board attorneys ("old" or "new") advised him not to vote on these matters. (Answer at p. 3) As to the vote at the May 19, 2008 meeting, the respondent asserted this vote was taken three weeks after he was sworn in and he was similarly not advised that he should abstain. (Id. at p. 3) As to the allegation that he voted for his wife for club sponsor, the respondent stated that his wife had been the sponsor for the Scrapbook Club for several years. (Id. at p. 4) In this connection, the Commission recognizes that the Commissioner of Education has found new Board member status to be a mitigating factor for a penalty determination. (See, I/M/O John Harrison, Ewing Township Bd. of Ed., C13-94 (December 14, 1995) Commissioner of Education Decision No. 78-96SEC, decided March 6, 1996).[7] However, the Commission cautiously applies this mitigating factor, inasmuch as it finds that the school official is charged with knowing his duties and responsibilities under the Act and cannot be granted a "free pass" for errors made during his initial meetings.

Even granting that the first four violations "occurred within minutes of the respondent's swearing in," (Answer at p. 3) there was a fifth violation on May 19, 2008 which occurred during an Executive Session meeting when the respondent participated in a discussion concerning the automatic renewal of the Superintendent's contract, then when he voted in the affirmative in a 5-4 vote not to automatically renew the Superintendent's contract. In Filipek, supra., the Commission cited to SEC v. Michael Kilmurray, Lacey Twp. Bd. of Ed., C12-94 (January 27, 1998), Commissioner of Education Decision No. 155-98 (April 15, 1998) where it found 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." (Kilmurray at page 3) The Commission therein advised that full recusal requires the conflicted school official to leave the room. In Filipek, the Commission recommended a penalty of censure for this single violation, and the Commissioner concurred.

The Commission also notes that after the respondent attended new board member training in June 2008, there was a sixth violation on September 23, 2008 when he voted to reappoint his wife as club sponsor for the Scrapbook Club. In I/M/O Lorraine Dunckley, Denville Twp. Bd. of Ed., C37-01 (July 23, 2002) Commissioner of Education Decision No. 330-02SEC, decided September 6, 2002, the Commission found that a Board member violated N.J.S.A. 18A:12-24(c) when she voted on a bill list which included reimbursement to her and her husband, and when

[7] Here, a Board member was found in violation of N.J.S.A. 18A:12-24(a) and (c) when he voted for a 48-day penalty-free extension for the construction of a new school while he was concurrently a partner in a firm subcontracted as the consulting structural engineer by the architect on the same project. The Commission recommended censure and the Commissioner found mitigating factors, including the fact that he was a new Board member who had not yet received training, that he sought and received a legal opinion prior to the filing of the charges, and that the Board subsequently unanimously sanctioned the vote – absent his participation.

she voted on a student tuition payment to the school where her husband was employed. She was also found in violation of N.J.S.A. 18A:12-26(a)(3) for not disclosing the Board as a source of prepaid expenses for her conference attendance. The Commission recommended a penalty of censure and the Commissioner approved.

In I/M/O Alexander Sipos, Garfield Bd. of Ed., C20-99 (May 23, 2000) Commissioner of Education Decision No. 221-00SEC, decided July 10, 2000, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) when, after being elected to the Board in 1997, he made motions to pass resolutions in July 1998 and January 1999 that resulted in the appointment of his wife to two positions with the Board. The Commission recommended a penalty of censure and the Commissioner approved.

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.

Robert W. Bender

Robert W. Bender
Chairperson

Mailing Date: April 21, 2010.

Resolution Adopting Decision – C40-08

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, the testimony presented on December 15, 2009; and

Whereas, at its meeting on December 15, 2009, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) and (e) of the School Ethics Act; 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 written statement submitted on behalf of the respondent was considered by the Commission;

Whereas, at its meeting on March 23, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended a penalty of censure; and

Whereas, at its meeting on April 20, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on April 20, 2010.

Joanne Boyle, Executive Director

#168-10A

SCHOOL ETHICS COMMISSION DKT. NO. C33-08
AGENCY DKT. NO. 3-3/10A

IN THE MATTER OF CHARLES CAREY, :
PENNSAUKEN BOARD OF EDUCATION, :
CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

Decided by the School Ethics Commission, March 23, 2010

For the Petitioner-Appellant, Charles Carey, *pro se*

For the Respondent, Deputy Attorney General Melissa Dutton

On March 26, 2010, appellant filed a notice of appeal from the March 23, 2010 decision of the School Ethics Commission, finding him in violation of *N.J.S.A.* 18A:12-24(c) of the School Ethics Act and recommending a penalty of reprimand. In its decision, the Commission determined that respondent – a member of the Pennsauken Board of Education, whose wife is employed as a secretary in the District – committed this violation when he voted to approve the 2008-09 salary for the Superintendent of Schools in the District. By letter dated April 8, 2010, the Director of the Bureau of Controversies and Disputes: 1) acknowledged respondent's appeal; 2) requested the Executive Director of the School Ethics Commission to certify the record and submit it, together with a statement of items comprising the record to the Commissioner; and 3) set up the briefing schedule for this appeal, which began by requiring appellant to submit a brief in support of his appeal within 20 days of the date of the April 8 letter. On April 16, 2010, the Executive Director of the School Ethics Commission certified the

record and submitted it – together with a statement of items comprising the record – to the Commissioner. Respondent, however, has failed to submit the requisite brief in support of his appeal and, therefore, the appeal IS HEREBY DISMISSED for failure to prosecute.

Accordingly, as the determination of the Commission as to violation of the School Ethics Act **is not reviewable by the Commissioner due to respondent's failure to prosecute his appeal,** pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the Commissioner's jurisdiction at this time is limited to reviewing the sanction to be imposed following the 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 reprimand is the appropriate penalty in this matter. As clearly stated in its decision, the Commission finds this penalty congruent with that imposed in similar cases previously decided by the Commission. As such, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/03/10
Date of Mailing: 6/04/10

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

IN THE MATTER OF CHARLES CAREY *PENNSAUKEN BOARD OF EDUCATION CAMDEN COUNTY*	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C33-08**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on October 1, 2008 by Michael Stargell alleging that Charles Carey, a member of the Pennsauken Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. An answer was filed on behalf of the respondent on December 15, 2008.[1] The matter was scheduled for a probable cause determination by the Commission on November 24, 2009, at which time the Commission voted to table the matter. At its meeting on December 15, 2009, the Commission found probable cause to credit the allegation in the first count of the complaint that the respondent violated N.J.S.A. 18A:12-24(c) when, on August 28, 2008, he voted to approve the 2008-2009 salary for the Superintendent. The Commission also determined to resolve this matter on a summary basis pursuant to N.J.A.C. 6A:28-6.8(b), in that the material facts are not in dispute.[2]

Pursuant to N.J.A.C. 6A:28-6.8(b), the respondent was accorded 30 days from the mailing date of the Probable Cause Notice to submit a written statement of the reasons he should not be found in violation of the Act based on the undisputed facts set forth in this Probable Cause Notice. On February 2, 2010, the respondent filed his statement. Therein, the respondent underscored that he excused himself from the Executive Session when the Superintendent's annual increase to his existing contract was discussed, although he did not abstain on the vote. As to the continued significance of the advice rendered by the Commission in *Advisory Opinion A30-05* (March 10, 2006), the respondent states:

> Also, A30-05 was a decision made regarding our organization in 2005. Things change and the hierarchy in our district Administration has changed. For example, at least two new Assistant Principal [p]ositions were added to the High School, a

[1] By notice dated January 4, 2010, received by the Commission on January 12, 2010, the respondent notified the Commission that he was no longer represented by counsel and that he would be proceeding *pro se* in this matter.

[2] On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed before May 18, 2009, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

> Director of Curriculum was added; we have a new Special Services Director and a new Business Administrator. From these and all other changes has come a change of responsibilities. ***
>
> As far as the meeting of August 28th, 2008, after the superintendent's increase was approved by the **majority** of board members attending, I voted yes to show my support for the superintendent. I have done this in the past. At one public meeting, after a great deal of discussion, we were deadlocked 4-4 on a resolution and I was one of the no votes. I **changed** my vote to yes to show my support for the Superintendent. I believe that one of the President's tasks is to support the Superintendent. (Respondent's Statement at page 2)

FINDINGS OF FACT

The undisputed facts are as follows:

1. At all times relevant, the respondent was a Board member.

2. The respondent's wife is a secretary for the nurses in the Pennsauken High School's nursing office. His wife reports to the school nurse and the school physician; her evaluation is performed by the Assistant Principal or the Principal. The Assistant Principal is evaluated by the Principal and the Principal is evaluated by the Superintendent. (Answer at page 5)

3. The respondent attended a Board meeting on August 28, 2008. Item 38 of the Board's agenda included a resolution approving the 2008-2009 salary for the Superintendent. The respondent voted to approve the Superintendent's salary, although he did not participate in any discussions regarding Item 38, including the amount of annual increase to be accorded to the Superintendent. (Id. at pages 1-4)

4. The respondent is "Board Member B" in *Advisory Opinion A30-05* (March 10, 2006).

ANALYSIS

Based on the undisputed facts set forth above, the Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) when, on August 28, 2008, he voted to approve the 2008-2009 salary for the Superintendent. N.J.S.A. 18A:12-24(c) provides:

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

> shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

In order to find a violation of N.J.S.A. 18A:12-24(c), the Commission must find evidence that the respondent has either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family[3] had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment or 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or created some benefit to him or the member of his immediate family.

The Commission has advised that a Board member whose spouse works in the District may not participate in discussions or vote on employment issues concerning the employee's supervisors, including the Superintendent. *Advisory Opinion A10-00* (June 27, 2000); *Advisory Opinion A30-05* (March 10, 2006). In the instant matter, there is no dispute that the respondent's wife is employed in the District as a secretary for the nurses in the Pennsauken High School's nursing office. According to the respondent, his wife's evaluation is performed by the Assistant Principal or the Principal. The Assistant Principal is evaluated by the Principal and the Principal is evaluated by the Superintendent. (Answer at page 5) Thus, while the respondent argues in his responsive statement that the existing reporting hierarchy in the District renders *A30-05* inapplicable,[4] the Commission notes that the facts presented for the purpose of that advisory were not appreciably different from those set forth above. Specifically, *A30-05* includes the following recitation of facts:

> You have further set forth that board member B has a spouse employed in the district as a secretary in the office of the nurse at the high school. The principal of the high school is the direct and immediate supervisor of the spouse. The Superintendent is the immediate supervisor of the principal of the high school. Board member B's spouse is a member of the secretaries' union and the majority of the terms, conditions and benefits of her employment are subject to collective bargaining. (*A30-05* at p. 2)

Thus, in *A30-05*, the Commission stated, in relevant part:

> With regards to board member B, since the high school principal is the direct and immediate supervisor of the board member's spouse, for the reasoning noted above, the board member would violate

[3] The School Ethics Act at N.J.S.A. 18A:12-23 defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. The Commission's regulations at N.J.A.C. 6A:28-1.2 define "spouse" as "the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33." Thus, the respondent's spouse is a member of his immediate family.

[4] The respondent in this matter is identified as Board Member B in A30-05.

> N.J.S.A. 18A:12-24(c) if he were to participate in any employment issues regarding the principal. **Similar to *A10-00*, since the Superintendent is the direct supervisor of the principal, there is an opportunity for the spouse's employment to be affected by the board member's involvement in employment issues related to the Superintendent in terms of the way the administrators treat and evaluate the spouse, even if such impact does not affect the contractually determined salary.** Therefore, board member B has an indirect financial involvement that might reasonably be expected to impair his objectivity of judgment in violation of N.J.S.A. 18A:12-24(c). (*A30-05* at p. 4, emphasis added)

Consequently, the Commission advised that Board member B "would violate N.J.S.A. 18A:12-24(c) if he were to participate in employment issues regarding the principal of the High School **and the Superintendent**." The Commission further advised that Board member B must recuse himself "from all discussions **and votes** with regard to those administrators." (Id., emphasis added) Thus, while the Commission accepts that the affiliation between the respondent's spouse and the Superintendent is indirect, it must nevertheless recognize that the Superintendent has general supervision over all aspects of the schools, N.J.S.A. 18A:17-20, which allows for a variety of managerial actions or decisions that could affect the employment of the respondent's spouse. The Commission finds, therefore, that when the respondent voted to approve the 2008-2009 salary for the Superintendent, he was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c).

DECISION

For the reasons set forth above, the Commission finds that Charles Carey violated N.J.S.A. 18A:12-24(c).

PENALTY

The Commission recommends a penalty of reprimand, as it did in similar matters where Board members were found to have violated N.J.S.A. 18A:12-24(c) in a single instance of voting on matters where they were conflicted. See, I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10, decided March 11, 2010; I/M/O Stewart, Atlantic City Bd. of Ed., Atlantic County, C20-07 (August 26, 2008), Commissioner of Education Decision No. 410-08, decided October 9, 2008; I/M/O Diana Lobosco, Passaic County Educational Services Commission, Passaic County, C31-05 (November 22, 2005), Commissioner of Education Decision No. 7-06, decided January 10, 2006. As such, the Commission recognizes that the facts in this matter, as set forth in the Factual Findings, may be distinguished from those in School Ethics Commission v. Gunning, C15-93 (September 22, 1994), where the Commission recommended a penalty of censure for a board member found to have violated N.J.S.A. 18A:12-24(c), when he voted on the

Superintendent's raise notwithstanding that his spouse was employed as a confidential secretary to the Superintendent, was directly supervised by him and was not a member of a collective bargaining unit. (Gunning, slip. op. at p. 3)

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.

Robert W. Bender

Robert Bender
Chairperson

Mailing Date: March 24, 2010

Resolution Adopting Decision – C33-08

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, the testimony presented on November 24, 2009 and the documents submitted to the Commission thereafter; and

Whereas, at its meeting on December 15, 2009, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; 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 February 23, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended a penalty of reprimand; and

Whereas, at its meeting on March 23, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the 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.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
March 23, 2010.

Joanne Boyle, Executive Director

169-10SEC

IN THE MATTER OF CHARLES CAREY ,	:	COMMISSIONER OF EDUCATION
PENNSAUKEN BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Pennsauken Board of Education – violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when he voted to: appoint the non-tenured members of the Administrators Association for Pennsauken, including the Principal of the High School, for the 2009-2010 school year, and when he voted to reappoint the members of the Pennsauken Association of Educational Secretaries, which included his wife. The Commission recommended the penalty of reprimand in this matter.

Upon review, the Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – concurred that reprimand is the appropriate penalty for the violations found. Accordingly, the Commissioner directed that respondent be reprimanded as a school officer found to have violated the School Ethics Act.

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

June 4, 2010

AGENCY DKT. NO. 75-4/10

IN THE MATTER OF CHARLES CAREY ,	:	COMMISSIONER OF EDUCATION
PENNSAUKEN BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Charles Carey, member of the Pennsauken 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(c) of the School Ethics Act when, on June 25, 2009, he voted to appoint the non-tenured members of the Administrators Association for Pennsauken for the 2009-10 school year, which included the Principal of the High School; he then voted to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-10 school year, which included his wife.

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. Carey.

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, which did not happen here. Therefore, 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 reprimand is the appropriate penalty in this matter. As clearly stated in its decision, the Commission finds this penalty congruent with that imposed in similar cases previously decided by the Commission. As such, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/04/10
Date of Mailing: 6/04/10

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

IN THE MATTER OF	:	**BEFORE THE**
CHARLES CAREY	:	**SCHOOL ETHICS COMMISSION**
PENNSAUKEN BOARD OF	:	
EDUCATION	:	**Docket No. C27-09**
CAMDEN COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on July 9, 2009 by Michael Stargell alleging that Charles Carey, a member of the Pennsauken Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. An answer was filed on behalf of the respondent on October 5, 2009.[1] The complainant and respondent were notified by letter dated December 29, 2009 that the Commission would review this matter at its meeting on January 26, 2010 in order to make a probable cause determination, in accordance with procedures set forth at N.J.A.C. 6A:28-10.7. At its meeting on January 26, 2010, the Commission found probable cause to credit the allegations that the respondent, whose spouse is employed as a secretary in the District, violated N.J.S.A. 18A:12-24(c) when, on June 25, 2009, he voted to reappoint the non-tenured members of the Administrators Association for Pennsauken for the 2009-2010 school year and to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-2010 school year. The Commission also determined to resolve this matter on a summary basis pursuant to N.J.A.C. 6A:28-10.7(c)1, in that the material facts are admitted.

Pursuant to N.J.A.C. 6A:28-10.7(c)1, the respondent was accorded 20 days from the mailing date of the Probable Cause Notice to submit a statement setting forth the reasons he should not be found in violation of the Act. On March 8, 2010, the respondent filed his statement, which challenged the continued significance of the advice rendered by the Commission in *Advisory Opinion A30-05* (March 10, 2006), the basis of the complaint. In this connection, the respondent notes that the District has added Assistant Principals and "the responsibilities in the High School have changed dramatically since 2005." (Respondent's Statement at p. 2) The respondent also points out that his spouse is a tenured secretary with a pre-existing contract defining her salary increase, which he took no part in negotiating.

At its March 23, 2010 meeting, and upon consideration of the respondent's arguments, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c), as set forth below, and recommended a penalty of reprimand.

[1] By notice dated January 4, 2010, received by the Commission on January 12, 2010, the respondent notified the Commission that he was no longer represented by counsel and that he would be proceeding *pro se* in this matter.

FINDINGS OF FACTS

The undisputed facts are as follows:

1. At all times relevant, the respondent was a Board member. He is serving as the President of the Board for the 2009-2010 school year. (Answer at p. 2)

2. The respondent's wife is a tenured secretary for the nurses in the Pennsauken High School's nursing office. (Id. at pp. 3, 9)

3. There are five Assistant Principals at the Pennsauken High School. The respondent's spouse is evaluated by one of the Assistant Principals. The Assistant Principals are evaluated by the Principal who, in turn is evaluated by the Superintendent. (Id. at p. 7)

4. On June 25, 2009, the respondent attended a Board meeting. Item 40 on the agenda included a resolution to reappoint the non-tenured members of the Administrators Association for Pennsauken for the 2009-2010 school year, including the Principal of the Pennsauken High School, Dennis Vinson, at a specified salary. The respondent voted in favor of the motion. (Id. at pp. 5-7; Id. at Exhibit A)

5. On June 25, 2009, the respondent attended a Board meeting. Item 41 on the agenda included a resolution to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-2010 school year "at salaries to be adjusted pursuant to the successor collective bargaining agreement with the Pennsauken Association of Educational Secretaries." His wife was included on the list of secretaries, with her approved salary. He voted in favor of the motion. (Id. at pp. 8-10; Id. at Exhibit A)

6. There was no reduction in force in effect for the 2009-2010 school year. (Id. at p. 9)

7. The respondent is "Board Member B" in *Advisory Opinion A30-05* (March 10, 2006).

ANALYSIS

Based on the undisputed facts set forth above, the Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) when, on June 25, 2009, he voted to appoint the non-tenured members of the Administrators Association for Pennsauken for the 2009-2010 school year, which included the Principal of the High School and when he voted to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-2010 school year, which included his wife. N.J.S.A. 18A:12-24(c) provides:

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

> shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

In order to find a violation of N.J.S.A. 18A:12-24(c), the Commission must find evidence that respondent has either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family[2] had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment or 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or created some benefit to him or the member of his immediate family.

Action Concerning Employment Issues of the Supervisor of Respondent's Spouse

With respect to the respondent's vote on June 25, 2009 to appoint the non-tenured members of the Administrators Association for Pennsauken for the 2009-2010 school year, the Commission has advised that a Board member whose spouse works in the District may not participate in discussions or vote on employment issues concerning the employee's supervisors. *Advisory Opinion* A10-00 (June 27, 2000); *Advisory Opinion A30-05* (March 10, 2006). The Commission has affirmed this principle in recent decisions. In I/M/O Richard Filipek, Saddlebrook Bd. of Ed., C18-07 (June 24, 2008) Commissioner of Education Decision No. 317-08, decided July 23, 2008, the Commission found that the respondent Board member, whose spouse was employed in the District, violated N.J.S.A. 18A:12-24(c) by being present in his capacity as president of the Board and running two closed session meetings of the Board when the tenure appointment of the middle/high school principal, his wife's direct supervisor, was discussed, notwithstanding that he did not participate in the vote. The Commission found that the respondent had 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. See also, I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10SEC, decided March 11, 2010.

In the instant matter, there is no dispute that the respondent's wife is employed in the District as a secretary for the nurses in the Pennsauken High School's nursing office. According to the respondent, his wife's evaluation is performed by an Assistant Principal. (Answer at p. 7) The Assistant Principal is evaluated by the Principal and the Principal is evaluated by the Superintendent. (Id.) Thus, while the respondent argues in his responsive statement that the existing reporting hierarchy in the District renders *A30-05* inapplicable, the Commission notes that the facts presented for the purpose of that advisory were not appreciably different from those set forth above. Specifically, *A30-05* includes the following recitation of facts:

---

[2] The School Ethics Act at N.J.S.A. 18A:12-23 defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. The Commission's regulations at N.J.A.C. 6A:28-1.2 define "spouse" as "the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33." Thus, the respondent's spouse is a member of his immediate family.

> You have further set forth that board member B has a spouse employed in the district as a secretary in the office of the nurse at the high school. The principal of the high school is the direct and immediate supervisor of the spouse. The Superintendent is the immediate supervisor of the principal of the high school. Board member B's spouse is a member of the secretaries' union and the majority of the terms, conditions and benefits of her employment are subject to collective bargaining. (*A30-05* at p. 2)

Thus, in *A30-05*, the Commission stated, in relevant part:

> With regards to board member B, since the high school principal is the direct and immediate supervisor of the board member's spouse, for the reasoning noted above, the board member would violate N.J.S.A. 18A:12-24(c) if he were to participate in any employment issues regarding the principal. (*A30-05* at p. 4, emphasis added)

Consequently, the Commission advised that Board member B "would violate N.J.S.A. 18A:12-24(c) if he were to participate in employment issues regarding the principal of the High School and the Superintendent." The Commission further advised that Board member B must recuse himself "from all discussions **and votes** with regard to those administrators." (Id., emphasis added) Although the respondent's action in this matter did not take place in Executive Session, as in Filipek, and even granting that the High School Principal is no longer the "direct and immediate supervisor" of the respondent's spouse, the Commission nevertheless reasons, as it did in *A30-05*, that "there is an opportunity for the spouse's employment to be affected by the [respondent's] involvement in employment issues related to [the supervisors in his spouse's chain of command] in terms of the way the administrators treat and evaluate the spouse, even if such impact does not affect the contractually determined salary." (*A30-05* at p. 4) Thus, when the respondent voted on June 25, 2009 to reappoint the non-tenured Principal of the High School, he was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c).

Action Concerning the Respondent's Spouse

The Commission now considers the respondent's vote on June 25, 2009 to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-2010 school year, which included his wife. The Commission has long held that a Board member may not vote on matters where he, or a member of his immediate family, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. See, I/M/O Wayne Wurtz, Paulsboro Bd. of Ed., C01-96 (May 28, 1996), Commissioner of Education Decision No. 293-96SEC, decided July 9, 1996; I/M/O Barry Levine, Egg Harbor Township School District, C31-97 (July 30, 1998), Commissioner of Education Decision No. 373-98SEC, decided August 26, 1998; I/M/O Lorraine Dunckley, Denville Twp. Bd. of Ed., C37-01 (July 23, 2002) Commissioner of Education Decision No.

330-02SEC, decided September 6, 2002; I/M/O Alexander Sipos, Garfield Bd. of Ed., C20-99 (May 23, 2000) Commissioner of Education Decision No. 221-00, decided July 10, 2000. Even granting that the respondent's wife is tenured and there was no reduction in force in effect for the 2009-2010 school year (Answer at p. 9), the Commission has found that "the employment of one's spouse is a matter which might reasonably be expected to impair one's objectivity." (Sipos, slip op. at p. 3) In this connection, the Commission rejects the respondent's position that his wife's tenure rights shield him from accountability. See, Donna Custode v. Bd. of Education of the Town of Hackettstown, Warren County, Commissioner of Education Decision No. 349-00, decided October 30, 2000, State Bd. of Ed., Decision No. 71-00, *aff'd.* The Commission finds, therefore, that when the respondent voted on June 25, 2009 to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-2010 school year at a specified rate, which included his wife, he was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment and was also acting in a matter where a member of his immediate family had a personal involvement that is or creates a benefit to her. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24(c).

DECISION

For the reasons set forth above, the Commission finds that Charles Carey violated N.J.S.A. 18A:12-24(c) when, on June 25, 2009, he voted to reappoint the non-tenured members of the Administrators Association for Pennsauken for the 2009-2010 school year and to reappoint the members of the Pennsauken Association of Educational Secretaries for the 2009-2010 school year.

PENALTY

The Commission recommends a penalty of reprimand. In so doing, it has carefully considered that this respondent was recently found in violation of N.J.S.A. 18A:12-24(c). See, I/M/O Charles Carey, Pennsauken Bd. of Ed., C33-08 (March 23, 2010), which is pending review before the Commissioner of Education pursuant to N.J.S.A. 18A:12-29(c). In this connection, however, the Commission noted that the actions taken by the respondent occurred on June 25, 2009, well before C33-08 was adjudicated by the Commission. Consequently, in this unusual circumstance, the Commission is constrained to recommend a penalty of reprimand, in accordance with its previous decisions. See, I/M/O Wayne Wurtz, Paulsboro Bd. of Ed., C01-96 (May 28, 1996), Commissioner of Education Decision No. 293-96SEC, decided July 9, 1996; I/M/O Barry Levine, Egg Harbor Township School District, C31-97 (July 30, 1998), Commissioner of Education Decision No. 373-98SEC, decided August 26, 1998; and I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10SEC, decided March 11, 2010.

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.

Robert W. Bender

Robert Bender
Chairperson

Mailing Date: April 21, 2010

Resolution Adopting Decision – C27-09

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

Whereas, at its meeting on January 26, 2010, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the respondent was so notified and accorded 20 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 March 23, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended a penalty of reprimand; and

Whereas, at its meeting on April 20, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on April 20, 2010.

Joanne Boyle, Executive Director

172-10

AGENCY DKT. NO. 20-2/10

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES STEWART,	:	
NEW JERSEY DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
CORRECTIONS, NEW JERSEY	:	DECISION
STATE PRISON.	:	
	:	

The record of this matter and the parties' proposed Stipulation of Settlement – which was submitted for the Commissioner's review and approval prior to the filing of an Answer in this matter – have been reviewed.

Upon such review, the Commissioner determines to accept the parties' proposed settlement as he finds that it is consistent with established standards governing the settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the 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: 6/04/10
Date of Mailing: 6/04/10

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PAULA T. DOW
Attorney General

ROBERT M. HANNA
Director

May 5, 2010

Patty Friend, Director
State of New Jersey Department of Corrections
Whittlesey Road
P.O. Box 863
Trenton, N.J. 08625

Re: In The Matter of the Tenure Hearing: James Stewart
Agency Docket No: 20-2/10

Dear Ms. Friend:

Enclosed please find the Original Settlement Agreement which has been executed by all parties relative to the above captioned matter.

Sincerely yours,

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Christopher C. Josephson
Deputy Attorney General

CCJ:vm
Enclosure

RECEIVED
DEPT. OF CORRECTIONS
MAY 10 2010
OFFICE OF
EDUCATIONAL SERVICES

PAULA T. DOW
Attorney General of New Jersey
Attorney for Petitioner,
New Jersey Department of Corrections
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Christopher C. Josephson
Deputy Attorney General
(609)292-8550

In the Matter of the Tenure Hearing of JAMES STEWART, New Jersey Department of Corrections	:	Agency Dkt. No.: 20-2/10
	:	STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), New Jersey State Prison ("NJSP"), which is located at Third and Federal Streets, Trenton, New Jersey 08625, represented by Paula T. Dow, Attorney General of New Jersey, Christopher C. Josephson, Deputy Attorney General, appearing; and James Stewart, 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. Stewart, having filed the charges with the Commissioner of Education on or about February 4, 2010; and

WHEREAS, Mr. Stewart was charged with Conduct Unbecoming a Public Employee and Sleeping While on Duty; and

WHEREAS, the tenure charges alleged that on September 28,

2009, James Stewart, a "Teacher II" within the Department, who is assigned to NJSP, was observed by Shirley Stephens, Supervisor of Education, and Shelley Council, Teacher I, to be sleeping in a classroom at NJSP at a time when he should have been preparing for his afternoon class;

WHEREAS, the Department sought the suspension of Mr. Stewart on the above charges for a period of thirty (30) days without pay; and

WHEREAS, Mr. Stewart disputed the charges; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Stewart; 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. Stewart agrees to serve a suspension for fifteen (15) days without pay to be served during a time period that is agreeable to the parties. Service of the entire fifteen-day suspension must be completed within six months of the date that the Commissioner of Education approves the within settlement.

2. This Agreement shall be part of Mr. Stewart'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. Stewart 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. Stewart has had one prior disciplinary action taken against him, which was also for Sleeping While on Duty, and which resulted in a five-day suspension. 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. Stewart 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:

James Stewart

Dated: April 12, 2010

Rosemarie Cipparulo, Esq.
Attorney for James Stewart

Dated: 4/15/2010

For the Department of Corrections:

Dated: 4/26/2010

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Deputy Attorney General

Dated: 4/21/10

#173-10SEC

IN THE MATTER OF VALERIE JORDAN,	:	
HIGH BRIDGE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUNTERDON COUNTY.	:	DECISION

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the High Bridge Board of Education – violated *N.J.S.A.* 18A:12-24.1(g) of the Code of Ethics for School Board Members of the School Ethics Act when she transmitted confidential correspondence from Board counsel to the Interim County Superintendent of Schools and when she posted on NJ.com inaccurate information regarding the salary negotiations for the Interim Superintendent. The Commission recommended the penalty of reprimand in this matter.

The Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction in the absence of an appeal of the finding of violation – adopted the Commission's recommendation that respondent be reprimanded, finding that the Commission fairly considered the nature and circumstances of respondent's violations, as well as applicable case precedent pertaining to penalty.

This synopsis is not part of 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 7, 2010

AGENCY DKT. NO. 76-4/10
SEC DKT. NO. C 03-09

IN THE MATTER OF VALERIE JORDAN,	:	
HIGH BRIDGE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUNTERDON 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, 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. *

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/10
Date of Mailing: 6/09/10

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

IN THE MATTER OF VALERIE JORDAN	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
HIGH BRIDGE BOARD OF EDUCATION	:	**Docket No. C03-09**
HUNDTERDON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on March 3, 2009 by Robert Imhoff, alleging that Valerie Jordan, a former member of the High Bridge Board of Education, Hunterdon County, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. An answer was filed on behalf of the respondent on April 9, 2009.[1] The matter was scheduled for a probable cause determination by the Commission on December 15, 2009, at which time the Commission voted to find probable cause that the respondent violated N.J.S.A. 18A:12-24.1(g) when, on October 3, 2008, she transmitted to the Interim County Superintendent of Schools confidential correspondence from Board counsel and when, on January 30, 2009, she posted on NJ.com inaccurate information regarding the salary negotiations for the Interim Superintendent. The Commission also found that the complaint was not frivolous. The Commission determined to resolve this matter on a summary basis pursuant to N.J.A.C. 6A:28-6.8(b), in that the material facts in this matter are not in dispute.[2]

The Commission adopted its Probable Cause Notice at its meeting on January 26, 2010 and mailed the notice to the respondent, via regular and certified mail, on January 27, 2010.[3] Pursuant to N.J.A.C. 6A:28-6.8(b), the respondent was accorded 30 days from the mailing date of the Probable Cause Notice to submit a written statement of the reasons she should not be found in violation of the Act based on the undisputed facts set forth in this Probable Cause Notice.[4] Respondent was therein notified that after expiration of the time for submission of her statement, the Commission may make a determination of violation on a summary basis. The respondent did not submit a statement in response to the Probable Cause Notice. At its meeting on March 23, 2010, the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(g) and recommended a penalty of reprimand.

---

[1] By letter dated June 26, 2009, the respondent notified the Commission that she was no longer represented by counsel.

[2] On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed before May 18, 2009, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

[3] The "green card" returned to the Commission shows delivery on January 29, 2010.

[4] The respondent was therein also advised that if she disputed the facts set forth in the Probable Cause Notice, she should set forth the facts with which she disagreed and state why they are material to the case.

FINDINGS OF FACT

The following facts are deemed to be undisputed:

1. At all times relevant, the respondent was a Board member.

2. On or about the beginning of 2009, the Board was interviewing two final candidates for an Interim Superintendent's position. Responding to a Board member's concern that the per-diem salary could be further negotiated, Board member Robert Imhoff, during a Board meeting, called both finalists and both finalists agreed to a lower per-diem rate than that which was previously given in the interviews.

3. The respondent acknowledged that she posted information on NJ.com as "CodeRedd1."

4. On January 30, 2009, the respondent posted a statement on NJ.com as "CodeRedd1" regarding the salary negotiations of the Interim Superintendent. That posting states: "[Word omitted] are correct. Jeff wanted to negotiate, but the interim would not take less. The range between all potential candidates was $600-620 a day." (Complaint attachment).

5. The January 30, 2009 posting by the respondent was an inaccurate statement.

6. The February 9, 2009 Board minutes state, in relevant part:

> Mr. Imhoff also pointed out that Mrs. Jordan had inaccurately posted on the NJ Forum that "Jeff Raefski wanted to negotiate, but the interim would not take less." Mr. Imhoff pointed out that again Mrs. Jordan was lying to the public, when in fact Mr. Raefski did want to negotiate with the final candidates, and as a result of his request, the Board authorized, Mr. Imhoff, with the entire BOE present, to call the top 2 candidates and negotiate salary. Mr. Imhoff stated that both candidates made salary concessions, which Mrs. Jordan agreed and stated "oh yeah $5.00". Mr. Imhoff pointed out that it was actually a $10.00 per day concession for the CSA the BOE ultimately hired. *** (February 9, 2009 Board Minutes at p. 7)

7. A memorandum from the Superintendent of Schools, Patricia Ash, to the Board, dated September 11, 2008 states, in full:

> Please find attached confidential correspondence from Nick Celso, Board Attorney regarding an analysis and opinion of the type of language used for executive session resolution.
>
> This is not an agenda item. (Answer/Ash Memo, September 11, 2008)

8. On October 3, 2008, the respondent sent via telefax from her home to the office of the Interim County Superintendent the letter from the Board attorney that was marked "ATTORNEY-CLIENT PRIVILEGED – CONFIDENTIAL." The attorney's letter, dated September 3, 2008, is addressed to the High Bridge Superintendent and contains legal advice.

9. The respondent acknowledged that the fax number shown on the banner of the letter was from her fax machine.

ANALYSIS

Based on the undisputed facts set forth above, the Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(g), which states:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

As noted above, the respondent did not submit a written statement in response to the Probable Cause Notice and, therefore, did not challenge any of the facts set forth in the notice. With respect to the respondent's posting on NJ.com of inaccurate information regarding the salary negotiations for the Interim Superintendent on January 30, 2009, the Commission reflects on its decision in I/M/O Randie Zimmerman, Rocky Hill Bd. of Ed., (C49-02) (July 22, 2003), Commissioner of Education Decision No. 497-03SEC, decided August 21, 2003. There, the Commission found that a Board member violated N.J.A.C. 18A:12-24.1(g) when, after receiving a complaint from a parent about a classroom, she forwarded a letter to the Superintendent which referred to the "substandard kindergarten classroom" and stated that the room was an "obvious Fire Code Violation" because there must be two available exits to any classroom." The Superintendent challenged the accuracy of the correspondence, noting that the classroom had been approved by the county superintendent for instruction. The Commission found that Ms. Zimmerman did not provide accurate information; neither did she discuss these strong allegations with her Board or give the administration an opportunity to address the concerns raised. Therefore, the Commission reasoned, she did not act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school.[5]

Similarly, in the instant matter, at the probable cause phase of the Commission's review, two Board members, Ms. Kay Daughters-Musnuff and Ms. Janice Stemple, testified that the Board was interviewing two final candidates for an interim Superintendent's position when one of the Board members wanted to negotiate the per-diem salary. Thus, during a Board meeting, Robert Imhoff called the candidates and negotiated down the daily rate that was previously given in the interviews. The respondent never denied that she was present at the meeting when these

[5] The Commission also found that the respondent violated N.J.S.A. 18A:12-24.1(e).

calls were made. Yet, her posting on NJ.com did not accurately reflect this course of events. Although it is a mere couple sentences, the Commission is concerned that this communication was presented in a manner which was inconsistent with the respondent's duty to provide accurate information *and* to act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school.[6]

With respect to the respondent's transmittal of a document on October 3, 2008 to the Interim County Superintendent of Schools which the Superintendent and Board attorney deemed confidential, the Commission specifically rejects the respondent's assertion that the letter was not confidential in nature (Answer at paragraph 23) and finds that a reasonable Board member would have known that a letter from the Board attorney marked "ATTORNEY-CLIENT PRIVILEGED – CONFIDENTIAL" should have been treated as a confidential correspondence. (See, Jacobs v. Delbury. C44-07 (November 25, 2008) Commissioner of Education Decision No. 7-09SEC, decided January 9, 2009, where the Commission found that respondent's public posting of a confidential email that included information about a District employee could have needlessly injured the staff member or the schools because it exposed the school to possible litigation and revealed confidential medical information about a staff member.)

In I/M/O Frank Pizzichillo, C17-02 (January 28, 2003), Commissioner of Education Decision No. 102-03SEC decided March 6, 2003, the Commission found that a board member should have been convinced that documents given to the Board at a public meeting (an employee's payroll records) were confidential due to the specific personal information contained in the documents; the Commission also noted that the release of the same could have subjected the Board to adverse consequences. Consequently, the Commission found that Pizzichillo violated N.J.A.C. 18A:12-24.1(e) and (g).

In the instant matter, the Commission finds that the respondent should not have transmitted counsel's confidential correspondence to anyone outside of the Board. The Commission further finds that the Board attorney's correspondence was of such a nature that its release could have needlessly injured the Board. Accordingly, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(g) when, on October 3, 2008, she transmitted to the Interim County Superintendent of Schools confidential correspondence from Board counsel and when, on January 30, 2009, she posted on NJ.com inaccurate information regarding the salary negotiations for the Interim Superintendent.

DECISION

For the reasons set forth above, the Commission finds that Valerie Jordan violated N.J.S.A. 18A:12-24.1(g) of the Code of Ethics for School Board Members.

[6] The Commission notes that there is no allegation that the information in the posting was confidential. Nor does the record provide any support for such an assumption.

PENALTY

The Commission recommends a penalty of reprimand, as it did in Pizzichillo, supra., and Zimmerman, supra., since it finds Pizzichillo and Zimmerman to be both factually analogous and comparable in violation(s) to the matter herein, for the reasons set forth in the above analysis.

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.

Robert W. Bender

Robert Bender
Chairperson

Mailing Date: April 21, 2010

Resolution Adopting Decision – C03-09

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, the testimony presented on December 15, 2009; and

Whereas, at its meeting on December 15, 2009, the Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(g) as set forth in Counts II and IV of the complaint, but found no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(b), as set forth in Count III or N.J.S.A. 18A:12-24.1(a), as set forth in Counts I, II and IV and, therefore, dismissed those allegations;

Whereas, the respondent was so notified and accorded 30 days to submit a written statement setting forth the reasons why she should not be found in violation of the Act.

Whereas, the respondent failed to submit a written statement; and

Whereas, at its meeting on March 23, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24.1(g) of the School Ethics Act and recommended a penalty of reprimand; and

Whereas, at its meeting on April 20, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on April 20, 2010.

Joanne Boyle, Executive Director

174-10S

DEPARTMENT OF CHILDREN AND :
FAMILIES, INSTITUTIONAL ABUSE :
INVESTIGATION UNIT, :
PETITIONER, :
V. :
K.N., :
RESPONDENT, :
AND
IN THE MATTER OF THE TENURE :
HEARING OF KENNETH NAYLOR, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, :
ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Department of Children and Families, Institutional Abuse Investigation Unit (DCF-IAIU) substantiated that K.N. physically abused E.W., a twelve year old student. K.N. denied all charges, and requested that his name be removed from the Central Registry. Following the DCF complaint, the District filed tenure charges of unbecoming conduct against K.N. – a special education teacher – and sought his removal from his tenured position. The cases were consolidated; DCF was determined to have the predominant interest; and the ALJ ordered the record sealed.

The ALJ found that: respondent's testimony was credible and consistent with the evidence; any physical contact that occurred between K.N. and E.W. consisted of K.N. holding E.W.'s arm to stop him from passing out candy to other students; and no credible evidence exists to support the petitioners' contentions of abuse. The ALJ concluded that: DCF-IAIU failed to meet its burden of proving that a substantiated abuse determination is warranted; that the District failed to demonstrate that K.N.'s conduct was unbecoming; termination is not warranted, but respondent's conduct warrants verbal counseling on appropriateness of physical contact with a student when intervening to stop misconduct. The ALJ ordered the DCF-IAIU's substantiated abuse determination dismissed, and reversed K. N.'s removal from his tenured teaching position by the District.

The Chief of Staff of the DCF found no indication that the ALJ's determination was arbitrary, capricious or unreasonable, and adopted the Initial Decision reversing the finding of abuse. Further, the DCF determined that K.N.'s name would not be placed on the central registry.

The Commissioner's sole focus in this matter is to determine whether the District's tenure charges against K.N. have been sustained. The Commissioner concurred with the ALJ's findings that the District failed to establish conduct unbecoming. Accordingly, the Initial Decision dismissing the tenure charges and returning respondent to his tenured position was adopted; the Commissioner, however, declined to adopt that portion of the OAL decision recommending verbal counseling as he found nothing inappropriate about K.N. holding E.W.'s arm for a short period of time to stop him from passing out candy in class. The Commissioner ordered respondent returned to his tenured position and reimbursed for back pay and emoluments, less mitigation.

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

June 10, 2010

State of New Jersey

DEPARTMENT OF CHILDREN AND FAMILIES
POST OFFICE BOX 729
TRENTON, NEW JERSEY 08625

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

JANET F. ROSENZWEIG M.S., PH.D., M.P.A.
Acting Commissioner

DEPARTMENT OF CHILDREN AND FAMILIES, INSTITUTIONAL ABUSE INVESTIGATION UNIT,

Petitioner,
v.

K.N.,

Respondent,

and

IN THE MATTER OF THE TENURE HEARING OF K.N., STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

FINAL DECISION
OAL DKT. NO.: HSV 12667-08
AGENCY DKT. NO.: AHU08-1027

OAL DKT. NO. EDU 3071-09
AGENCY DKT. NO. 23-2/09
(CONSOLIDATED)

A. INTRODUCTION

K.N., a teacher for the City of Newark, appealed a finding of abuse rendered by the Institutional Abuse Investigation Unit (IAIU) pursuant to N.J.S.A. 9:6-8.21(c). The IAIU investigation resulted in a finding that K.N. abused a twelve-year-old student, E.W., by placing a plastic bag and holding it tightly over his head, picking E.W. up out of his seat and slamming him down into his desk. K.N. filed a request for a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to 13 on March 10, 2009.

In addition, the school district filed tenure charges against K.N., related to this incident. This agency does not have jurisdiction over the tenure charges. Administrative Law Judge Mumtaz Bari-Brown (ALJ Bari-Brown) ordered on March 10, 2009, that the two

matters be consolidated and that DCF has the predominant interest in determining whether an act of child abuse had taken place. ALJ Bari-Brown heard the matter on June 4, 15, and 16, and July 30, and 31, 2009. The record remained open for post-hearing submissions and was closed on October 30, 2009. The Initial Decision, which is attached hereto and incorporated by reference, was issued on January 26, 2010, and received by this agency on the same day.

B. THE INITIAL DECISION

In rendering her decision, the ALJ considered the testimony of: E.W., the victim; Kim Barnes, a teacher's aide; Nahlia Gad, IAIU investigator; Ronald Orr, vice principal and school administrator at William H. Brown Academy; Diane Anderson, social worker for the Office of Alternative Education; Davis Hannah, art teacher; Janice Holmes, in-class support teacher; and K.N., the respondent. ALJ Bari-Brown also considered IAIU investigative reports and supporting documentation.

ALJ Bari-Brown noted inconsistencies in the witness' testimony. E.W. stated that while the class watched a Jet Li movie after lunch, K.N. placed a plastic bag over his head, and held it tightly around his neck. K.N. then picked E.W. up by the arm and leg and slammed him into his desk. K.N. denied that any incident occurred in the afternoon and further denied that he showed a Jet Li movie that afternoon. According to K.N., in the morning he told E.W. to stop passing out candy and when E.W. did not listen, he grabbed E.W.'s arm. K.N. testified that this "unnerved" E.W., and that E.W. told K.N. to let go of his arm.

The ALJ also considered the statements that the caseworker took from the other students, S.S., J.J., and J.R., who did not testify in court. Lastly, the ALJ also considered the testimony of several coworkers, who testified on K.N.'s behalf, but they did not have any direct knowledge of the incident. The ALJ evaluated the testimony of K.N. and E.W. since they were the only witnesses who had first hand knowledge of the incident. The ALJ noted that E.W. changed details, such as the number of bags, the location of the bags, and color of the bag allegedly placed over his head. E.W. also testified that J.R. was given papers to hold from the bag, but J.R. told the caseworker that he was asleep and did not witness the incident. During testimony K.N. denied placing a plastic bag on E.W.'s head, denied grabbing E.W. by the neck, denied slamming E.W. into the desk, denied showing a movie that afternoon, denied every showing a Jet Li movie, and denied even keeping plastic bags in his classroom.

The ALJ made additional findings which related to the tenure issue, and which are, accordingly, not addressed herein. ALJ Bari-Brown after evaluating the testimony of the witnesses determined that K.N.'s testimony was credible and constant. Accordingly, the ALJ found that some physical contact took place, but determined that the extent of the contact consisted of K.N. grabbing E.W.'s arm to prevent him from passing out candy.

ALJ Bari-Brown considered relevant regulatory and statutory law, including the definition of child abuse and neglect at N.J.S.A. 9:6-8.21(c):

> a child less than 18 years of age whose parent or guardian . . . (1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; . . . (4) or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care . . . (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.

The ALJ concluded that "no credible evidence exists to support the versions of the events of May 23, 2008, presented through the testimony of E.W. and Barnes or the investigator's statements of S.S., J.J., M.B. and J.R. I therefore CONCLUDE that the Department of Children and Families, Institutional Abuse Investigation Unit, has failed to meet its burden of proving that a substantiated-abuse determination is warranted." Accordingly, ALJ Bari-Brown overturned the substantiation of abuse.

C. COMMENTS

Pursuant to N.J.A.C. 1:1-18.8, appellants may file exceptions within 13 days of the date that the Initial Decision was mailed to the parties. No exceptions were received.

D. FINAL DECISION

The OAL file was transmitted to this Department for consideration, pursuant to N.J.S.A. 52:14B-10(d) and was reviewed in its entirety. Careful consideration was given to the ALJ's findings and conclusions with respect to the evidence and testimony presented at the hearing. I concur that the facts in this matter, as found by ALJ Bari-Brown, do not support the finding of child abuse.

The basic facts of this case are disputed. According to E.W., while the class was watching a Jet Li movie, K.N. picked up a plastic bag, removed its contents, and gave the contents to another student. K.N. then put the bag over E.W.'s head, holding it

tightly around his neck, and picked E.W. up by his shoulder and leg and slammed him down into the desk. E.W. was not injured as a result of this incident. K.N. denied showing a movie that afternoon and denied ever showing a Jet Li movie. K.N. also denied keeping plastic bags in the classroom. He denied any incident happening at that time. K.N. contends that earlier in the day he told E.W. to stop passing out candy. When E.W. did not listen, K.N. grabbed E.W.'s arm, which "unnerved" E.W. prompting E.W. to tell K.N. to let go.

ALJ Bari-Brown found K.N.'s account of the incident, as set forth within, to be credible while finding E.W.'s account of the incident to be inconsistent and not credible. It is the task of the ALJ to make her own credibility determinations, based upon the testimony and evidence presented. Those determinations may only be modified when the Division determines, from a review of the record, that the findings are arbitrary, capricious, or unreasonable, or are not supported by sufficient, competent and credible evidence. N.J.A.C. 1:1-18.6(c). The ALJ provided an explanation regarding her determination that K.N.'s testimony was credible. There is no indication that this determination was arbitrary, capricious, or unreasonable.

ALJ Bari-Brown found that the only physical contact between K.N. and E.W. occurred when K.N. held E.W.'s arm to stop him from passing out candy to his classmates. Such contact does not constitute abuse or neglect pursuant to N.J.S.A. 9: 6-8.21(c). Therefore, in the absence of evidence to reject the ALJ's credibility determination, I **ADOPT** the ALJ's Initial Decision, which **REVERSED** the finding of abuse. Consequently, K.N.'s name will not be placed on the central registry.

Date: 4/21/10

Kara P. Wood
Chief of Staff
Department of Children and Families

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DEPARTMENT OF CHILDREN AND FAMILIES/INSTITUTIONAL ABUSE INVESTIGATION UNIT, Petitioner, v. **K.N.,** Respondent.	OAL DKT. NO. HSV 12667-08 AGENCY DKT. NO. AHU# 08-1027 **RECORD SEALED**
and	
IN THE MATTER OF THE TENURE HEARING OF K.N., STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK.	OAL DKT. NO. EDU 3071-09 AGENCY DKT. NO. 23-2/09

Keri Ann Eglentowicz, Deputy Attorney General, appearing for petitioner Department of Children and Families (Paula T. Dow, Acting Attorney General of New Jersey, attorney)

Adam S. Herman, Esq., for petitioner State-Operated School District of the City of Newark

Eugene Liss, Esq., for respondent K.N.

Record Closed: October 30, 2009 Decided: January 28, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Department of Children and Families, Institutional Abuse Investigation Unit, (DCF-IAIU) substantiated that K.N. physically abused E.W., a twelve-year-old student, by placing a plastic bag over his head, closing it tightly, pulling E.W. up, and slamming him over a desk. K.N. denies all charges of abuse and requests that his name be removed from the Central Registry. See N.J.S.A. 9:6-8.11.

As a result of the DCF complaint, the State-Operated School District of the City of Newark charged K.N., a tenured teacher in special education, with unbecoming conduct. The District seeks K.N.'s removal from his tenured position. K.N. opposes the removal action.

The DCF and the Commissioner of Education transmitted the matters to the Office of Administrative Law (OAL) for determination as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On March 10, 2009, a prehearing conference was held pursuant to N.J.A.C. 1:1-13.1. I ordered that the cases be consolidated and determined that the DCF has the predominant interest in the outcome of this proceeding. N.J.A.C. 1:1-17.3(a); N.J.A.C. 1:1-17.5(a). I further ordered that the record be sealed pursuant to N.J.S.A. 9:6-8.10a and N.J.A.C. 1:10A-14.1(b).

Hearings were held on June 4, 15, and 16, and July 30, and 31, 2009. I granted the parties' requests for an extended period of time to submit posthearing briefs, and the record was closed on October 30, 2009. Based on the voluminous record and the administrative law judge's voluminous caseload, an extension of time to complete the initial decision was granted. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

ISSUES

1. Whether K.N. is guilty of the charges alleged by the IAIU, and, if so, does the conduct constitute substantiated abuse?

2. Whether K.N. is guilty of the charges (conduct unbecoming) alleged by the District, and, if so, what is the appropriate penalty?

FACTS

Based on the joint stipulation of facts and the relevant evidence, I **FIND** the following as **FACT**:

1. On May 23, 2008, K.N., a tenured teacher of special education, was employed by the State-Operated School District of the City of Newark and assigned to William H. Brown Academy.

2. On May 23, 2008, principal Kevin Guyton of William H. Brown Academy referred a child abuse allegation to the IAIU and charged K.N. with physical abuse of E.W., a twelve-year-old student.

3. Nahlia Gad, IAIU investigator, investigated the child abuse allegation.

4. On August 11, 2008, Charmine L. Thomas, chief of IAIU Investigations, informed K.N. that the child abuse allegation was substantiated.

5. On September 3, 2008, K.N. denied the allegation and requested a hearing before the Office of Administrative Law.

6. On February 4, 2009, Clifford B. Janey, State district superintendent of the Newark Public Schools, certified tenure charges against K.N.

SUMMARY OF TESTIMONY

K.N.

Since 1978, K.N., a certified teacher of the handicapped, has worked in the Newark public schools. In school year 2007–2008 he taught a "self-contained" class at William H. Brown Academy.[1] Students were placed in "self-contained" classes due to learning disabilities. Some exhibited behavior disorders with tendencies to be disruptive and impulsive. For example, they were subject to sudden outbursts of anger and out-of-control behavior, and were argumentative, verbally abuse and physically abusive. These students often repeat grades two or three times.

The students in K.N.'s science class were J.J., S.S., E.W., M.B., J.R. M.S. (absent) and D.H. (absent). In November 2007 E.W. transferred into the class. K.N. described his students' behavior patterns. For example, M.S. would refuse to stay inside the classroom and had to be placed in an SOS (suspension-on-site) class. S.S. was very quiet, but when teased by another student he would explode, pushing over desks and chairs and going after whoever bothered him. At times S.S. would blow things out of proportion, would fantasize, and would become argumentative, as well as combative. J.R. was sometimes argumentatively combative. School personnel would call J.R.'s mother and she would speak to her son until he became calm. K.N. noted that J.R. was learning to control his temper and might be a good candidate for inclusion-class placement. J.J. liked to be the center of attention and exhibited sadomasochistic behavior. On one occasion while sitting in his seat, J.J. stabbed himself in the arm with a tack, looked at the blood flowing out, and smiled. K.N. also recalled the day that J.J. sliced his tongue with a razor. When these incidents occurred K.N. calmly spoke to the students, making it a point not to yell.

K.N. also testified about E.W.'s behavior. In November 2007 E.W. transferred from a sixth-grade class and was very adamant about not wanting to be in K.N.'s classroom. He would constantly figure out ways to leave the classroom. E.W. would be

[1] Formerly Bergen Street School.

totally out of control if he did not take his medication. Initially, E.W. was not assigned an aide. When given permission to leave the room, e.g., go to the bathroom, school security would find him in the hall and escort him back to class. K.N. further testified that E.W. fabricated stories. For example, E.W. was in the after-school program, where the students complete homework assignments. Often, E.W. did not do his assignment; instead, he told K.N. no teachers were available to help him. On other occasions E.W. claimed that the book slid off his desk onto the floor, claimed that the pencil broke because it was weak, or denied eating candy although candy wrappers were found on the floor beneath his desk. K.N. believed uncontrolled intake of candy could impact E.W.'s behavior. He described an occasion when E.W. ate candy and then K.N. found him on the playground flipping off the wall. E.W. exhibited volatile behavior and was assigned a personal aide, Ms. Venable. However, due to E.W.'s volatility the school principal removed Ms. Venable from the classroom. K.N. claimed that he repeatedly requested that the principal assign E.W. an aide, as required by his Individualized Education Plan (IEP).

K.N. described the daily class schedule and the incident that occurred on May 23, 2008. Between 8:40 and 9:25 a.m. the students work on vocabulary, and they go to lunch from 12:15 to 12:45 p.m. On May 23, 2008, at approximately 8:40 a.m. E.W. entered the classroom and began passing portions of his sandwich to the other students.[2] K.N. said, "I told him, 'Stop giving out the sandwich pieces and put it away.'" K.N. said that E.W. mumbled and rolled his eyes at him. At 10:00 a.m. K.N. observed E.W. passing candy to the other students and told him to stop. Between 10:20 and 11:50 a.m. K.N. showed a film, "The Pursuit of Happiness."

K.N. testified that between 11:50 a.m. and 12:10 p.m. Kimberly Barnes, the teacher's aide, walked into the classroom. She stayed only briefly. Generally, the teacher's aide assists K.N., e.g., escorts students to the lunch room. However, on May 23, 2008, K.N. escorted the students to the lunch area. Generally, after lunch K.N. meets the students in the playground and escorts them back to class. On May 23, 2008, K.N. arrived at the playground and observed E.W. "flipping off the wall, running up

[2] Three students, J.S., M.S. and D.H., were absent from the class.

to the wall and planting his feet and spinning off the wall." K.N. and the students returned to the classroom at 1:00 p.m. and worked on a science lesson.

K.N. observed E.W. passing out candy to other students. Although he told him to stop several times, E.W. continued the behavior. K.N. said that he walked over to E.W. and reached out and held E.W.'s arm in order to stop him from passing out the candy. K.N. stated, "I told him to stop, and he looked at me, and was very unnerved with me holding his arm, saying, 'Let go.'" K.N. maintained that he then walked away while E.W. sat in his chair pouting. K.N. denied grabbing E.W.'s neck, placing a plastic bag over E.W.'s head, and "slamming" E.W.

K.N. denied kicking or hitting any student with a hammer, making students participate in torture games, and allowing them to hit each other. He acknowledged having a hammer in his classroom, which he borrowed from the custodian in the beginning of the school year to hang pictures. He then returned the hammer. Further, K.N. denied showing films containing violence. Indeed, he said he believed that films that contained violence were contrary to the calm environment he tried to maintain. He believed a sedate atmosphere helped to diffuse real incidents of violence in his class. For example, K.N. recalled M.S. placing a knife at another student's throat. On another occasion he observed E.W. "tormenting" his aide, Ms. Venable. Other incidents involved J.R. attacking a teacher, S.S. and M.B. fighting, and J.J. using a razor and thumbtack to inflict wounds on himself.

K.N. further testified that E.W. and S.S. sat next to each other. K.N. has observed S.S.'s aggressive behavior, e.g., he has seen S.S. throw chairs at student J.R. K.N. believed that if he were to ever punch and kick S.S. that S.S. could react by throwing chairs. Therefore, K.N. sought to create a "tranquil and calm" setting by playing music in the background during class. He also used lavender or lemongrass oil diffusers in the classroom. K.N. believed these techniques created a calming effect "subliminally" on the students in the classroom.

K.N. continued describing the events of May 23, 2008. The teacher's aide, Kimberly Barnes, returned to the classroom at 1:50 p.m., stayed briefly, and left. She

returned at 2:30 p.m. and sat at her desk. Prior to dismissal K.N. left the room to find S.S., who had run out the classroom. The students were dismissed at 2:55 p.m. K.N. returned to the classroom and asked Barnes to escort the students to the bus. He noticed that E.W. was not in the room. Barnes said that E.W. "left out." K.N. searched for E.W. and found him in front of the main office. He denied that Barnes took E.W. out of the classroom; he said that E.W. had run out of the classroom.

Under cross-examination K.N testified that E.W.'s violent conduct frequently occurred in other classes, taught by teachers Janice Holmes and Rasheeda Bates. On those occasions K.N. would escort E.W. to the vice principal's office. K.N. knew that E.W. was on medication to control his behavior. When E.W. didn't take his medication he would sometimes be out of control and couldn't sit for five minutes without getting up. K.N. believed that E.W.'s behavior on May 23, 2008, could have been the result of not taking his medication.

E.W.

E.W. testified that the movie shown in class was not "The Pursuit of Happiness." Instead, K.N. showed a martial arts movie with Jet Li containing "fighting," "kicking," and "guns." Everyone was watching the movie, talking or sleeping. Sometime between 1:15 and 1:45 p.m. he heard a noise, turned around, and saw K.N. take papers out of a plastic bag and give the contents to J.R., another student in the class. E.W. maintained that he was watching the Jet Li movie when K.N. came at him from behind and placed the plastic bag over his head. He said, "I felt like I couldn't breathe for a minute." Then K.N. lifted him from the chair and "slammed [him] on the chair." K.N. then removed the plastic bag from E.W.'s head and he began to cry. E.W. further testified that he tried to leave the room "to tell a teacher" and report K.N. He could not, because K.N. grabbed his arm and said, "Everything is going to be all right."

Kim Barnes

Kim Barnes is the teacher's aide assigned to K.N.'s classroom. She testified that on May 23, 2008, K.N. showed part of a Jet Li movie in the morning before lunch and

continued the movie after the children returned from lunch. She entered the room and saw four students, E.W., S.S., J.S. and J.J. Barnes testified that S.S. and J.J. approached her laughing and said, "'Mr. N. put a bag over E.W.'s head and picked him up and slammed him down on the desk.' . . . They were all talking about it. They were all laugh ing." Barnes further testified that as S.S. and J.J. were reporting the incident she heard K.N. remark, "He's okay. He's fine." Barnes testified that K.N. kept white, beige and yellow plastic shopping or grocery bags in the classroom. Under cross-examination Barnes conceded that she did not hear K.N. threaten E.W. However, she believed that K.N. treated E.W. and S.S. differently from the other students regarding their use of the computer.

Barnes maintained that she sat there for a minute, and she tried to get E.W. to talk to her but he said nothing. Therefore, she left the classroom and reported the incident to the vice principal, Mr. Orr. Barnes conceded that she did not ask to leave the classroom or inform K.N. that she was leaving the room. Barnes, adamantly and somewhat belligerently, stated, "I'm grown. Ask Mr. N. can I leave the class? No." In contrast to Orr's testimony, Barnes maintained that it was school policy that she could leave the classroom whenever she chose.

Barnes further testified that when she reported the incident to Orr he acted like he didn't know what to do or how to tell Barnes to handle the situation. She said that she went back to the classroom because it was time to take the students to the bus. She was taking S.S. and J.S. to the bus at 2:15 when E.W. asked if he could go with her. Barnes said that she was hoping that E.W. would tell her about what had happened with K.N. when they were outside of the classroom, which he did. E.W. said to her, "It's true, Ms. Barnes. Mr. N. did put the plastic bag over my head and slammed me down." Barnes escorted E.W. to the Child Study Team and then to the principal, Mr. Guyton, and submitted a statement.

Barnes further testified that she had been assigned to K.N.'s classroom as the teacher's aide since the beginning of the 2007–2008 school year. She never observed K.N. kick, hit or act inappropriately towards a student. She never observed K.N. do anything that could be considered "torture" games with the children. Barnes said that

K.N.'s approach to educating the students included "the meditation stuff." In the morning he would tell the kids to meditate, and would put a particular video on. Barnes also described E.W.'s behavior. She said that there were instances when E.W. would "explode." He would go in a closet, and either she or Ms. Venable would have to go in the closet and calm him down. Barnes has seen E.W. "get mad" and "kick the chair or something, because they'd be picking on him," but nobody did anything.

Nahlia Gad

Nahlia Gad, an investigator for the IAIU, interviewed E.W. at his home on May 23, 2008. She reported that E.W. told her that K.N. was a mean teacher, but Ms. Barnes, his teacher's assistant, was nice. He told her that while the class was watching a movie K.N. walked over to him, "asked [student J.R.] to hold some stuff that was in a plastic bag and placed the bag over [E.W.'s] head." K.N. "then picked [E.W.] up by his left leg and right shoulder and slammed him against the bottom of the seat he was already sitting on." Four classmates were sitting near him, S.S., J.R., M.B. and another J. Gad further reported that E.W. told her, "Ms. Barnes was at lunch and when she returned she overheard [K.N.] telling him 'I'll get you later.'" E.W. also said that Ms. Barnes "made up a story" to get him out of the classroom and into the hallway. E.W. told Barnes about the incident while they were in the hallway. E.W. also told Gad that K.N. had hit him on another occasion, and that K.N. kept a hammer and plastic shopping or grocery bags in his classroom. Gad also noted in her report that E.W. said that he had told his mother that K.N. had hit him before, "but she didn't do anything." (P-2).

Gad interviewed S.S., who "reported the same exact story as [E.W.]." He told her that the whole class was watching the movie, Mr. N. took "some stuff" out of a plastic bag and told J.R. to hold the stuff then [S.S.] watched K.N. walk over to E.W. and placed a bag over E.W.'s head, picked him up and slam him back onto the chair. S.S. watched as E.W. then began to cry. Gad also reported that S.S. told her "[E.W.] eventually ripped the bag off of his own head." (P-2.)

Gad interviewed M.B., who told her that he was "sleeping during the movie and did not see anything that happened between E.W. and K.N." (P-2.)

Gad interviewed J.J., who her that he didn't see or hear anything that happened between E.W. and K.N. J.S. was sitting in front of E.W. and heard the chair "slam on the ground" and saw E.W. "on the floor with his face up." S.S. also told Gad that he had no knowledge of an incident involving K.N. putting a plastic bag over E.W.'s head. Gad noted, "He reports that he did not hear [K.N.] saying anything to [E.W.] or threatening him." (P-2.)

Gad interviewed J.R., who said that he was sleeping during the movie and did not see or hear anything between K.N. and E.W. In contrast to the version reported by S.S., Gad reported in her interview with J.R. that he (J.R.) denied that K.N. asked him to hold the plastic bag or its contents. (P-2).

Gad also interviewed Kimberly Barnes, who said that she was returning to K.N.'s classroom after her lunch period. Barnes also told Gad that E.W. was crying as S.S. approached her and said, "Ms. Barnes, you don't want to know what happened." Gad reported that S.S. then proceeded to tell Barnes about K.N. placing the plastic bag over E.W.'s head and slamming him back on his chair. (P-2.)

Gad interviewed L.W., mother of E.W., who told her that E.W. came home on May 23, 2008, and said, "The teacher said he was 'gonna' get him, put a bag on his head, flipped him, and hit him." L.W. further said that her son was "mad, but was not crying and wasn't complaining of pain." (P-2.)

Gad then interviewed Principal Guyton. He reported that the incident came to his attention through Barnes and E.W., who were waiting for him in his office. E.W., who appeared distraught and was crying, told him that K.N. had put a plastic bag over his head. (P-2.)

Gad testified that there was no question in her mind that the incident happened as described by E.W., S.S. and Kimberly Barnes. She believed E.W. and S.S. were

credible, honest, sincere, and genuine. Gad also believed that E.W. never lied, as reported by Barnes.

Ronald Orr

Ronald Orr held the position of vice principal and school administrator at William H. Brown Academy. Neither he nor Kimberly Barnes witnessed the incident between K.N. and E.W. on May 23, 2008. However, he was familiar with the general makeup of the students in K.N.'s class and the duties of the teacher's aide. As a teacher's aide, Kimberly Barnes' responsibilities were to remain in the classroom at all times and take her lunch period when the children ate their lunch. However, Barnes was not in the classroom during the incident. When questioned by Orr about why she was away from the classroom, Barnes respondend, "I was doing something else."

Orr further testified that K.N.'s students were classified, many with behavior disorders, and were the most difficult to manage. The students had special needs and all had IEPs, an education plan that addresses social and emotional behavior as well as academics. The IEP also describes the student's behavior pattern, i.e., what sets the student off and what behavior he or she responds to. For example, if agitated or upset some children might have a tendency to throw chairs. Some of the students have been "bounced" from one school to another due to behavior problems. Orr testified that "they've been known to make up stories."

K.N.'s classroom was located above Orr's office, so Orr was able to hear loud noises from the classroom. On several occasions, upon hearing a "ruckus" in the classroom Orr would run upstairs to the classroom. Often the students would explain that K.N. had done something to cause a loud noise.

Orr observed K.N.'s class on several occasions. As vice principal it was his responsibility to discipline students for misbehavior. Orr described K.N.'s relationship with his students as "good." The students respected him. On one occasion a special education student had a loaded gun in school. The school administration believed that the student would listen to K.N. and asked him to intervene. K.N. asked the student,

"Do you have a gun?" The student replied, "Yeah." K.N. asked, "Can I have it?" The student gave the gun to K.N., and the administration put it in a bag and waited for the police to arrive. Orr further described K.N. as "strong." He said that K.N. cared about his students and brought supplies for the students to work with. Orr also said that K.N. was "very rigid, [a] very no-nonsense type."

Diane Anderson

Diane Anderson was employed as a social worker for the Office of Alternative Education. She worked at William H. Brown Academy for seven years with K.N. Three or four times per week she observed K.N.'s classroom, and she described it as "the epitome of calm." He played soothing music and maintained a "pleasant atmosphere." The students were engaged in academic work as K.N. walked around the room interacting with each student, never raising his voice. Anderson further revealed that some of the students were reassigned to K.N.'s class because the other special education teachers could not handle these students' "difficult behavior."

Janice Holmes

Janice Holmes was employed as an in-class support teacher for special education students and worked with K.N. for twelve years. Three special education teachers taught the same students in school year 2007–2008: Rasheeda Bates, K.N. and Holmes, who taught literacy and history. Holmes' duties brought her into K.N.'s classroom daily. She described K.N.'s demeanor as calm and collected, and said that he was very accessible and approachable for his students. He earned a reputation within the school as a person who cared about his students and for whom the students felt respect.

Davis Hannah

Davis Hannah was employed at William H. Brown Academy as the art teacher. His duties allowed him to observe K.N. in the classroom. Hannah said he believed that the "toughest kids" were enrolled in K.N.'s class, "because a lot of teachers sent the

most problematic students to Mr. N." Hannah further observed that those students became calmer after being in K.N.'s class. He attributed the transition to the classroom atmosphere, e.g., soft music and calming scents. Hannah admitted that he believed it was "odd," until he actually paid attention to the students' response to the classroom environment. Hannah candidly testified that the school had a negative reputation within the school district. He testified about his first experience walking in the building and thinking that the bell had rung because so many people were in the hallway. He then learned that it was the middle of a class period and no bell had rung. In contrast, K.N.'s classroom was "sort of an oasis." He said that K.N. would bring the most "belligerent kids in there and try to show them a different way, a different outlet."

DISCUSSION

1. Substantiated Abuse

The charges against K.N. are serious and the penalty sought is severe. If it is determined that an allegation of child abuse or neglect has been substantiated, the name of the individual and any identifying information are entered into the Central Registry maintained by the DHS. See N.J.S.A. 9:6-8.11. The information contained in the Registry is confidential, but may be disclosed to various people for specified purposes. N.J.S.A. 9:6-8.10a; In re L.R., 321 N.J. Super. 444, 466 n.3 (App. Div. 1999); New Jersey Div. of Youth and Family Servs. v. M.R., 314 N.J. Super. 390, 399-402 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 156-59 (App. Div. 1998).

After an allegation of child abuse or neglect has been received, the child protective investigator shall evaluate the available information and determine whether abuse or neglect has occurred, and shall make a finding of either "substantiated" or "unfounded." N.J.A.C. 10:129-5.3(a).

> "Substantiated" means a finding when the available information, as evaluated by the child protective investigator, indicates by a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.A.C. 10:133-

> 1.3 because the alleged child victim has been harmed or placed at risk of harm by a parent or guardian.
>
> "Unfounded" means a finding when:
>
> i. There is not a preponderance of evidence that the alleged child victim was harmed or placed at substantial risk of harm; or
>
> ii. There is not a preponderance of evidence indicating that a parent or guardian and child were involved.
>
> [N.J.A.C. 10:129-1.3.]

"Parent or guardian" includes a teacher. Ibid. An "abused or neglected child" means a child less than eighteen years of age

> [w]hose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his or her parent or guardian to exercise a minimum degree of care . . . [i]n providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court . . . .
>
> [N.J.A.C. 10:133-1.3.]

The IAIU has the burden of proving substantiated abuse by the preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). Preponderance is 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). 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). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted).

Proof of the charge that K.N. abused E.W. depends in large part on the credibility of the witnesses. Credibility contemplates an assessment of a witness's story in light of its rationality, internal consistency and manner in which it hangs together with other evidence. In re Schulman, 92 N.J.A.R.2d (BDS) 16, 27 (citing Carbo v. United States, 314 F.2d 718 (9th Cir. 1963)).

The IAIU relies on the testimony of E.W. and Kimberly Barnes, as well as statements contained in the investigation report. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Moreover, the trier of fact is not bound to believe the testimony of any witness and may accept or reject, in whole or in part, the testimony. Application of Howard Sav. Bank, 143 N.J. Super. 1 (App. Div. 1976). One factor to consider in determining which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, bias, or prejudice of a witness may affect his credibility and justify [the trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

K.N. and E.W. were the only witnesses to the incident who presented live testimony. Thus, I have carefully observed their demeanor, and evaluated the consistencies of all persons who contributed his or her version of the incident.

Gad, an investigator since 2003, testified that there was no question in her mind that the incident on May 23, 2008, happened as it was told by E.W., S.S., and Kimberly Barnes. The IAIU and the school district maintained that K.N. was showing a martial arts movie containing action and violence. Indeed, E.W. testified that the movie starred Jet Li and had "kicking," fighting," and "guns." According to Gad, students J.R., and M.B. said that they slept through the movie and J.J. claimed he did not see or hear any

incident involving E.W. and K.N. During the interview E.W. told Gad that K.N. picked him up by his left leg and right shoulder and slammed him on the seat. Gad also took a statement from E.W.'s mother, L.W. According to L.W., her son said that K.N. "put a bag on his head, flipped him and hit him."

Gad's interpretation depicts an unusual amount of commotion in a classroom that has been described as relatively serene and calm. Is it more likely than not that E.W. and S.S., who heard and witnessed everything, sat quietly while K.N. attacked E.W.? Should not the sounds of the violent martial arts movie and K.N. "flipping" and "slamming" E.W. have awakened at least one of the sleeping students or caused the other student, who was watching a movie, turn around to see what the commotion was all about?

Another problem in the credibility determination is E.W.'s claim that prior to putting the bag over his head, K.N. gave J.R. something to hold from the bag. If J.R. slept through the event, as recorded in Gad's report, how could he at the same time hold anything given to him by K.N.?

Even more incredible version of the incident was presented by Kimberly Barnes. She said that she walked into the room, observed E.W. crying, and observed two other students, S.S. and J.J., laughing and talking about the incident. Barnes was not a credible witness, and her version of the incident is also inconsistent with the testimony presented by Gad that J.J. reports he did not see or hear anything that happened between K.N. and E.W. because he was sleeping during the incident. When did he awaken and begin to laugh at an incident that he claimed he neither observed nor heard?

Respondent points to other inconsistencies in petitioners evidence. For example, E.W. told his mother that the plastic-bag incident occurred during his after-school program. E.W. said that K.N. attacked student J.J. with a hammer. Further, E.W. said that K.N. kept plastic bags in his desk drawer, then said the bags were kept next to K.N.'s desk. Respondent further notes that E.W. told the IAIU investigator that the plastic bag was white, then told her that it was white and beige. At the hearing E.W.

"insisted" that the bag was yellow, and he told Principal Guyton that K.N. put two plastic bags over his head. E.W. and S.S. reported that E.W. was lifted from his seat and slammed into his desk and chair, and that he was injured with an initial mark across his back, which he testified left after ten minutes. E.W. testified that Barnes took him out of the class on the pretense of permitting him to wash his face.

I have considered the parties' evidence and their arguments. Some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. United Stations of N.J. v. Getty Oil Co., 102 N.J. Super. 459 (Ch. Div. 1968). The testimony must be such that the trier of fact can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances. I have also considered the nature, character and scope of statements taken by Gad, as well as the circumstances and reliability of the statements. The out-of-court statements of S.S., J.J. and J.R. are problematic because there exist none of the safeguards of in-person testimony under oath, i.e., the opportunity for cross-examination of the witness and the opportunity for the trier of fact to observe the witness's demeanor. However, in administrative proceedings all hearsay is admissible. Furthermore, the ALJ has sole discretion in determining what weight to accord hearsay evidence. The ALJ is further guided by the residuum rule, N.J.A.C. 1:1-15.5. The rule requires that a fact finding or legal determination cannot be based on hearsay alone. For a court to sustain an administrative finding that affects the substantial rights of a party, there must be a residuum of legally competent evidence to support it. Weston v. State, 60 N.J. 36, 51 (1972); Goodman v. London Metals Exch., 86 N.J. 19 (1981). The evidence presented by the DCF-IAIU gives no clue when the sleeping students awoke and found E.W. crying or lying face-up on the floor. Nevertheless, Gad opined that both E.W. and S.S. were credible, honest, sincere, and genuine.

I have also considered the testimony of several employees who have worked with K.N. and observed his classroom demeanor and interaction with the students. Social worker Diane Anderson, special education support teacher Janice Holmes and art teacher Davis Hannah all testified as to K.N.'s general character and their positive

professional relationships with him. They worked at William H. Brown Academy at the time of the incident. However, none of them were present in the classroom for the alleged incident on May 23, 2008, or had any firsthand knowledge of the incident. Indeed, the only persons who had any firsthand knowledge of the incident and presented live testimony at the hearing were K.N. and E.W.

Evidence presented through Gad's testimony merely supports a conclusion that some physical contact occurred between K.N. and E.W. This is consistent with K.N.'s testimony. K.N. observed E.W. passing out candy. He said that several times he told E.W. to stop passing out candy, and then reached out and held his arm in order to stop him. K.N. testified, "I told him to stop, and he looked at me, and was very unnerved with me holding his arm, saying, 'Let go.'" K.N. maintained that he then walked away while E.W. sat in his chair pouting. K.N. denied grabbing E.W.'s neck, placing a plastic bag over his head, and slamming E.W.

I am persuaded more by the evidence presented by respondent than by the evidence presented by the petitioners. K.N.'s testimony was credible and consistent with the whole of the evidence. I **FIND** that any physical contact that occurred between K.N. and E.W. consisted of K.N. holding E.W.'s arm in order to stop him from passing out candy.

Based on the whole of the record, I **CONCLUDE** that no credible evidence exists to support the versions of the events of May 23, 2008, presented through the testimony of E.W. and Barnes or the investigator's statements of S.S., J.J., M.B. and J.R. I therefore **CONCLUDE** that the Department of Children and Families, Institutional Abuse Investigation Unit, has failed to meet its burden of proving that a substantiated-abuse determination is warranted.

2. Removal

As a result of the DCF complaint, the State-Operated School District of the City of Newark charged K.N., a tenured teacher in special education, with unbecoming conduct and seeks his removal.

State law provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:6-10. Thus, tenured employees are protected "in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control." In re Tenure Hearing of Maratea, 1966 S.L.D. 77, 106. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing are required under the law to protect tenured teachers from arbitrary dismissal for unfounded or flimsy reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in the context of any events leading up to the allegations made against the employee that may help to explain the situation. See In re Tenure Hearing of Romanoli, 1975 S.L.D. 352.

The District has the burden of proof to establish the charges against respondent by a preponderance of the credible evidence. In re License Revocation of Polk, 90 N.J. 550, 560 (1982).

Members of the teaching profession hold a sacred position in our society. They have daily contact with our students, molding habits and nurturing young minds. Thus, teachers must be held to a high standard of conduct. Parents, law enforcement officials and the general public expect teachers to impart to students the foundations of "reading, writing and arithmetic," as well as convey social and moral values appropriate to the setting. Clearly, teachers influence the opinions of their pupils and, indeed, teachers are role models. Also, teachers encourage students to set goals and then help to steer them on a path to achieve those goals. Further, teachers are entrusted with the care and custody of school children. Thus, they play a most important role in the community. In In re Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99, the Commissioner recognized:

> 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 deliberately and willfully . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

It is essential that teachers avoid conduct that is in violation of the public trust or that creates a justifiable impression among the public that such trust is being violated. Teachers are expected to exercise self-restraint and control.

I am persuaded more by the evidence presented by respondent than by the evidence presented by the petitioners. I **FIND** that any physical contact that occurred between K.N. and E.W. consisted of K.N. holding E.W.'s arm in order to stop him from passing out candy. I **CONCLUDE** that the District failed to demonstrate by a preponderance of the credible evidence that K.N.'s conduct was unbecoming, and therefore **CONCLUDE** that termination is not warranted. Rather, K.N.'s conduct warrants verbal counseling on the appropriateness of physical contact with a student when attempting to stop a student's misconduct.

ORDERS

Based on the above, it is **ORDERED** that the IAIU's substantiated-abuse determination is **DISMISSED**.

It is further **ORDERED** that the removal of K.N. from his tenured teaching position by the State-Operated School District of the City of Newark is **REVERSED**.

I hereby **FILE** this Initial Decision with the **EXECUTIVE DIRECTOR OF COMMUNITY SERVICES**.

This recommended decision may be adopted, modified or rejected by the **EXECUTIVE DIRECTOR OF COMMUNITY SERVICES**, who by law is authorized to make the final decision on all issues within the scope of that agency's predominant interest. If the Executive Director of Community Services does not adopt, modify or

reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision, the **EXECUTIVE DIRECTOR OF COMMUNITY SERVICES** shall forward the record, including this recommended decision and the Executive Director's final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **EXECUTIVE DIRECTOR OF COMMUNITY SERVICES** 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 **CIVIL SERVICE COMMISSION** within forty-five days of the predominant agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ADMINISTRATIVE HEARINGS COORDINATOR, DEPARTMENT OF CHILDREN AND FAMILIES, 222 South Warren Street, PO Box 729, Trenton, NJ 08625-0729**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 28, 2010
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: January 28, 2010

EXECUTIVE DIRECTOR OF COMMUNITY SERVICES

Laura Dardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JAN 29 2010
dr

APPENDIX

WITNESSES

Presented by Petitioner

E.W.

Kim Barnes

Nahlia Gad

Presented by Respondent

K.N.

Ronald Orr

Diane Anderson

Janice Holmes

Davis Hannah

EXHIBITS

Presented by Petitioners

P-1	Screening Summary (4 pages)
P-2	IAIU Investigation Report of Incident at William H. Brown Academy including SPRU Report (37 pages)
P-3	August 11, 2008, Findings Report signed by Charmine Thomas addressed to K.N.
P-4	August 11, 2008, Findings Report signed by Charmine Thomas addressed to Susan Kandell, the Director of Student Information Services, Newark Public Schools
P-5	White plastic bag

Presented by Respondent

R-1	Letter sent by Eugene G. Liss, Esq., to Investigator Gad dated June 5, 2008
R-2	Janice Holmes letter of reference regarding K.N.

R-2	Janice Holmes letter of reference regarding K.N.
R-3	Teaching schedule of Janice Holmes
R-4	Letter of character reference of Davis Hannah dated September 25, 2008
R-5	Letter of Davis Hannah regarding argument between Ms. Barnes and students in Davis Hannah's classroom dated September 25, 2008
R-6	The tenure charges preferred against K.N. by Newark Public Schools Assistant Superintendent Johnson-Green
R-7	Initial response of K.N. dated January 2, 2009, addressed to Superintendent Janey in reply to tenure charges (54 pages)
R-8	Ronald W. Orr's letter of reference for K.N. dated December 1, 2008
R-9	February 28, 2006, Observation of K.N. completed by Vice Principal Orr (6 pages)
R-10	June 6, 2006, Annual Evaluation of K.N. signed by Principal Guyton (4 pages)
R-11	June 13, 2007, Observation of K.N. completed by Vice Principal Orr (5 pages)
R-12	June 15, 2007, Annual Evaluation of K.N. completed by Vice Principal Orr (4 pages)
R-13	June 15, 2008, Annual Evaluation of K.N. completed by Vice Principal Orr (2 pages)
R-14	May 13, 2008, Teacher Observation of K.N. completed by Vice Principal Orr (3 pages)
R-15	June 10, 200,8 Annual Evaluation of K.N. completed by Vice Principal Orr (2 pages)
R-16	Article
R-17	2007–2008 School Schedule of K.N. (1 page)
R-18	IEP of E.W. (14 pages)
R-19	K.N.'s response to Request for Admissions prepared by Newark Public Schools dated May 7, 2009, signed by K.N. (4 pages)
R-20	K.N.'s response to interrogatories served upon him by Newark Public Schools signed by K.N. on May 15, 2009, with attachments (12 pages)
R-21	Photo of E.W. by K.N.
R-22(a–e)	Five letters referenced by K.N.

State of New Jersey
DEPARTMENT OF CHILDREN AND FAMILIES
TRENTON, NEW JERSEY 08625

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KARA P. WOOD
Acting Commissioner

April 23, 2010

Mr. Eugene G. Liss, Esquire
94 Main Street – 1st Floor
Little Falls, NJ 07424

RE: Administrative Hearing Final Decision
OAL Docket No. HSV12667-08; AHU#08-1027
OAL Docket No. EDU3071-09; AGENCY DKT. NO. 23-2/09

Dear Mr. Liss:

Enclosed you will find the Final Decision of the Department of Children and Families in the matter specified above. Please note that the information contained in this decision is confidential under *N.J.S.A.* 9:6-8.10a and must be kept confidential by those to whom DCF releases such information.

The finding of substantiated abuse was reversed and K.N.'s name and the findings relative to this incident will not be placed on the Central Registry.

Sincerely,

Scott Semmel
Supervising Administrative Analyst
Administrative Hearings Unit

Enclosure: Final Decision
c: Keri Ann Eglentowicz, DAG
OAL Library
Mumtaz Bari-Brown, ALJ
Karen Dolan, Manager, Metropolitan Region Institutional Abuse Investigations Unit
Adam S. Herman, Esq.
M. Kathleen Duncan, Director, Department of Education

THOMAS MANNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher of Diesel Technology in respondent's district, alleged that his tenure rights were violated when he was terminated from full-time employment as the result of a reduction in force and reinstated to a part-time position, which resulted in the loss of his health insurance benefits. Respondent contends that petitioner, as a part-time employee, is not eligible for health insurance benefits.

The ALJ identified two issues in this matter: whether petitioner's tenure rights were violated when he was reduced in force and then offered only a part-time teaching position, which he accepted; and whether petitioner lost compensation to which he is otherwise entitled as a tenured teacher when his health insurance benefits ended because he was no longer working full-time. The ALJ found that: petitioner was reinstated into his position and compensated by receiving a percentage of his salary step in proportion to his new part-time teaching schedule, and therefore his appeal as to the first issue is without merit; and eligibility for health insurance in the district is a contractual matter limited to full-time employees. Accordingly, the ALJ concluded that petitioner's appeal as to loss of tenure rights must be dismissed and the respondent's determination as to petitioner's ineligibility for health insurance benefits must be affirmed.

Upon a thorough and independent review of the record, the Commissioner adopted the Initial Decision as the final decision, with the following modification: any increase in petitioner's teaching hours in the second semester of the 2009-2010 school year would necessitate a recalculation of the proportionate salary he was entitled to receive during this period; if the parties are unable to agree on the number of increased hours involved or the appropriate pro-rata salary calculation, the petitioner is encouraged to file a new petition of appeal on that issue.

This synopsis is not part of 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 14, 2010

178-10

OAL DKT. NO. EDU 6384-09
AGENCY DKT. NO. 167-7/09

THOMAS MANNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that although the court's decision in *Bassett v. Board of Education of the Borough of Oakland*, 223 *N.J. Super.* 136 (App. Div. 1988) stands for the proposition that a reduction in force, through the diminishment of a particular program, still entitles the teaching staff member's continuation in the reduced program at a pro-rata reduction in compensation, because this court was silent on the issue as to whether such "compensation" includes benefits – such as the health insurance coverage petitioner is seeking here, comparatively reduced – the parties' collective bargaining agreement (CBA) must control the outcome of that issue. Petitioner argues that the statutory

protection referred to by the *Bassett* court "is *N.J.S.A.* 18A:25-5 which prohibits a 'reduction in compensation' except for statutory cause", and the interpretation given by the court is that a "reduction" in the instance of a diminished position necessitates a pro-rata reduction no matter what a CBA might direct. Petitioner further argues that "compensation" as utilized in *N.J.S.A.* 18A:28-5 has to mean more than salary. An argument that an individual is protected pursuant to *N.J.S.A.* 18A:28-5 merely by maintaining a pro-rata level of salary with a total loss of insurance benefits, he contends, is unfathomable, especially in current times when an individual's cost for health care is nearly equal to his pro-rata share of salary. Petitioner, therefore, maintains that "[a] pro-rata reduction in compensation should include *all* compensation meaning salary, benefits and other quantifiable emolument[s] of employment." (Petitioner's Exceptions at 2) (emphasis added)

Petitioner next charges that there is a second issue in this matter which was left fully unaddressed by the ALJ in her decision. He points out that although the ALJ's factual findings, paragraph 5, recognized:

> [f]or the first semester of school year 2009-2010, petitioner taught three courses per week, which totaled fifteen teaching hours plus administrative and prep time (approximately five to six hours per week, pro-rated). For the second semester, he taught three courses and had one additional course assigned to him (to permit a student to compete the program), which totaled twenty teaching hours plus administrative and prep time (approximately six to eight hours per week, pro-rated). [Initial Decision at 3]

she failed to consider his argument that – as the determination of the pro-rata share of salary paid him by the Board was made by hours worked vis-à-vis his salary on the salary guide were he still in a full time position – his "pro-rata salary should increase by virtue of the increase in his

assignment from one semester to the next – an increase of approximately 25% in teaching time." (Petitioner's Exceptions at 2-3)

In reply, the Board advances that petitioner was subject to a bona fide reduction in force but was later rehired on a part-time basis (58% of his prior full-time teaching hours) to allow the diesel program to continue on a limited basis for one year to accommodate those students who only had one year left to complete the program.[1] Upon his rehire, petitioner's salary, vacation, sick leave time and pension contributions were pro-rated to reflect his part-time status. However, pursuant to a 1996 Board resolution which set employment of 35 hours a week as the minimum eligibility requirement for health insurance benefits, petitioner's part-time status rendered him "ineligible" for health insurance benefits provided by the Contract. The Board argues that petitioner's contention that its refusal to provide him with health care benefits is a reduction in "compensation" within the intendment of *N.J.S.A.* 18A:28-5 is belied by prior education law decisions which specifically determined that the protections of this statute apply only to salary and that contractual benefits other than salary are not entitled to protection by the statute. *See Arlene C. Allen, et al v. Board of Education of the Township of Clark, Union County*, Commissioner decision No. 189-04, April 30, 2004, *aff'd* State Board, September 1, 2004, *aff'd* A-754-04T2 (App. Div. 2005); *Also See* [*Hyman*] *v. Board of Education of the Township of Teaneck*, decided by State Board March 6, 1985, wherein it was determined "that there is no statutory entitlement to benefits, only a right to that which is granted

[1] The Board additionally emphasizes that "[petitioner's] employer, Somerset County Vocational Technical Institute, will cease to exist on June 30, 2010 when Raritan Valley Community College assumes responsibility for post secondary adult education in Somerset County. Mr. Manna was not offered a position by Raritan Valley Community College." (Board's Reply Exceptions at 1)

by contract", *aff'd* A-3508-84T7 (App. Div. 1986), *cert. den.* 104 *N.J.* 469 (1986) (Board's Reply Exceptions at 2)

As to petitioner's argument that he was entitled to additional money because he taught an extra class in the second semester of the school year, the Board advances that the ALJ refused to entertain argument on this issue "as that was not the subject of his petition and he never established how many more hours, if any, he taught as a result of an additional class." (*Ibid.*)

Upon careful review of the record, the Commissioner determines to modify the Initial Decision as set forth below.

It is without question that, pursuant to *N.J.S.A.* 18A:28-5, "teaching staff members" serving in any school district or under any board of education "shall not be dismissed or reduced in compensation" except as specifically prescribed under *N.J.S.A.* 18A:6-10(b). In this matter, petitioner, a full-time tenured teacher whose position was eliminated by reason of a reduction in force, was subsequently offered and accepted reassignment to a part-time position in the same instructional area. As found by the ALJ, upon his reinstatement – in accordance with *N.J.S.A.* 18A:28-5 and the Court's holding in *Bassett, supra.* – petitioner was compensated by receiving a percentage of his salary in proportion to his new part-time teaching schedule. The crux of petitioner's contention here is that, on his reinstatement, the Board's refusal to provide him with health insurance benefits – since he was now working fewer than 35 hours per week – was an impermissible reduction of his "compensation" within the intendment of *N.J.S.A.* 18A:28-5. As recognized by the Board in its Reply Exceptions, the term "compensation" with respect to the tenure right protections provided by education law is by now well-established, having been explicitly defined as encompassing **only salary**. *See Arlene C. Allen, et al, supra;*

Hyman v. Board of Education of the Township of Teaneck; Also See Mark Kramer v. Board of Education of the City of East Orange, Essex County, Commissioner's Decision No. 299-04, July 12, 2004. Consequently, as petitioner received compensation proportionate to his full-time position, he was accorded the full extent of his statutory right pursuant to *N.J.S.A.* 18A:28-5. Health insurance benefits are not preserved and protected by this statute but, rather – as recognized by the ALJ – are a contractual benefit subject to collective bargaining negotiations. For the reasons presented by the ALJ on pp. 5-6 of her Initial Decision, because petitioner did not qualify as "eligible" for health insurance benefits pursuant to the Contract, he possesses no entitlement to this benefit.

Finally, the record here indicates that subsequent to the filing of his petition on July 24, 2009, and his reinstatement to his position for the 2009-10 school year on a part-time basis at a pro-rata salary of 58% of his prior full time teaching hours, petitioner contends that – beginning in the second semester of this school year – his course load increased by an additional class. Although the ALJ finds the details with respect to this second semester course load increase an undisputed finding of fact – see Findings of Fact No. 5, Initial Decision at 3 – a finding which might appear arguable in light of the Board's Reply Exception argument, she nonetheless failed to address and resolve the impact of such a finding. The Commissioner concludes that it is without question that to prevent an impermissible "reduction in compensation" – pursuant to *N.J.S.A.* 18A:28-5 and *Bassett, supra* – an increase in petitioner's teaching hours in the second semester of the 2009-10 school year would necessitate a recalculation of the proportionate salary he was entitled to receive during this period. If the parties are unable to agree on the number of increased hours involved or the appropriate pro-rata salary calculation, petitioner is encouraged to file a new petition of appeal on this issue.

Accordingly, the recommended decision of the OAL – as modified above – is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|14|10
Date of Mailing: 6|14|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6384-09

AGENCY DKT. NO. 167-7/09

THOMS MANNA,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Lisa M. Fittipaldi, Esq., for respondent (DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, attorneys)

Record Closed: April 16, 2010 Decided: April 30, 2010

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner Thomas Manna, a tenured teacher at respondent Somerset County Vocational-Technical School District, alleges that his tenure rights were violated when he was terminated from full-time employment as the result of a reduction in force and reinstated to a part-time position, which caused the loss of his health insurance benefits. Respondent contends that as a part-time employee, petitioner is not entitled to such benefits.

PROCEDURAL HISTORY

On April 28, 2009, petitioner was advised that his employment contract for the 2009-2010 school year was not being renewed as the result of a reduction in force. On July 24, 2009, petitioner appealed that determination. In August 2009, petitioner was reinstated to his position, but for fewer hours per week, which resulted in a proportionate salary, vacation, sick time and pension reduction, and the loss of his health insurance benefits.

The Department of Education transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 20, 2009. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was conducted on March 25, 2010. The record remained open for the submission of briefs until April 16, 2010, at which time the record closed.

FINDINGS OF FACT

The essential facts as revealed by the testimony and the evidence are not in dispute:

1. On September 1, 2001, petitioner was hired by respondent as a Diesel Technology instructor for its post-secondary program at its Technology Institute. Petitioner was expected to teach twenty-five hours per week, plus administrative

and prep time of an additional eight to ten hours per week, which was considered full-time employment. He was entitled to and received health insurance benefits pursuant to the employment contract. Petitioner became tenured in that position.

2. In April 2009, petitioner was notified that respondent had determined to eliminate its post-secondary vocational instruction program and permit it to be taken over by Raritan Valley Community College. As a result, there would be a reduction in force of the Technology Institute instructors, and petitioner would lose his employment.[1]
3. Petitioner filed an appeal on July 24, 2009, seeking "reinstatement . . . to his legally entitled position of employment, with all back pay, and other emoluments of employment and any relief deemed equitable and just."
4. On August 24, 2009, respondent offered to reinstate the petitioner to the part-time position of Diesel Technology instructor at fifty-eight percent of step 23/A of the salary scale for the 2009-2010 school year. [Exhibit R-2.] The petitioner accepted that reinstatement, teaching fifteen to twenty hours per week, plus requisite administrative and prep time. He was also advised that he would receive pro-rata vacation and sick days, and pension contributions, but no health insurance benefits except for what he was entitled to pursuant to COBRA, to be paid for at his own expense. Petitioner contended that, as a tenured employee, his entitlement to his heath insurance benefit should have continued when he was reinstated.
5. For the first semester of school year 2009-2010, petitioner taught three courses per week, which totaled fifteen teaching hours plus administrative and prep time (approximately five to six hours per week, pro-rated). For the second semester, he taught three courses and had one additional course assigned to him (to permit a student to complete the program), which totaled twenty teaching hours plus administrative and prep time (approximately six to eight hours per week, pro-rated).

[1] Respondent indicated that the Technology Institute program will be discontinued later this year as originally contemplated, and that petitioner's employment will again be terminated.

6. In September, 2009, petitioner assumed responsibility for his monthly COBRA expense of $1,481, and has been paying it since. This expense increased to approximately $1,670 per month in February 2010.
7. The contract between the respondent and the Education Association, adopted June 26, 2009 for the school years 2009-2010, 2010-2011, and 2011-2012, provided that respondent would provide hospital, medical and surgical insurance "to each eligible employee." The contract did not define "eligible employee," nor did it differentiate between full- and part-time employees. [Exhibit R-3.]
8. The contract also provided that the total weekly workload for full-time Technology Institute teachers would be thirty-three hours per week (distributed as twenty-five hours of instruction, one hour for office time, four prep hours and three administrative assignment hours).[2]
9. Pursuant to a resolution adopted by respondent in 1996, in order for an employee to be considered eligible for health insurance benefits, he or she must be working full-time, which is defined as working at least thirty-five hours per week. [Exhibit R-1.]

LEGAL ANALYSIS AND CONCLUSION

Two issues must be addressed in this matter: first, whether petitioner's tenure rights were violated when he was reduced in force and was then offered only a part-time teaching position in the Technology Institute which he accepted; and second, whether petitioner lost compensation to which he is otherwise entitled as a tenured teacher, namely, his health insurance benefits, because he was no longer working full-time.

In this case, the original notice of appeal, filed in July after petitioner's teaching contract was not renewed due to a reduction in force, referred to petitioner's imminent loss of employment in his full-time position as Diesel Technology instructor for school year 2009-2010. Petitioner acknowledged that no full-time teaching position was available for him, but that he was entitled "to retain the position he once held 'to the

[2] For instructors teaching on Saturdays, it appears the full-time weekly workload is thirty-two hours.

extent that it continues in any form.'" Accordingly, when respondent determined to continue the program in limited form, it offered, and petitioner accepted, a reinstatement to his teaching position in August 2009, but for fewer hours per week.

The reduction of a full-time teaching staff member to a part-time employee has uniformly been considered a reduction in force with an appropriate concomitant salary reduction. Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 240 (App. Div. 1987); Klinger v. Cranbury Tp. Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982); Popovich v. Bd. of Educ. of Wharton, 1975 S.L.D. 737, 745.

In Bassett v. Board of Education of the Borough of Oakland, 223 N.J. Super. 136, 142-43 (App. Div. 1988), the court held that a part-time tenured teacher should be paid proportionately to the full-time salary for her step on the salary scale. As petitioner was reinstated into his position and, in accordance with the holding of Bassett, was compensated by receiving a percentage of his salary step in proportion to his new "part-time" teaching schedule, his appeal as to the first issue is without merit.

Petitioner also argued that as a tenured teacher, he was entitled to a continuation of the health insurance benefits previously provided to him pursuant to the contract negotiated between respondent and the Education Association. Respondent argued that the continuation of such benefits was not permitted because petitioner was not an eligible employee. Although petitioner contended that Bassett also controlled on this issue, the court specifically did not address this issue. As a footnote in Bassett indicated, "petitioner . . . did not challenge the conclusion of the administrative law judge that . . . she would not be entitled to insurance 'fringes.' We accordingly do not address that issue." Bassett, supra, 223 N.J. Super. at 143.

Therefore, in order to determine whether petitioner is entitled to a continuation of his health insurance benefits, reference must be made to the terms of the contract itself. Article III A provided that eligible employees were entitled to health insurance benefits, but the contract did not define "eligible employee." N.J.A.C. 17:9-4.6(a)(1) set forth the terms of eligibility for the NJSHBP for full-time employees, and provided that:

> For purposes of local [NJSHBP] coverage, "full time" shall mean: employment of any eligible employees who appear on a regular payroll and who receive a salary or wages for an average of the number of hours per week as prescribed by the governing body of the participating employer. Each participating employer shall by resolution determine the number of hours worked which shall be considered to be "full-time." In no case shall the number of hours for full-time be less than 20. (Emphasis added.)

Accordingly, a resolution was passed by respondent in 1996 which provided that, for the purposes of eligibility for health benefits for its employees , "the definition of full-time . . . [is] set at 35 hours per week . . . , and ... any new employees hired [hereafter] . . . must work 35 hours a week in order to be eligible for the NJSHBP."

Respondent argued that this resolution was dispositive as to an employee's eligibility for health insurance benefits, regardless of whether the terms of the resolution were incorporated into the contract; that is, in order to qualify for such benefits, an employee must be working at least thirty-five hours per week. In practice, respondent has clearly deviated from the terms of this resolution, by making health insurance benefits available to Technology Institute instructors whose full-time work week consisted of less than thirty-five hours. But whether it can do this without modifying the previous resolution is not the issue here.

Rather, it is clear that for respondent's purposes of determining eligibility for health insurance benefits, "full-time employment" at the Technology Institute was considered to be thirty-three hours per week (or thirty-two for Saturday instructors). In his new position, petitioner did not come close to the total number of hours worked per week to be considered "full-time," whether it be thirty-five hours (or thirty-three hours) per week. Accordingly, he could not be considered eligible for the health insurance benefits which are provided to full-time employees.

Based upon the foregoing, I **CONCLUDE** that the appeal as to loss of tenure rights regarding the teaching position should be dismissed, and the determination of respondent as to petitioner's ineligibility for health insurance benefits should be affirmed.

ORDER

I hereby **ORDER** the appeal as to tenure rights **DISMISSED,** and hereby **AFFIRM** the determination of the respondent as to petitioner's ineligibility for health insurance 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.

April 30, 2010
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 4/30/10

Date Mailed to Parties: 4/30/10

mph

WITNESSES

For petitioner:

Mr. Thomas Manna

For respondent:

Ms. Carene Jegou

EXHIBITS

For petitioner:

P-1 Somerset County Vocational and Technical Schools Seniority report – Fall Certification Codes

P-2 COBRA expense payment coupons for petitioner

For respondent:

R-1 Somerset County Vocational and Technical Schools Board of Education Resolution dated 1995-1996

R-2 Reinstatement to position, dated August 24, 2009

R-3 Contract between Board of Education of the Somerset County Vocational and Technical Schools and the Somerset County Vocational and Technical Education Association for School Years: 2009/2010, 2010/2011 and 2011/2012, dated June 26, 2009.

179-10

OAL DKT. NO. EDU 3338-09
AGENCY DKT. NO. 17-1/09

JANNA PFEIFFER,	:	
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 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 settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|14|10

Date of Mailing: 6|14|10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03338-09
AGENCY DKT. NO. 17-1/09

JANNA PFEIFFER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Michael T. Barrett, Esq. for petitioner (Bergman and Barrett, attorneys)

Karen A. Murray Esq., for respondent (Elizabeth Board of Education)

Record Closed: April 22, 2010 Decided: April 27, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 17, 2009 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 on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated April 15, 2010.

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 27, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 4-28-10

Mailed to Parties: Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 28 2010
DATE

OFFICE OF ADMINISTRATIVE LAW

/rr

KAREN A. MURRAY
LABOR COUNSEL
500 North Broad Street
Elizabeth, New Jersey 07208
(908) 436-5031

Attorney for Respondent,
ELIZABETH BOARD OF EDUCATION

JANNA PFEIFFER, Petitioner, v. CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO.: EDUOR 3338-2009N AGENCY DOCKET NO.: 17-1/09 **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 07208, and the law offices of Bergman & Barrett, whose offices are located at 9 Tamarack Circle, Montgomery Knoll, U.S. Highway 206 North, Skilman, New Jersey 08558, on behalf of the Petitioner, Janna Pfeiffer. 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 acknowledged, the undersigned parties agree as follows:

1. Releasor and Releasees. The Releasor is Janna Pfeiffer, hereinafter referred to as "Petitioner" or "Mr. Pfeiffer." Releasees are the Elizabeth Board of Education, its agents, officers and assigns, past and present. Releasees are hereinafter collectively referred to as "the Board."

2. Petitioner releases and gives up any and all claims and rights which he may have against the Board, including those of which he is not aware and those not mentioned in this General Release. This Settlement Agreement and General Release ("Release") applies to claims resulting from anything which has happened up to now and specifically as full payment and satisfaction for any and all claims resulting from the Petition entitled Jamie Pfeiffer v. City of Elizabeth Board of Education, Union County, bearing OAL Docket No. EDUOR 03338-2009N, Agency Ref. No. 17-1/09, filed with the Commissioner of the Department of Education, State of New Jersey.

3. Payment. The Board will pay to Mr. Pfeiffer the gross sum of Twenty Thousand One Hundred Forty-Six Dollars and Ninety-Seven Cents ($20,146.97). This amount is based on back-pay to Mr. Pfeiffer from February 2, 2009 to June 30, 2009 (which equals $29,989.50, based on placement on the Step 6 salary guide), minus Mr. Pfeiffer's mitigation earnings of $9,842.53 during this time period. This amount is subject to standard and ordinary deductions and constitutes a full and complete settlement of the Petition and all claims or potential claims referred to above, including costs of suit. Petitioner has been placed on the Step 6 salary guide for the 2009-2010 year.

4. No Other Actions or Proceedings. Mr. Pfeifer represents that, other than the above-entitled Petition, he has no pending lawsuits, charges, administrative proceeding, or other claims of any nature whatsoever against the Board in any form, based upon the events, whether known or unknown, occurring prior to the date of execution of this Release.

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

clauses, waivers and releases of claims and rights [illegible] if possible in order to achieve the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Release shall remain in full force and effect.

6. Entire Terms. This Release sets forth the entire terms between the parties, and fully supersedes any and all prior Agreements between them pertaining to the subject matter thereof.

7. No Admission or Liability. Nothing contained in this Release constitutes an admission of any wrongdoing by either party and neither party shall be considered a prevailing party.

8. Who is Bound. It is understood and agreed that Mr. Pfeiffer is bound by the Release. Anyone who succeeds to his rights and responsibilities, such as his heirs, or the executor of his estate, is also bound.

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

10. Legal Representation and Signatures. Mr. Pfeiffer agrees that he has been fully and fairly represented by legal counsel throughout this proceeding. In addition, by signing this Settlement Agreement and General Release, Mr. Pfeiffer acknowledges that he has read, understands and agrees to the terms of this Release and he signs it knowingly and voluntarily.

JANNA PFEIFFER

s/ Janna Pfeiffer

ELIZABETH BOARD OF EDUCATION

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

Dated:

BERGMAN & BARRETT

Michael Barrett, Esquire
Attorney for Janna Pfeiffer

Dated: 4-14-10

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Labor Counsel for the Elizabeth Board of Education

Dated: 4/22/10

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Janna Pfeiffer (J.P.) have discussed a resolution of Office of Administrative Law case (OAL Docket No. EDUOR 3338-2009N; Agency Reference # 17-1/09); and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing and a trial, the parties have agreed to settle this case; and,

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD APRIL 15, 2010

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

09-179

#181-10

OAL DKT. NO. EDU 5369-05
AGENCY DKT. NO. 71-3/05

ANGEL RIVERA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Insofar as the parties have submitted a Stipulation of Dismissal that does not disclose settlement terms, the matter shall be deemed withdrawn, pursuant to *N.J.A.C.* 1:1-19.2.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/10

Date of Mailing: 6/18/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 5369-05
AGENCY DOCKET NO. 71-3/05

ANGEL RIVERA,
Petitioner,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

Michael t. Barrett, Esq. for petitioner (Bergman & Barrett, attorneys)

Karen a. Murray, Esq., for respondent

Record Closed: April 30, 2010 Decided: May 4, 2010

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 13, 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. This matter was initially assigned to Caridad F. Rigo, ALJ whom placed it on the inactive list because of a companion Workers' Compensation petition. On April 29, 2010, petitioner's attorney advised that the parties have amicably adjusted and they stipulated and agreed that the captioned matter be **DISMISSED WITH PREJUDICE**.

I **CONCLUDE** that this dismissal meets the requirements of N.J.A.C. 1:1-19.1. I approve the dismissal and, therefore **ORDER** 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.

May 4, 2010
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 5/6/10

Mailed to Parties:

MAY 5 2010
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr
attachment

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
MONTGOMERY KNOLL
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Angel Rivera

ANGEL RIVERA,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	
v.	OAL DOCKET NO.: EDUOT 05369 2005N AGENCY REF. NO.: 71 - 3/05
CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	***STIPULATION OF DISMISSAL***
Respondent.	

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2005 APR 30 P 5: 10

This matter having come before the Office of Administrative Law and the matter having been amicably adjusted, it is hereby stipulated and agreed that this matter should be dismissed with prejudice and without costs.

Karen A. Murray, Esq.
Attorney for Elizabeth Bd of Ed.

Michael T. Barrett, Esq.
Attorney for Angel Rivera

#182-10

A.J.M. on behalf of minor children, J.A.M. and B.T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his children in September 2009. The respondent filed an answer and counterclaim for tuition. Petitioner failed to appear in the OAL for a scheduled telephonic hearing on February 16, 2010 and provided no explanation for his nonappearance. The respondent Board subsequently withdrew its counterclaim.

The ALJ found that: the petitioner failed to explain his non-appearance, and respondent Board withdrew its counterclaim subject to dismissal of petitioner's claim. Accordingly, the ALJ ordered the matter returned to the Department for disposition pursuant to *N.J.A.C.* 1:1-3.3(b) and (c).

The Commissioner adopted the Initial Decision as the final decision, and dismissed the petition.

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

June 17, 2010

OAL DKT. NO. EDU 10388-09
AGENCY DKT. NO. 263-9/09

A.J.M. on behalf of minor children, J.A.M. and B.T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL SCHOOL DISTRICT, BURLINGTON 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. In consequence of 1) his failure to appear in the OAL at a telephonic hearing of which he was duly advised, and 2) his subsequent failure to offer any explanation for his non-appearance, petitioner's appeal is dismissed pursuant to *N.J.A.C.* 1:1-14.4. As respondent has withdrawn its counterclaim for tuition, disposition of this case is complete.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/10

Date of Mailing: 6/18/10

[1] No exceptions were filed.
[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

ORDER

PURSUANT TO N.J.A.C. 1:1-14.4-

FAILURE TO APPEAR AND

WITHDRAWAL OF COUNTERCLAIM

CONTINGENT UPON DISMISSAL

OAL DKT. NO. EDU 10388-09

AGENCY DKT. NO. 263-9/09

A.J.M. O/B/O J.A.M.

AND B.T.M.,

Petitioners.

v.

BOARD OF EDUCATION OF

LENAPE REGIONAL

SCHOOL DISTRICT,

BURLINGTON COUNTY,

Respondent.

A.J.M., petitioner, pro se

Kimberly A. Sukinik, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: March 19, 2010 Decided: April 28, 2010

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

Petitioner timely appealed from a Board determination that he did not reside within the school district and therefore, his daughter, J.A.M. was not entitled to attend the district's schools pursuant to N.J.S.A. 18A:38-1(b)(2). In his appeal, petitioner also

sought a determination with regard to his son, B.T.M. In its answer, the Board asserted a counterclaim for tuition reimbursement. The matter was transmitted to the Office of Administrative Law on October 20, 2009, for a hearing as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. Although the Board's answer also included a motion for summary decision, that motion was stayed pending an attempt to achieve a resolution with the petitioner, who by September 28, 2009, may have properly resided within the district. Respondent propounded discovery upon the petitioner. I conducted a conference on December 8, 2009, during which time I reviewed the discovery demands propounded upon the respondent and issued an Order. A settlement conference was then scheduled for January 5, 2010, during which time petitioner provided some proofs with regard to residency but not all the proofs he was required to pursuant to my December 10, 2009, Order. The hearing of January 14, 2010, was adjourned to permit the petitioner sufficient time period to provide additional discovery responses. A status telephone conference was scheduled for February 16, 2010, at 3:30 p.m. I personally advised petitioner of the February 16, 2010, conference during the January 5, 2010, conference and confirmed his telephone number. Additionally, an official notice was mailed to him on January 14, 2010, scheduling the February 16, 2010, conference. That notice has not been returned by the United States Post Office as undeliverable. On February 16, 2010, respondent's counsel and I were prepared to proceed with the conference call but the petitioner failed to appear and has not submitted any explanation for his non-appearance. I advised counsel I would proceed forward pursuant to N.J.A.C. 1:14.4; however, if no explanation was forwarded by the petitioner regarding his non-appearance, the issue of the counterclaim remained and based upon the proofs submitted by the petitioner thus far, respondent should consider withdrawing the counterclaim.

Petitioner has failed to explain his non-appearance and in accordance with N.J.A.C. 1:1-14.4, and in consideration of respondent's letter of March 18, 2010, (C-1), withdrawing its counterclaim for tuition reimbursement subject to the dismissal of petitioner's claim, I am **ORDERING** the Clerk to return this matter to the Department of Education for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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.

April 28, 2010

DATE

Ana C. Viscomi

ANA C. VISCOMI, ALJ

/lam

183-10

DEPARTMENT OF CHILDREN AND FAMILIES, INSTITUTIONAL ABUSE INVESTIGATION UNIT, PETITIONER, V. M.D., RESPONDENT, AND IN THE MATTER OF THE TENURE HEARING OF MICHAEL DOUGHERTY SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The Department of Children and Families, Institutional Abuse Investigation Unit (DCF-IAIU) substantiated that M.D. placed a seventh grade student under his charge in substantial risk of harm by directing and allowing the student, J.W., to retrieve a book from a slanted roof approximately 20 feet above paved ground. Following the DCF complaint, the District filed tenure charges of unbecoming conduct against M.D. – a social studies teacher – and sought his removal from his tenured position. The cases were consolidated; DCF was determined to have the predominant interest; and the ALJ ordered the record as to the substantiated neglect charge sealed.

The ALJ found, *inter alia,* that: J.W. was a credible witness, in contrast to the respondent; respondent, M.D., was overwhelmed by the demands of his classroom, and asked J.W. to retrieve a textbook from the roof outside of the classroom window; M.D. realized that he made a serious mistake in judgment, but nonetheless allowed J.W. to step out onto a slanted roof; M.D. repeatedly disregarded procedures described in the school handbook, including allowing students to play card games during instructional time, showing violent "R" rated movies such as "Glory" to 7th graders, and failing to carry his roll book with him during fire drills. The ALJ concluded that the DCF/IAIU finding of substantiated neglect should be affirmed, as should the Board's removal of respondent's tenure, and ordered respondent's name to be maintained on the central registry.

The Chief of Staff of the DCF found no indication that the ALJ's determination was arbitrary, capricious or unreasonable, and adopted the Initial Decision, modifying it only to the extent that the reasoning in the Initial Decision was supplemented by the reasoning in contained in the DCF's Final Decision. Further, the DCF determined that M.D.'s name would be placed on the central registry.

The Commissioner's sole focus in this matter is to determine whether the District's tenure charges against M.D. have been sustained. The Commissioner concurred with the ALJ's findings that the District has established conduct unbecoming. Accordingly, the Initial Decision affirming the Board's tenure charges of unbecoming conduct was adopted, and the respondent dismissed from his tenured teaching position. The matter was transmitted to the State Board of Examiners 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.

June 17, 2010

183-10

RECORD PARTIALLY SEALED

OAL DKT. NO. HSV 2576-09
AGENCY DKT. NO. AHU #08-0990

OAL DKT. NO. EDU 895-09
AGENCY DKT. NO. 43-3/09
(CONSOLIDATED)

DEPARTMENT OF CHILDREN AND :
FAMILIES, INSTITUTIONAL ABUSE :
INVESTIGATION UNIT, :
PETITIONER, :
V. :
M.D., :
RESPONDENT, :
AND :
IN THE MATTER OF THE TENURE :
HEARING OF MICHAEL DOUGHERTY:
SCHOOL DISTRICT OF THE CITY OF :
TRENTON, MERCER COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Procedural History

On May 27, 2008 respondent M.D. – a tenured social studies teacher at Rivera Elementary School in the City of Trenton – was allegedly involved in an incident with J.W., a thirteen-year old seventh grade student, where it is charged that respondent requested J.W. to

retrieve a textbook from the roof outside of his classroom; J.W. climbed onto a chair to the window sill, dropped down approximately one and a half feet to the roof; she then walked approximately 2 to 3 feet onto the asphalt shingle roof, which sloped at an approximate 30 degree angle and was approximately 20 feet above the black top driveway; J.W. retrieved the book and climbed back in the window as instructed by M.D. By letter dated July 31, 2008, the Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU), informed M.D. that – upon investigation by the IAIU – it was found that allegations that he placed J.W. in serious risk of harm, in contravention of *N.J.S.A.* 9:6-8.21, had been substantiated. M.D. was further advised that he had a right to appeal this determination – which he ultimately did – and the matter was transmitted by the DCF to the Office of Administrative Law (OAL) for hearing on April 3, 2009.

On March 3, 2009, the School District of the City of Trenton (District) certified tenure charges against M.D. to the Commissioner of Education. This certification consisted of One Charge with 33 paragraphs which, in addition to the May 27, 2008 incident involving J.W., included other alleged charges of inappropriate behavior by respondent, *i.e.,*

- November 28, 2006 – respondent removed a student's "hoodie" in the hallway in violation of school policy.
- December 1, 2006 – the school principal observed students playing cards in respondent's class during instructional time in violation of school policy.
- April 20, 2007 – during a fire drill, respondent did not have his roll book with him in violation of school policy.
- April 20, 2007 – the school principal observed respondent showing an R-rated movie to his class in violation of school policy.

- September 18, 2007 – respondent failed to pick up his class from the cafeteria in a timely manner in violation of school policy.
- October 11, 2007 – respondent's classroom was in violation of various fire codes.
- November 7, 2007 – respondent permitted more than one student out of his class at a time; permitted students to play cards during instructional time; and exhibited poor classroom management.
- November 16, 2007 – respondent was involved in an incident with student K.F. wherein he pulled off the student's hoodie and leaned on his desk, overturning it and sending the student to the floor.[1]
- December 21, 2007 – principal sent respondent a memo regarding his work attendance (daily absence rate for the 2007-08 school year did not meet District guidelines).
- January 18, 2008 – respondent was written up for failure to meet requirements of the Learning for Learning monitoring checklist.

The District urged that this pattern of unbecoming conduct necessitated M.D.'s dismissal from his tenured employment. With receipt of an answer to the tenure charges from M.D., the matter was transmitted on March 18, 2009 to the OAL for hearing. Aware of the impending filing of the DCF, IAIU case – and recognizing that case and one of the charges in the tenure matter both involved the incident involving J.W., which occurred on May 27, 2008 and presented the same facts for adjudication – the Bureau of Controversies and Disputes transmitted the tenure matter with the following special feature: "Suggest consolidation and predominant interest determination, pursuant to *N.J.A.C.* 1:6B-17 with D.C.F. matter which we have been advised will

[1] This incident was the subject of an IAIU investigation which resulted in an unsubstantiated abuse finding.

be transmitted shortly." The tenure matter and the DCF matter were subsequently assigned to Administrative Law Judge Ana C. Viscomi.

On April 9, 2009, the ALJ issued an Order of Consolidation and Predominant Interest[2] in these matters, ordering therein that the DCF, IAIU shall have the Predominant Interest with regard to issues relating to the charges of child neglect. As such the ALJ's Initial Decision in this consolidated matter would first be filed with the DCF: 1) for a determination by that entity as to whether the factual allegations against M.D., with respect to the J.W. incident, have been established by a preponderance of the competent and credible evidence and constitute neglect warranting inclusion of M.D.'s name on the Central Registry, and 2) for issuance of a final decision by DCF in this regard. Thereafter this decision would be transmitted to the Commissioner of Education to determine – dependent upon the DCF's findings with respect to the J.W. incident which are binding upon him, and his conclusion on the remaining tenure charges – whether M.D.'s conduct is sufficient to warrant his removal or a reduction in salary. Hearing in these consolidated cases took place at the OAL on June 2, June 10, July 10, July 23, July 28, July 29, August 25, September 25, October 13, and October 23, 2009.[3]

The Initial Decision of the ALJ was issued on March 22, 2010 and was received by the DCF on that date. Therein, with respect to the May 27, 2008 J.W. incident – driven largely by her credibility assessments – the ALJ determined:

> In this matter, I found J.W. to be an articulate and sincere 8th grader. She had no reason to discredit the respondent. She testified that she liked Mr. D. and enjoyed being in his class. I found her to be a credible witness in contrast to the respondent. I FIND that M.D. was overwhelmed by the demands of his

[2] On May 19, 2009, the ALJ issued a separate Order partially sealing the record in this matter (the record with respect to the neglect part of the hearing was closed; that which dealt with the tenure charges was left open). She additionally did not seal the Initial Decision.

[3] The instant record includes transcripts of the proceedings conducted on all but the July 10 and August 25, 2009 hearing dates.

> classroom. Upon learning that text books, which looked "new" to him were on the roof, he asked student M.B. to retrieve it. When that student refused, he ultimately asked J.W. to retrieve it. The first textbook was closer to the window. J.W. climbed out onto the slanted roof, approximately 20 feet from the ground and retrieved the book. Upon returning to the inside of the classroom, M.D. asked her to retrieve the second textbook which was near the edge of the roof. She declined. Even if one were to accept as credible M.D.'s version that J.W. volunteered to retrieve the book and was partially out of the window, his duty to her was to use reasonable physical force to prevent her from the foreseeable danger of falling from the roof. Instead, even if one was to accept his version of the events, his focus was on the fact that the textbooks looked "new" and not on the safety of 7th graders entrusted to him. His belated indication that his diabetic condition prevented him from acting appropriately is specious. It did not prevent him from noticing that the textbooks were "new." It did not prevent him from realizing that he made a serious mistake in judgment, if one believes his version of the event, as soon as he told J.W. she could retrieve the book from the roof. Based upon these findings, I CONCLUDE that the DCF appropriately substantiated neglect based upon the May 27, 2008, incident involving the respondent. (Initial Decision at 16)

The ALJ, thus, concluded that respondent's name should be maintained on the Central Registry.

By decision dated May 4, 2010, transmitted to the Commissioner on May 5, 2010, the Acting Commissioner, DCF – after full review of the record, the ALJ's decision, and the parties' exception arguments – first recognized that the credibility determinations of the ALJ could not be modified unless, after a full review of the record, these were found to be arbitrary, capricious or unreasonable or were not supported by sufficient, competent and credible evidence. The Acting Commissioner found that the ALJ provided an explanation of her determination that J.W.'s testimony was more credible than that of M.D. and she found no reason to conclude that such a determination was arbitrary, capricious or unreasonable. The Acting Commissioner determined to modify the ALJ's decision "only to the extent the reasoning in the Initial Decision is supplemented by the reasoning herein." (DCF Decision at 5) Specifically, the Acting Commissioner stated:

As J.W.'s teacher, M.D. had a duty to ensure the student[']s safety. His conduct was grossly and wantonly negligent and placed J.W. at risk of substantial harm when he permitted her to climb out a window onto a roof twenty feet above paved ground. *N.J.S.A.* 9:6-8.21(c)(4)(b) notes in part an:

> abused or neglected child means a child less than 18 years of age whose...physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian...to exercise a minimum degree of care...in providing the child with proper supervision...by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof.

The New Jersey Supreme Court has held that the applicable standard for minimum degree of care is not one of simple negligence, but rather "conduct that is grossly or wantonly negligent, but not necessarily intentional" and "can apply to situations ranging from slight inadvertence to malicious purpose to inflict injury." (citations omitted)

Additionally, respondent's intent to place the child at risk of harm is irrelevant. "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result...So long as the act or omission that causes injury is done intentionally, whether the actor actually recognizes the highly dangerous character of her conduct is irrelevant...Knowledge will be imputed to the actor." (citations omitted)

As counsel for the Trenton [B]oard of Education correctly noted, *N.J.S.A.* 9:6-8.21(c)(4)(b) includes a "substantial risk thereof" of harm. Indeed, DYFS "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." (citations omitted)

Accordingly, for the reasons set forth within, I find that M.D. committed an act of child neglect when he asked J.W. to climb onto a slanted roof, twenty feet above paved ground, to retrieve a text book...Accordingly, M.D.'s name will be placed on the central registry, pursuant to *N.J.S.A.* 9:6-8.11. (DCF Decision at 4-5)

Commissioner's Decision

The record of this matter – which included the Initial Decision, exhibits, post-hearing submissions of the DCF, the District, and respondents, transcripts of the hearing,[4] the

[4] Including all hearing days except July 10 and August 25, 2009.

decision of the DCF and exceptions of respondent and replies thereto of the District with respect to the tenure charges – have been reviewed.

In his exceptions, respondent charges that the ALJ resolved every dispute in this matter in favor of the District without a sufficient factual basis to do so. Particularly troubling, he maintains, is the fact that the tenure charge relating to the incident involving K.F. – which was the subject of an IAIU investigation which concluded that allegations of abuse were unfounded – should have been dismissed. In support of this argument, respondent points out that *N.J.S.A.* 18A:6-7(a) states:

> 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 it[s] 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.

Respondent contends – that over his objection – the ALJ held that this statute does not prevent testimony in a legal hearing about events involved in an IAIU unfounded determination as long as they are derived from another source. Respondent maintains that this "very loose interpretation" renders this statute meaningless. "The legislature determined that DCF (IAIU in this case) is the appropriate entity to investigate matters such as this. They have experience and they know the terrain. In directing that full weight be given to an IAIU unfounded determination, and full protection to one accused after such a determination, the legislature wanted to put full reliance on that determination. While we submit that 'full reliance' means evidence concerning the underlying complaint should not be taken, we would respectfully

request that to the extent the Court disagrees, then at least due consideration be given to the unfounded determination of IAIU and the impact of such a finding on a claim of unbecoming conduct." (Respondent's Exceptions at 4)

Respondent next contends that the "non-abuse" portion of these tenure charges are simply insufficient to constitute unbecoming conduct. Moreover, they evidence that Principal Marazzo – the only witness against respondent on all of these charges – is so completely biased against him as to render his testimony "incredible and meaningless." For the ALJ to accept Marazzo's testimony as fully credible and to discount testimony of respondent, he argues, "led to an improper determination of unbecoming conduct that should be reversed. (*Id.* at 5)

In reply, the District submits that respondent's argument that *N.J.S.A.* 18A:6-7(a) precludes the District's tenure charge involving student K.F. – which was the subject of an IAIU investigation where allegations of abuse were determined to be unfounded – is specious. As the District specifically "removed any reference to the complaint, investigation, or report of the Department of Children and Families from Respondent's employee records and did not used (sic) them to prove the tenure charges against Respondent, it was in full compliance with *N.J.S.A.* 18A:7-6(a)." Furthermore, it argues, although respondent claims that this statute precludes presentation in a legal proceeding of evidence about events which were the subject of an IAIU unfounded determination, he is mistaken for a number of reasons. First of all, the District proposes, the purpose of an IAIU investigation was to make a determination as to whether the actions of respondent constituted child abuse. In contrast, the purpose of the District's independent investigation of this incident was to determine whether respondent's actions were in violation of the District's physical contact policy and, as such, constitute

unbecoming conduct. Secondly, the District cites to *In re Young*, 2009 WL 1789466[5], wherein the Appellate Division held "there is nothing in the law that precludes the school district from conducting it[s] own independent investigation and based thereon from pursuing charges for conduct unbecoming a teacher and/or other just cause for dismissal under its own statutory scheme and pursuant to its own jurisdiction." (District's Reply Exceptions at 4-5, quotations at 5)

Finally, although respondent asserts that the "non-abuse" charges are insufficient to constitute unbecoming conduct, the District points out that he makes no argument or demonstration in support of this claim. The District emphasizes that the ALJ was able to observe, listen to and judge the credibility of the witnesses during the course of the hearing and, therefore, her findings of fact and conclusions of law should be accorded proper deference. (*Id.* at 6)

Upon careful and independent review – and recognizing that the findings of fact with respect to the J.W. incident adopted by the DCF in its final decision in this matter are binding on him – the Commissioner's sole focus here is on whether the District's tenure charges against M.D. have been sustained, and on determination of the appropriate penalty to be imposed. In this regard – finding respondent's exception arguments without merit – the Commissioner is in full accord with the factual findings of the ALJ, for the reasons presented on pages 16-18 of the Initial Decision, and her conclusion that these amply establish that:

> Time and time again, respondent exercised poor decision making that placed the safety of the students under his care in jeopardy. Asking students to retrieve books from the roof, tilting a desk because a student refused to identify himself and remove a "hoodie," purposeful failure to acclimate to hand book requirements of taking his roll book with him to fire drills and failure to clear his classroom of

[5] The Commissioner notes that the Supreme Court recently affirmed the Appellate Division's opinion. *In the Matter of the Tenure Hearing of Gilbert Young, Jr., School District of the Borough of Roselle, Union County, 2010 N.J. Lexis 407.*

> obstructions determined to be fire code violations are all the actions of a teacher whose unbecoming conduct warrants his termination from employment. Purposefully ignoring a handbook prohibition of showing an "R"-rated movie to 7th graders under the guise of "academic freedom" constitutes conduct unbecoming. Inability to control his classroom and allowing students to engage in card playing without even noticing it is not an example of effective teaching techniques and constitutes conduct unbecoming. The conglomeration of all of these unfortunate instances over less than two years' period of time amply demonstrate that the respondent [should properly be] removed from his position as a teacher. (Initial Decision at 19)

Accordingly, that portion of the Initial Decision of the OAL dealing with the tenure charges in this consolidated matter – finding respondent M.D. guilty of unbecoming conduct – is adopted as the final decision in this matter. Respondent is hereby dismissed from his tenured teaching position with the School District of the City of Trenton. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/10

Date of Mailing: 6/18/10

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

State of New Jersey
DEPARTMENT OF CHILDREN AND FAMILIES
POST OFFICE BOX 729
TRENTON, NEW JERSEY 08625

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KARA P. WOOD
Acting Commissioner

DEPARTMENT OF CHILDREN AND FAMILIES, INSTITUTIONAL ABUSE INVESTIGATION UNIT,	**FINAL DECISION** OAL DKT. NO.: HSV 2576-09 AGENCY DKT. NO. AHU # 08-0990
Petitioner, v. **M.D.,** Respondent, and	
IN THE MATTER OF THE TENURE HEARING OF MICHAEL DOUGHERTY, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	OAL DKT. NO. EDU 895-09 AGENCY DKT. NO. 42-3/09 CONSOLIDATED)

A. INTRODUCTION

M.D., a Trenton middle school teacher, sought to appeal a finding of neglect rendered by Department of Children and Families (DCF) Institutional Abuse Investigation Unit (IAIU) pursuant to N.J.S.A. 9:6-8.21(c)(b)(4). The IAIU investigation on May 28, 2007 resulted in a finding that M.D. placed J.W., then a thirteen-year-old student at the Rivera School at serious risk of harm when M.D. requested and or permitted J.W. to climb out a window, onto a slanted roof to retrieve a textbook. M.D. was notified by letter dated July 31, 2008 that he had been substantiated as a perpetrator of child neglect and his right to appeal this determination. M.D. subsequently appealed the finding to the Office of Administrative Law (OAL). This matter was transmitted to the OAL pursuant to N.J.S.A. 52:14B-2(b) on April 3, 2009

In addition, on January 15, 2009, the Trenton Board of Education filed tenure charges against M.D. related to this as well as other incidents. This agency does not have jurisdiction over the tenure charges. Administrative Law Judge Ana C. Viscomi (ALJ Viscomi) ordered on April 9,

2009 that the two matters be consolidated, and that DCF has the predominant interest in the matter. ALJ Viscomi heard the matters on June 2 and 10, 2009; July 10, 23, 28 and 29, 2009; August 25, 2009; September 25, 2009; October 13 and 23, 2009 and the record closed on December 22, 2009. The Initial Decision, which is attached hereto and incorporated by reference, was issued on March 22, 2010 and received by this agency on the same date.

B. THE INITIAL DECISION

In rendering her decision, ALJ Viscomi considered the testimony of J.W., the alleged victim; F.B., another student and classmate; Kelli Williams, a paraprofessional at Rivera School; Mathew Butcher, IAIU investigator; and M.D., respondent. ALJ Viscomi also considered investigative reports, photographs and diagrams of the classroom and other supporting documentation.

The ALJ found the testimony of J.W., now an 8th grade student to be credible. J.W. testified that M.D. initially asked another student, M.B. to retrieve the book from the roof. When M.B. refused, he then asked J.W. to retrieve the book. J.W. testified that she climbed out the window onto the slanted roof and took two steps to retrieve the book. When she reentered the window, M.D. asked her to retrieve another book that was further from the window and closer to the edge of the roof, which she declined to do.

The testimony of another student witness, F.B. corroborated J.W.'s account of the incident. F.B. also liked having M.D. as a teacher and testified that M.D asked a student, M.B. to retrieve the book from the roof, when he refused, J.W. was asked to do it.

A paraprofessional at Rivera School, Kelli Williams testified that she had a clear view of the roof and saw a female student walking on the roof. She stated the student was about five to ten feet from the window that accesses the roof.

The IAIU investigator, Mathew Butcher inspected the roof that J.W. climbed onto to retrieve the book. He noted the roof was slanted and the ground surrounding the area was covered in asphalt. He obtained measurements from the school custodian that it was 20 feet in height.

The ALJ found that on May 27, 2008, M.D. initially asked a student, M.B to retrieve a textbook from the roof. When M.B. refused, M.D. asked J.W. to retrieve it. After she retrieved the first textbook, M.D. asked J.W. to retrieve a second book closer to the edge of the roof which she declined to do. The ALJ noted that even if M.D.'s version of this event were true, that J.W. was already partially out the window when she offered to retrieve the book, it was M.D.'s responsibility to stop her to prevent the foreseeable danger of a fall from the roof.

The ALJ found the respondent, M.D.'s testimony to be less credible than that of the victim, J.W. The ALJ affirmed the IAIU decision to substantiate M.D. for neglect of J.W. for the May 27, 2008 incident. The ALJ made additional findings which related to the tenure issue, and which are accordingly not addressed herein.

C. COMMENTS

Pursuant to N.J.A.C. 1:1-18.8, any party may file exceptions within 13 days of the date that the Initial Decision was mailed to the parties.

On April 1, 2010, respondent's attorney, Michael T. Barrett filed exceptions to the Initial Decision of ALJ Viscomi. Mr. Barrett took exception to the conclusion that M.D. placed a student in his charge at serious risk of harm claiming that M.D. never affirmatively instructed any student to go onto the roof to retrieve a book. Mr. Barrett also noted that J.W. was not harmed and cited G.S. v Department of Human Services, 157 NJ 161 (1991) noting that the Department must show that M.D. was "grossly or wantonly negligent." Mr. Barrett argued that M.D.'s conduct did not meet that threshold.

On April 9, 2010, Rocky L. Peterson, attorney for the Trenton Board of Education filed a reply to Mr. Barrett's exceptions. Mr. Peterson noted that per N.J.S.A. 9:6-8.21(c)(4)(b) a child is considered neglected if:

> the child is less than 18 years old and the child's "physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parents or guardian...to exercise a minimum degree of care . . . (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof.

Mr. Peterson stated that M.D. did permit J.W. to go on the roof to retrieve the book noting that during M.D.'s own testimony he said, "no, okay get it and come back in."

The balance of the exceptions raised related solely to the tenure charges and are accordingly outside of the scope of this agency's interest in the matter. Accordingly, these additional exceptions will not be commented on herein. These exceptions as well as the reply will be forwarded along with this decision and the OAL record to the Department of Education for consideration.

D. FINAL DECISION

Careful consideration was given to the ALJ's Initial Decision, the exceptions and replies submitted, and to the entirety of the OAL file, which was transmitted to the Department for consideration, pursuant to N.J.S.A. 52:14B-10(d).

This matter is about a teacher who allegedly asked a student, J.W., to climb out of a window and onto a pitched roof, twenty feet above paved ground, to retrieve a text book. Thirteen-year-old J.W. retrieved the book as asked and suffered no harm from the incident. Pursuant to M.D.'s version of events in testimony, he permitted J.W. to retrieve the textbook from the roof in a split second decision but did not instruct the student to do the same. However, this is contradicted by

two students, J.W. and F.B both of whom liked M.D. as their teacher. Both F.B and J.W. testified that M.D. initially asked another student, M.B., to retrieve the book from the roof. When M.B. refused, M.D. asked J.W. to retrieve the book. J.W. testified that M.D. had also asked her to retrieve a second book that was closer to the edge of the roof and she refused.

It is the task of the Administrative Law Judge to make her own credibility determinations, based upon the testimony and evidence presented. Those determinations may only be modified when the Division determines from a review of the record that the findings are arbitrary, capricious, or unreasonable, or are not supported by sufficient, competent and credible evidence [N.J.A.C. 1:1-18.6(c)]. ALJ Viscomi provided an explanation regarding her determination that J.W.'s testimony was more credible than that of M.D.'s testimony. There is no indication that this determination was arbitrary, capricious, or unreasonable.

As J.W.'s teacher, M.D. had a duty to ensure the students safety. His conduct was grossly and wantonly negligent and placed J.W. at risk of substantial harm when he permitted her to climb out a window onto a roof twenty feet above paved ground. N.J.S.A. 9:6-8.21(c)(4)(b) notes in part an:

> abused or neglected child means a child less than 18 years of age whose ... physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision . . . by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof.

The New Jersey Supreme Court has held that the applicable standard for minimum degree of care is not one of simple negligence, but rather "conduct that is grossly or wantonly negligent, but not necessarily intentional" and "can apply to situations ranging from slight inadvertence to malicious purpose to inflict injury." G.S. v. Dept. of Human Serv., 157 N.J. 161, 178 (1999).

Additionally, respondent's intent to place the child at risk of harm is irrelevant. "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result. . . . So long as the act or omission that causes injury is done intentionally, whether the actor actually recognizes the highly dangerous character of her conduct is irrelevant. . . . Knowledge will be imputed to the actor." [Id. at 161, 178.]

As counsel for the Trenton board of Education correctly noted, N.J.S.A. 9:6-8.21 (c)(4)(b) includes a "substantial risk thereof" of harm. Indeed, DYFS "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." In re D.M.H., 161 N.J. 365, 383 (1999) (citing Div. of Youth and Fam. Serv. v. A.W., 103 NJ 591, 616 n. 14 (1986)); Div. of Youth and Fam. Serv. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004); Div. of Youth and Fam. Serv. v. A.C., 389 N.J. Super. 97 (Ch. Div. 2006).

Accordingly, for the reasons set forth within, I find that M.D. committed an act of child neglect when he asked J.W. to climb onto a slanted roof, twenty feet above paved ground, to retrieve a text book.

I hereby **MODIFY** the ALJ's Initial Decision, as it relates to the IAIU substantiation, only to the extent the reasoning in the Initial Decision is supplemented by the reasoning herein. Accordingly, M.D.'s name will be placed on the central registry, pursuant to N.J.S.A. 9:6-8.11.

Date: 5/4/10

Kara P. Wood
Acting Commissioner
Department of Children and Families

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. HSV 2576-09
AGENCY DKT. NO. AHU # 08-0990

DEPARTMENT OF CHILDREN AND FAMILIES, LEGAL AFFAIRS UNIT, INSTITUTIONAL ABUSE INVESTIGATIONS UNIT (IAIU),
Petitioner,
v.
M.D.,
Respondent,

RECORD PARTIALLY SEALED

and

IN THE MATTER OF THE TENURE HEARING OF MICHAEL DOUGHERTY, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

OAL DKT. NO. EDU 895-09
AGENCY DKT. NO. 42-3/09
(CONSOLIDATED)

Michael T. Barrett, Esq., for M.D. (Bergman & Barrett, attorneys)

Rocky Peterson, Esq., for the Trenton Board of Education (Hill Wallack, attorneys)

Jennifer Hoff, Deputy Attorney General, for Division of Youth and Family Services, Legal Affairs Unit, Institutional Abuse Unit (Paula T. Dow, Acting Attorney General of New Jersey, attorney)

Record Closed: December 22, 2009 Decided: March 22, 2010

BEFORE **ANA C. VISCOMI**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent appeals from a July 31, 2008, finding by the Department of Children and Families (DCF), IAIU that on May 27, 2008, he placed student, J.W. in serious risk of harm, in contravention to N.J.S.A. 9:6-8.21. By letter, dated August 15, 2008, he requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on April 3, 2009, for a hearing as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. On January 15, 2009, the Trenton City Board of Education certified tenure charges against the respondent which dealt in part, with the IAIU finding relating to the alleged May 27, 2008, incident but that also separately averred other alleged incidences of unbecoming conduct purportedly warranting the dismissal of the respondent from his employment. The charges were filed with the Commissioner of Education on March 3, 2009, and transmitted to the OAL on March 24, 2009, for a hearing as a contested case. Both matters were consolidated pursuant to N.J.A.C. 1:6B-17.1 and N.J.A.C. 1:6B-17.2, by Order of April 9, 2009, which also determined predominant interest in the neglect matter to rest with the Executive Director of Community Services and the tenure matter with the Commissioner of Education. On April 20, 2009, I executed an Order permitting the release of DCF records and a protective Order. On May 19, 2009, I issued an Order partially sealing the record in this matter, which notably does not seal the initial decision. The hearing in these consolidated matters was conducted on June 2 and 10, 2009; July 10, 23, 28 and 29, 2009; August 25, 2009; September 25, 2009; and October 13 and 23, 2009. The hearing dates were selected based upon mutual availability of counsel and their respective witnesses. Additionally, one of petitioner Board of Education's witnesses failed to appear on the date of her scheduled testimony. A subpoena was served upon the witness and she still did not appear on the next date of her scheduled testimony. Thereafter, an Order enforcing the subpoena was executed by the Honorable Linda R. Feinberg, A.J.S.C., on July 17, 2009, and the witness still failed to appear. Ultimately,

the petitioner Board of Education elected to withdraw her as a witness in this case. The parties ordered transcripts and submitted written summations within 30 days of receipt. The record then closed. An extension was requested, and granted, in order to issue this initial decision.

FACTUAL DISCUSSION

For reasons further set forth below, the petitioners in both of these consolidated matters have met their respective burden of proof and the neglect substantiation by the DCF/IAIU finding that respondent Michael Dougherty placed student J.W. in substantial risk of harm by directing and allowing student J.W. to retrieve a book from a slanted roof approximately 20 feet high is **AFFIRMED.** Additionally, as further set forth below, respondent's pattern of conduct, including the disregard of board of education policies relating to safety and education, constitutes conduct unbecoming requiring the removal of his tenure and dismissal from his employment with the city of Trenton Board of Education.

The neglect matter

Matthew Butcher has been employed with the DCF for 12 years, nine of those years as an investigator in the IAIU unit. During that time, he has investigated approximately 250 matters; half of them involving allegations of neglect. He received training as to how to conduct neglect investigations and is required to complete additional training every few years.

He was charged with the responsibility of investigating the May 27, 2008, incident. Principal Joseph Marazzo contacted DCF and a screening summary was prepared. (JP-1). He contacted Marazzo initially to inquire about the allegations and action taken by the school district. He was provided the copies of students' respective written statements regarding the incident written individually in the principal's office after

the incident occurred. (JP-4 through JP-7).[1] He spoke with the 7th grade student, J.W. She advised him that M.D. requested student M.B. to retrieve a book from the roof, which was accessible from the classroom window. M.B. refused. M.D. then asked her and she stepped out the classroom window onto the roof and retrieved the book. She climbed back into the classroom and then M.D. requested she climb back out onto the roof and retrieve a second book which was located further down on the roof. She declined this time. At this point, the principal entered the classroom and inquired about what happened. On the basis of his discussion with J.W., Butcher then spoke with fellow students F.B. and M.B., separately. (JP-2). F.B. told him he was present when the incident occurred and overheard M.D. instruct J.W. to go out onto the roof and retrieve the book. M.B. told him that M.D. initially asked him to retrieve the book but he declined and then M.D. directed J.W. to obtain the book. A substitute teacher was in the classroom when the incident occurred. She corroborated J.W.'s version of the event.

Butcher spoke with M.D. at his attorney's office. He told Butcher that M.B. stated he was going onto the roof to retrieve the book to which M.D. replied, "anybody but you." J.W. was half-way out of the window and M.D. then stated, "o.k., get it and come back." M.D. also told him that the second floor roof was flat and not heavily slanted. M.D. also stated that he probably should not have let J.W. climb out the classroom window onto the roof.

Butcher visited the classroom and inspected the roof. He noted the roof was 20 feet off the ground and was slanted. The ground below was paved with asphalt. He took pictures. (PJ-9). He obtained measurements of the roof from the school custodian.

Based upon his investigation, he recommended that a substantiation of neglect findings be made against M.D. as he placed J.W. in substantial risk of harm. (JP-8).

[1] Principal Joseph Marazzo testified that obtaining statements after an incident is part of the district policy. Students are brought in individually to write statements and no one, including himself, remains in the room while the statement is being written.

J.W., now 14 years old and an 8th grade student, was in the 7th grade when the incident occurred. She testified that she liked having M.D. as a teacher. She testified that "Mr. D." asked M.B. to get on the roof and retrieve the book. When M.B. refused, Mr. D. asked her and she replied "yes" as she was not afraid of heights. She climbed out the window, took two steps on the roof, retrieved the book, and returned. Mr. D. stood near her and she completed this task. The roof was slanted she testified. After she climbed back into the classroom, Mr. D. asked her if she would retrieve a second book on the roof. This one was near the edge of the roof, she testified. She refused because she did not want anyone to see what happened. J.W. testified that Ms. Somerville was in the classroom when the incident occurred. She heard Somerville say to Mr. D., "why did you let her do that?" Then Mr. Marazzo entered the classroom and told her to report to his office and write a statement. (PJ-4). She testified that she was being truthful when she wrote the statement.

F.B. is also an 8th grader in Rivera school. He was in Mr. D.'s 7th grade Social Studies class and liked him. He was present when the incident occurred. Mr. D. asked M.B. to retrieve the book but he refused. He then asked J.W. and she replied that she would retrieve the book. Mr. D. stood by the window looking out. He then helped J.W. back into the classroom. The roof was slanted. After principal Marazzo came to the classroom, he asked her to write a statement. (JP-6).

Kelli Williams was a para-professional assigned to the Rivera school in the 2007-2008 school year. She recalled the incident that occurred on May 27, 2008. She walked into a classroom and teacher Graham pointed out to her the female student walking on the roof. Graham told her to report the incident and she did. She had a clear view of the incident as it occurred and testified that the student was about five to ten feet away from the window on the roof. As part of routine procedures after an incident, she wrote a statement. (JP-7).

M.D. testified he entered the classroom and the students were already there. Ms. Somerville was sitting in the back of the classroom grading papers. Students were standing nearby talking with her. He was notified by one of the students, M.B., that

there was a book on the roof. M.B. also asked if he should retrieve the book and respondent told him "no." One or two other students volunteered to retrieve the book and he responded in the same manner. J.W. was leaning right by the window and said, "Mr. D., I'll get it." He asked, "where is it? O.K. get it." As soon as he said it, he realized he made a mistake. It was a new textbook, he testified. It looked like someone had just thrown it out. He had an issue with his diabetes that morning. Considering the prior two incidents and the amount of time he was away from school, he would not ask anyone to go out on the roof. J.W. was a wonderful "kid," he testified. He had mentored her over the past two years. She was already out the window when she said, "I'll get it, Mr. D." He initially said "no" but then saw where she was and said "all right." He then realized his mistake. It all happened in a matter of seconds. In a "normal situation," he testified, he would never let any student out on the roof, but he was under stress and needing sugar. He testified that he never told the IAIU investigator that he was feeling ill that day because either the investigator "never asked" or he may not have written it.

The tenure matter

The Board certified tenure charges based on one charge of unbecoming conduct contained within 33 separate paragraphs and correlated to a Statement of Evidence comprising 18 separate exhibits. Because some of the paragraphs and exhibits concerned DCF, IAIU investigations against respondent determined unsubstantiated, petitioner Board of Education, pursuant to N.J.S.A. 18A:6-7a withdrew paragraphs 8, 9, 10, 11, 17, 18, 19, 23, 24 and 25 and exhibits 9, 10, 14 and 15. (C-1).

Joseph Marazzo has been employed with the Trenton Board of Education for 38 years during which time he served as a teacher, supervisor and principal, respectively. He has served as a principal since the 1997-1998 school year. He reviews the performance of teachers as one of his functions and walks through the school building every day.

He testified that he sent respondent a confidential memorandum, dated December 4, 2006, because of a complaint from a parent or student regarding his interaction with a student wearing a "hoodie"[2] in the hallway and because of his observation of students in Dougherty's classroom playing cards during instruction time. (PT-1). The complaint regarding the "hoodie" was that Dougherty touched the student and removed it from the student's head himself. Marazzo testified that the general rule requires the teacher to request the student remove the hood; "hoodies" are not permitted to be worn at any of the schools in the district. He explained that middle school students are difficult to work with and that teachers need to talk to the students and explain policies to them. With regard to the playing cards incident, Marazzo testified that as the principal he walks through the building and checks the classrooms. It was during his rounds that he observed students in Dougherty's classroom playing cards. He testified it would not be appropriate to confront Dougherty in the classroom when he made the observation, so he made a note of it in the notebook he carries in his pocket and sent the memorandum requesting a meeting for the following morning. (PT-1). Instead, he received a written reply from the respondent. (PT-1A). In the response, Dougherty indicates "judge not without knowledge and insight" and defends his use of playing cards as a reward to the students who stayed on task during the week. With regard to the "hoodie" incident, Dougherty indicated that Marazzo did not personally witness the incident and detailed as well that the student is problematic. He admitted to removing the student's hood after the student refused to comply.

On April 27, 2007, he sent the respondent a memorandum after a fire drill during which time he observed that Dougherty did not have his roll book with him. Policy requires teachers to bring the roll book with them during an emergency because the book is required to account for every student. (PT-4). The very same day, he observed Dougherty showing his class an "R"-rated movie. He walked into the classroom, watched it for a while and then checked the videocassette casing for the rating. He does not specifically recall what he did at the time although procedure would have required him to direct Dougherty to stop showing the video. He sent Dougherty a memorandum indicating that page 35 of the staff handbook specifically prohibits the

[2] A "hoodie" has been defined by the witnesses as a sweatshirt with an attached hood.

showing of "R"-rated videos. (PT-5). Teachers are required to include the showing of any videos in their lesson plans. The principal and/or the vice-principal then check the lesson plan.

On September 18, 2007, he sent respondent a memorandum for failing to retrieve his class on time from the cafeteria. (PT-6). Marazzo testified that it is important to timely pick-up the students because of cafeteria and classroom schedules. However, he does not know how late Dougherty was in picking up his class.

He sent respondent another memorandum, dated October 11, 2007, due to fire code violations observed in his classroom several weeks after a faculty meeting in which the potential fines for fire code violations were explained. (PT-7).

He sent respondent another memorandum, dated November 7, 2007, after personally observing students playing cards again during instructional time and more than one student out of the classroom at a time. (PT-8). He was concerned that the instructional period was not being used as required. Social Studies is a core course, he testified. He was also concerned that by allowing more than one student out of the classroom at a time, there would be a great likelihood they would go outside and play or "fool around."

On November 18, 2007, he sent respondent another memorandum regarding an allegation made by student K.F. of assault. (PT-16J). He investigated the incident by speaking with K.F. and other students. K.F. advised that respondent had overturned his chair/desk during class. K.F. had his head down on his desk. His head was covered by a "hoodie" and he was not participating in class. Dougherty then picked up his chair and K.F. fell to the floor and hit his leg. He obtained statements from other students. (PT-27). And he contacted the Division of Youth and Family Services.[3] He was called to the nurse's office and observed that the nurse had placed an ice bag on K.F.'s leg over a bump that had developed. Marazzo testified that physical contact with students is permissible only: to protect a child from self-injurious harm; to protect a

[3] Although the DCF investigation did not substantiate any finding of abuse or neglect, the district's tenure charges allege conduct unbecoming on the part of the respondent.

child from being harmed by another child; or to protect oneself. Even then, only a reasonable amount of force may be used. A teacher can't overturn a student's desk for any reason.

He sent respondent a memorandum, dated December 21, 2007, expressing concern with the number of days Dougherty was absent and its affect on instruction. (PT-11). The memorandum indicated the number of days Dougherty was absent did not meet district guidelines. He specifically required a conference with the respondent, but does not recall if it occurred.

He sent respondent a memorandum, dated January 18, 2008, requiring a conference with regard to a number of issues including the "Looking for Learning" district mandates. (PT-12). He testified that all principals in the district were required to make sure the "Looking for Learning" mandates were met in every classroom. Dougherty did not appear for the scheduled meeting because he was absent the day it was scheduled, he testified. (PT-12A). With regard to the "Looking for Learning" mandates, the requirements were discussed with all district staff. Marazzo utilized a checklist for every classroom to make sure everyone was in compliance. (PT-13).

On February 15, 2008, he forwarded a memorandum to Assistant Superintendent of Human Resources, Patricia Lucas, recommending that respondent be reassigned to the high school level only, that he immediately be removed from contact with the Rivera School children and that his increment be withheld. He indicated that he made these recommendations because of respondent's continued acts of conduct unbecoming; poor decision-making; poor attendance over several years; poor classroom management and acts of perceived insubordination. (PT-16). Marazzo testified that based on his observations over the prior two school years, he felt that respondent may "work better" with older children. Marazzo explained that middle school children represented a "challenge" that was difficult for Dougherty. He testified that he spoke with Dougherty several times about the challenges of working with students that age and gave him pamphlets regarding professional development and recommended he attend workshops on dealing with middle school students. (PT-16).

Marazzo testified he specifically recalled the rooftop incident. During the course of his daily rounds that day, a para-professional came running down to the office and said that a student was on the roof. There are only two classrooms with windows over the roof and Dougherty's classroom was one of them. The first classroom he came to down the hallway was Dougherty's. He walked into the classroom and asked if anyone was on the roof. One of the students acknowledged that someone from the classroom was on the roof and then J.W. identified herself. He asked her to step out into the hallway and verify what occurred. He asked her to identify witnesses. Several students acknowledged in writing what they had observed. He asked Ms. Somerville to verify the incident. He then asked Dougherty to step out of the classroom and to contact his union representative and come to his office. He then told respondent that he was relieved of his duties and to report to Central Administration. He never asked Dougherty for his version of the events. Human Resources would not withhold Dougherty's increment because he had filed a discrimination complaint that was eventually dismissed. He had recommended reassignment to the high school and increment withholding; he never recommended tenure removal. But he testified that from June 2007 through February 2008, he did not feel that respondent had progressed even taking out of consideration the roof incident. He completed a final evaluation for Dougherty on April 25, 2008. (PT-21). He noted that Dougherty was a highly qualified social studies teacher but he needed to improve his communication skills with students. He was concerned with what he termed Dougherty's poor decision-making and he based this on student concerns, observations and interaction with students that Dougherty could have handled in a different manner. For example, he testified that the overall curriculum needs to be taught in a meaningful manner. He explained that with a subject area like Social Studies, there are many opportunities to present project-based instruction. If a teacher spends too much time lecturing, particularly with middle school students, the teacher will lose the students. Additionally, teachers have to be diligent in following school policies and procedures. Based on his formal observations made during his daily rounds, he determined respondent was not effective in instruction. Dougherty did not effectively manage his classroom and this was evident in students being off-task, playing cards, not sitting down and being loud. He was concerned that

Dougherty would be returning to Riviera and that would not be in the best interest of the students or Mr. Dougherty; Marazzo testified.

K.F. testified with regard to the incident that occurred in respondent's Social Studies class. He was sitting at his desk. The desks are connected to the chairs in this classroom. The respondent was yelling at everyone in the classroom, K.F. testified. He put his head down because everybody was just talking. Dougherty pulled the desk out and flipped it. He fell and hit his leg on the side of the chair. His leg was sore and he went to see vice-principal Bethea who then sent him to the nurse. The nurse called the principal and Marazzo asked to write a statement. Dougherty filed a harassment complaint against K.F. (R-1). He denies telling the respondent that he wanted to slap him.

J.C. testified with regard to the incident involving K.F. The respondent assigned work to the students. K.F. asked the student sitting next to him a question. The respondent then yelled at K.F. and told him to leave the classroom. K.F. left but returned when respondent was turned away. K.F. sat down at his desk and put his head down. His head was covered by a "hoodie." Dougherty then asked her who that person was, but she could not answer because she was busy with her class assignment and did not realize it was K.F. Dougherty asked the person to identify himself but K.F. remained silent. Dougherty then tapped K.F. on the shoulder and then flipped the desk to the ground with K.F. still in it. She wrote a statement with regard to this incident. (PT-27).

Michael Dougherty testified on his behalf. He holds a B.S. in Social Science and a Masters. He taught for two years at Cherry Hill High School West and then left teaching to work in the private sector. He has 30 years of business experience. After several heart bypass procedures, he decided to return to teaching. He taught for two years at Malcolm X School in Newark before commencing his teaching career at the Trenton school district. He taught for three years at the high school before coming to Rivera. He taught 6th grade World Culture during the 2006-2007 school year and 7th grade American History during the 2007-2008 school year.

Prior to the hooded sweatshirt incident of November 2006, he had not been disciplined by Marazzo. He testified that he observed someone coming down the side hall with a "hoodie." He did not know who the person was and it is against student policy to wear hoods. That person ignored his directive to remove the hood. He conceded the student was not threatening any student at any time. Dougherty then removed the hood himself and sent the student to the principal. Nothing else occurred. He did not touch any part of the student's body when he removed the hood. He testified there is no policy prohibiting the touching of students' hoods. He was advised that day not to touch any article of clothing worn by the students and he followed that rule.

With regard to the card-playing incident, Dougherty testified that part of the difficulty with the class was that there was no interaction between the students. That is why he purchased games and with the stipulation that the students would be rewarded if they stayed on task during the week, he gave them the reward of some game time. He testified this was "outside the box" thinking on his part; if the students had fun in groups playing games, this might carry over in class.

He did meet with principal Marazzo regarding the "hoodie" incident and the card-playing incident.

He received the memorandum regarding the "R"-rated videos. (PT-5). He did show videos during class on occasion for instructional purposes. A lot of times he showed just portions of the films. Some of the films he maintained in his "bin" of movies were "R"-rated, such as "JFK," "Flight 93," "The Patriot" and "Amistad." The policy at school was that the movies had to be instructional. He would skip over any violent scenes when he showed the movies. He then formulated quizzes for the students on the movies they had seen. (R-3, R-4). He testified this was his multi-media approach to teaching in order to keep the students motivated in learning. He submitted his lesson plans to vice principal Bethea who approved it. It was Bethea's responsibility, respondent testified, to tell him otherwise. Bethea never told him he could

not show the movies. He conceded that the movie "Glory" had an "R"-rating but that "it would not have mattered because it is a critically acclaimed film about African-American soldiers." He conceded to being aware of the policy against showing "R"-rated movies. He conceded to showing "Glory" to the students. He testified that he exercised "a little bit of academic freedom.". He testified that he used the staff handbook (PT-28) as a reference and that it is not a policy by the board of education but a staff manual written by the principal.

With regard to the roll book incident (PT-4), Dougherty conceded that he did not have the roll book with him but that he always carried a daily log with him on a clipboard and then transferred the information to the roll book. He had the daily log with him that day during the fire drill. The daily log has a listing for each of his courses and lists all the students in each class. He conceded the staff handbook indicates that teachers are required to carry their roll books during fire drills. (PT-28).

Dougherty testified that he recalls two incidences when he was not able to get to the cafeteria in time to retrieve his students. On one occasion, he was on the cell phone with a parent; on the second occasion, he was sick during lunchtime. On both occasions, he advised the vice-principal. He was less than five minutes late and vice-principal Bethea was present. He has covered for other teachers who were late.

With regard to the safety and fire code issues (PT-7), Dougherty testified that his classroom was a homeroom and students typically left their belongings there all day. They had no closets in the classroom. The vent in the back of classroom does not work. That is where the students place their books. He had been out sick with ragweed and because he ate poisonous berries; otherwise, he would have cleared the room earlier.

With regard to allowing more than one student leave the classroom at a given time (PT-8), Dougherty testified that he would allow one female and one male leave with respective passes to go out to the bathroom at the same time.

Dougherty testified that principal Marazzo did not discuss attendance issues with him during the 2006-2007 school year. During the 2006-2007 school year, he was absent on October 24 with ragweed. He took off on October 10 and 11 to move into a new house. He was injured at school toward the end of October when he fell over a desk. In March, he was injured when he broke-up a fight between students. In June while on duty outside the building, he fell and injured himself. He went into cardiac arrest and stayed in the hospital for the remainder of the year. During the 2007-2008 school year (PT-12), he was out several days in November during the investigation of the K.F. incident. He was out again during the investigation of the V.B. incident. And that is when the Looking for Learning Checklist was reviewed. (PT-13).

With regard to the K.F. incident, respondent testified that K.F. was lying down on the floor acting strangely. This was in front of the classroom. He was making sounds. Dougherty called the office and no one answered. He walked to the hall and saw principal Marazzo and told him he was having difficulty with K.E. The principal came in and told K.F. to report to his office. Marazzo told respondent that he would keep K.F. for the day and call his mother. At the end of the day, a lot of students were running up and down the hallway. He told K.F. to report to vice-principal Bethea as K.F. was not allowed back in his classroom until the principal met with his mother. K.F. must have come into the class because he saw a "kid" with a hood and he could not identify him. He poked the student. He later denied testifying that he poked the student. He walked into the hallway but no guard was present. He called the office twice but no one answered. He then tilted the desk for the purpose of trying to get the student to "do something." He later testified that other students told him it was K.F. He leaned on the side of the desk with one of his hand and the student "slipped out" onto the floor screaming that he was hurt. Respondent testified that he did not turn over or flip the desk. He testified that he believes his leaning on the desk caused it to fall over and that caused the student to fall on the floor. He later testified that the student fell out of the desk of his own volition. Respondent testified that the handbook allows him to overturn a desk and poke a student. (PT-28). He did not consider removal of a hood to be an offensive touching. As a result of the DYFS investigation, he remained out of the school until mid-January 2008. That resulted in an unsubstantiated finding.

Shortly after his return to Rivera, the V.B. incident occurred. He remained out during the investigation of that incident and did not return until mid-May 2008.

Alexander Bethea was the vice principal at Rivera from 2006-2009. He has been employed with the Trenton Board of Education for 34 years. He testified that he worked with the respondent in reviewing his lesson plans. He never reviewed any lesson plan that indicated the respondent would show an "R"-rated movie. He would have never approved that. It is against Board policy.

The J.W. incident then occurred on May 27, 2008. He conceded that it was dangerous for a student to be out on the roof.

He testified that there was "bad blood" with principal Marazzo. He did not report to him but to the vice-principal. He realized that anything he said would not be received well by the principal. Most of the reprimands were not classroom related but "hallway stuff; what other teachers" did all the time. He testified that other teachers subject to DYFS investigations were not removed from the school.

LEGAL ANALYSIS

A child less than 18 years old is considered neglected if her physical condition is in imminent danger of becoming impaired as a result of her guardian's failure to exercise a minimum degree of care in providing her with the proper supervision. N.J.S.A. 9:6-8.21. Teaching staff members are considered guardians for purposes of the statute. N.J.S.A. 9:6-8.21(a). Logically stated, parents leave their children in the care and supervision of school personnel every day for purposes of education; thus a transfer of obligation occurs. As our Supreme Court noted in the oft-quoted statement in Frugis v Bracigliano, 177 N.J. 250, 268 (2003):

> The law imposes a duty on children to attend school and on parents to relinquish heir supervisor role over their children to teachers and administrators during school hours. .... No greater obligation is placed on

> school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgression of others.

In this matter, I found J.W. to be an articulate and sincere 8th grader. She had no reason to discredit the respondent. She testified that she liked Mr. D. and enjoyed being in his class. I found her to be a credible witness in contrast to the respondent. I **FIND** that M.D. was overwhelmed by the demands of his classroom. Upon learning that text books, which looked "new" to him were on the roof, he asked student M.B. to retrieve it. When that student refused, he ultimately asked J.W. to retrieve it. The first textbook was closer to the window. J.W. climbed out onto the slanted roof, approximately 20 feet from the ground and retrieved the book. Upon returning to the inside of the classroom, M.D. asked her to retrieve the second textbook which was near the edge of the roof. She declined. Even if one were to accept as credible M.D.'s version that J.W. volunteered to retrieve the book and was partially out of the window, his duty to her was to use reasonable physical force to prevent her from the foreseeable danger of falling from the roof. Instead, even if one was to accept his version of the events, his focus was on the fact that the textbooks looked "new" and not on the safety of 7th graders entrusted to him. His belated indication that his diabetic condition prevented him from acting appropriately is specious. It did not prevent him from noticing that the textbooks were "new." It did not prevent him from realizing that he made a serious mistake in judgment, if one believes his version of the event, as soon as he told J.W. she could retrieve the book from the roof. Based upon these findings, I **CONCLUDE** that the DCF appropriately substantiated neglect based upon the May 27, 2008, incident involving the respondent.

With regard to the tenure charge of conduct unbecoming, I make the following **FINDINGS OF FACT.**

Principal Joseph Marazzo was charged with the responsibility of evaluating teachers. In the appropriate discharge of his responsibilities, he walked through the Rivera school on a daily basis and took notes on matters that needed attention. He received a complaint on or about December 6, 2006, from a parent or student regarding

the respondent having removed a "hoodie" from a student walking through a hallway. Respondent concedes the student did not pose a threat to anyone. While respondent was well aware of the handbook prohibition on the wearing of "hoodies," the prohibition of physical contact with students in non-emergent situations was a part of the handbook he chose to ignore.

During his daily rounds, principal Marazzo observed respondent's class playing cards during instructional time. Respondent defended his use of playing cards as a reward to students who stayed on task during the week. After he told principal Marazzo that it would not happen again, students were later found to be playing cards but respondent stated he was unaware of this occurring in his own classroom.

Contrary to the requirements of the handbook, respondent did not bring his roll book with him during a fire drill occurring sometime in April 2007. Instead, he determined to use his own method of documenting daily student attendance which he would then transfer onto the roll book. This ignores the possibility that had a real fire occurred, he could have been left only with his daily student sheet if the roll book was destroyed in any fire.

Contrary to the requirements of the handbook, respondent elected to show a violent "R"-rated movie, "Glory," to his 7th grade class without administrative approval and without parental consent. Vice Principal Alexander Bethea credibly testified that respondent never submitted a lesson plan indicating intent to show any "R"-rated movie. If he had, Bethea would not have approved the lesson plan. The showing of an "R"-rated movie, even one with a historical context, was unsuitable for 7th graders and deprived their respective parents of the ability to decide whether their respective children should see it or were even mature enough to see it. It was also a value judgment he unilaterally deprived these parents from making by substituting his own judgment. The showing of an "R"-rated movie without permission was a deliberate act of insubordination and defiance on the part of the respondent. He knew the handbook did not permit the showing of such material without prior approval of a lesson plan. He chose, instead, to exercise what he termed "academic freedom" on his part. The

showing of this movie also demonstrated his disdain for principal Marazzo who drafted the handbook. According to the respondent, as the handbook was developed by Marazzo and not the Board of Education, he was not compelled to follow it.

Despite being told not to remove "hoodies" from students, respondent once again flouted authoritative direction and engaged in a "hoodie"-removing incident with student K.F. in November 2007. He purposely poked the student, although later denied it, and purposely leaned on the student's desk to tip it over, thereby sending the 7th grader to the ground.

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."

The multi-paragraph charge lodged by the district is conduct unbecoming 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 Atl. 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). 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).

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 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 Sammons, 1972 S.L.D. 302.]

Time and time again, respondent exercised poor-decision making that placed the safety of the students under his care in jeopardy. Asking students to retrieve books from the roof, tilting a desk because a student refused to identify himself and remove a "hoodie," purposeful failure to acclimate to hand book requirements of taking his roll book with him to fire drills and failure to clear his classroom of obstructions determined to be fire code violations are all the actions of a teacher whose unbecoming conduct warrants his termination from employment. Purposefully ignoring a handbook prohibition of showing an "R"-rated movie to 7th graders under the guise of "academic freedom" constitutes conduct unbecoming. Inability to control his classroom and allowing students to engage in card playing without even noticing it is not an example of effective teaching techniques and constitutes conduct unbecoming. The conglomeration of all of these unfortunate instances over less than two years' period of time amply demonstrate that the respondent was properly removed from his position as a teacher.

DECISION AND ORDER

Based on the foregoing, the DCF/IAIU finding of neglect substantiation is hereby **AFFIRMED** and I **ORDER** respondent's name shall be maintained on the Central

Registry. The petitioner board of education's removal of respondent's tenure is hereby **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **CHIEF OF STAFF, DEPARTMENT OF CHILDREN AND FAMILIES**.

This recommended decision may be adopted, modified or rejected by the **CHIEF OF STAFF, DEPARTMENT OF CHILDREN AND FAMILIES**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **CHIEF OF STAFF, DEPARTMENT OF CHILDREN AND FAMILIES,** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ADMINISTRATIVE HEARINGS COORDINATOR, DEPARTMENT OF CHILDREN AND FAMILIES, 222 South Warren Street, PO Box 729, Trenton, NJ 08625-0729,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **CHIEF OF STAFF, DEPARTMENT OF CHILDREN AND FAMILIES** shall forward the record, including this recommended decision and its final decision, to the **COMMISSIONER OF EDUCATION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **CHIEF OF STAFF, DEPARTMENT OF CHILDREN AND FAMILIES** 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 EDUCATION** within forty-five days of the predominant agency decision. If the **COMMISSIONER 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.

March 22, 2010
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency: 3-22-10

Date Mailed to Parties: 3-22-10

/lam

APPENDIX

IAIU MATTER

WITNESSES

For the Petitioner:

Matthew Butcher
J.W.
F.B.
Kelli Williams

For the Respondent:
M.D.

EXHIBITS

For the Petitioner:

JP-1	DCF Screening Summary, dated May 27, 2008
JP-2	IAIU Investigation Summary, dated May 27, 2008-July 22, 2008
JP-3	Diagram of roof outside of C-13, Riviera Elementary School, dated July 22, 2008
JP-4	J.W. statement, dated May 27, 2008
JP-6	F.B. statement, dated May 27, 2008
JP-7	Kelli Williams statement, dated May 27, 2008
JP-8	IAIU Findings Report dated July 31, 2008
JP-9	Photographs of Riviera Elementary School taken by Matthew Butcher

For the Respondent:

None

J-P denotes joint petitioners (DCF and Trenton School District)

TENURE MATTER

WITNESSES

For the Petitioner:

Joseph Marazzo

K.F.

J.C.

Alexander Bethea

For the Respondent:

Michael Dougherty

EXHIBITS

For the Judge:

C-1 July 6, 2009 correspondence from Rocky L. Peterson, Esq.

For the Petitioner:

PT-1 Joseph Marazzo memorandum, dated December 4, 2006

PT-1A Letter from Michael Dougherty to Joseph Marazzo, dated December 4, 2006

PT-4 Joseph Marazzo memorandum to Michael Dougherty, dated April 20, 2007

PT-5 Joseph Marazzo memorandum to Michael Dougherty, dated April 20, 2007

PT-6 Memo from Marazzo to Dougherty, dated September 18, 2007

PT-7 Memo from Marazzo to Dougherty, dated October 11, 2007

PT-8 Memo from Marazzo to Dougherty, dated November 7, 2007

PT-11 Memo from Marazzo to Dougherty, dated December 21, 2007

PT-12 Memo from Marazzo to Dougherty, dated January 18, 2008

PT-12A E-mail from Marazzo to Dougherty and Dawn Langford, dated January 20, 2008

PT-13 Looking for Learning Checklist, dated January 31, 2008

PT-16 Memo from Marazzo to Patricia Lucas, dated February 15, 2008

PT-16A 12/4/06 memo

PT-16B 1/5/07 memo

PT-16F 4/20/07 memo

PT-16G June 2007 evaluation

PT-16H 9/14/07 classroom notes

PT-16I 11/7/07 memo

PT-16J 11/18/07 memo

PT-16K 12/21/07 memo

PT-16M 1/18/08 memo

PT-18 IAIU Findings report, dated July 31, 2008

PT-19 Memo from Marazzo to Lucas, dated June 19, 2008

PT-20 Evaluation receipt, dated May 12, 2008

PT-21 Teacher Final Evaluation Form dated April 25, 2008

PT-23 Document Receipt dated February 1, 2008 re: scheduled meetings to share information regarding a perceived DYFS matter (with exception of students' statements)

PT-24 Handwritten letter to Marazzo from V.B.

PT-27 Student statements dated 11/16/07

PT-28 Staff handbook 2007-2008

For the Respondent:

R-1 Trenton Police Department Investigation Report

R-2 Michael Dougherty resume

R-3 Quiz-Hotel Rwanda movie (relevant as to methodology of teaching and not as proof of what was shown to class on day in issue)

R-4 Quiz-Glory movie (relevant as to methodology of teaching and not as proof of what was shown to class on day in issue)

R-5 12/4/06 memo from Dougherty to Marazzo re: attendance

#184-10

OAL DKT. NO. EDU 9-10
AGENCY DKT. NO. 354-12/09

IN THE MATTER OF THE TENURE HEARING OF KERRI A. POTTER, LITTLE EGG HARBOR SCHOOL DISTRICT, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Order of the Office of Administrative Law denying respondent's motion for summary disposition have been reviewed. The Commissioner adopts the Initial Decision for the reasons set forth therein. Accordingly, respondent's motion for summary disposition is denied.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/10

Date of Mailing: 6/18/10

* 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

ORDER DENYING
SUMMARY DECISION
OAL DKT. NO. EDU 9-10
AGENCY DKT. NO. 354-12/09

IN THE MATTER OF THE TENURE HEARING OF KERRI A. POTTER, SCHOOL DISTRICT OF THE TOWNSHIP OF LITTLE EGG HARBOR, OCEAN COUNTY.

Paul J. Carr, Esq., for petitioner Board of Education of the Township of Little Egg Harbor

William Koy, Esq., for respondent (Law Firm of William Koy, attorneys)

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter comes before me on respondent Potter's motion for summary decision, filed on March 19, 2010. Petitioner, Little Egg Harbor Board of Education ("Board") has made a determination that tenure charges filed against respondent Kerri Potter ("Potter") warrant her dismissal. Potter is employed by the Board as a tenured teaching staff member. In October 2006, Potter was injured in an automobile accident. As a result, she missed 467 days of work during the 2006-2009 school years, and needed to take prescription medication for her pain.[1] On October 7, 2009, the Board

[1] The certifications of the Board's counsel and the Board Superintendent are not in accord with respect to the amount of time Potter was absent during the 2006-2009 school years. The Board's counsel certifies that she missed 466 days; the Board Superintendent certifies that she missed 467 days.

Secretary received and filed tenure charges for Potter's dismissal. According to the Board, Potter engaged in insubordination because she "failed to comply with the directive of the administration to perform a [physical] reevaluation within the 120 days of the initial evaluation and she further failed to undergo a psychiatric evaluation and blood and urine testing within the time required by the administration;" Potter was incapacitated because she missed 467 days of work during the 2006-2009 school years; and Potter engaged in unbecoming conduct "in attending her responsibilities while under the influence of narcotic controlled substances in the presence of minor children, jeopardizing their safety and security." See Certification of Dr. Frank Kasyan, Board Superintendent, ¶¶16-20. According to Lynn Coates, Board Secretary, "[o]n October 7, 2009, and again on October 19, 2009, after considering the reply to charges filed by Kerri Potter, [the Board] determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant tenure dismissal of staff member, Kerri Potter. At the same time and place, [the Board suspended her without pay]. See Certification of Kerri Potter No. 2, Certification of Lynn Coates, ¶ 5, Exhibit P. The Board initially filed the tenure charges with the Commissioner of Education on November 20, 2009; however, due to deficiencies in its filing the Commissioner did not accept the Board's filing until December 16, 2009. On January 7, 2010, the matter was filed as a contested case with OAL.

Potter has appealed from the decision of the Board imposing tenure charges against her for incapacity (absenteeism), insubordination, and unbecoming conduct. Potter urges that the Board failed to meet the threshold for tenure charges against Potter based on absenteeism, insubordination and unbecoming conduct. Based upon those charges, the Board terminated Potter's employment.

The Board based the termination upon its contention that the Potter had excess absences from school, did not adhere to the requirements of the school district by failing to comply with a conveyed directive, and was under the influence of a controlled substance in the presence of minor children. The Board believes all proper procedures were followed by school personnel, and that Potter's rights were protected at all times. Potter requests the tenure charges be dismissed. The motion for summary decision is made on procedural and substantive grounds.

In its brief, Potter sets forth a series of factual and legal contentions in support of its position. Those factual and legal contentions include the following:

- The Board failed to provide adequate "Rice" notice to respondent.

- The Board failed to meet the threshold for tenure charges against respondent based on absenteeism.

- The Board failed to meet the threshold for tenure charges against respondent based on insubordination.

- The Board failed to meet the threshold for tenure charges against respondent based on unbecoming conduct.

The standards controlling a motion for summary decision are set forth in N.J.A.C. 1:1-12.5(b), which states in pertinent part:

> 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.

In making this determination, the Court must examine the facts in the light most favorable to the non-moving party, and draw all inferences in that party's favor. Bray v. Marriott Hotels, 110 F.3d 986,989 (3d. Cir.1997).

In this case, the initial legal issue raised by Potter is whether or not the tenure charges should be dismissed as there was no adequate "Rice" notice to Potter. The Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1, and the regulations promulgated thereunder, N.J.A.C. 6A:3-5.1 to -5.6, set forth specific procedural steps that must be followed before a tenured teacher may be dismissed or reduced in compensation. Ibid. Any charge against a tenured teacher must be filed with the secretary of the board of education and sworn evidence supporting such charge shall

be presented to the board. N.J.S.A. 18A:6-11; N.J.A.C. 6A:3-5.1. The board must then provide the tenured teacher with a copy of the charge and evidence, and give the tenured teacher the opportunity to respond by submission of a written statement of position and evidence. Ibid. After the board considers all of the evidence, the board shall determine by a majority vote whether there is probable cause to credit the evidence in support of the charge and, if so, whether the charge warrants dismissal or reduction in compensation. Ibid. All deliberations and actions of the board with respect to such charge shall take place at a closed meeting. Ibid. The board shall notify the tenured teacher of its determination, and if probable cause exists and the charge warrants dismissal or reduction in compensation, the board shall forward the charge to the Commissioner of Education ("Commissioner") for a hearing. Ibid. Upon certification of any charge to the Commissioner, the board may suspend, with or without pay, the tenured teacher against whom the charge is made. N.J.S.A. 18A:6-14. If the Commissioner disagrees with the board's determination, he shall dismiss the charge and penalty; however, if the Commissioner determines that the charge is sufficient to warrant dismissal or reduction in salary, he shall refer the matter to OAL for further proceedings. N.J.S.A. 18A:6-16.

The Open Public Meetings Act, N.J.S.A. 10:4-6 to -21 ("OPMA"), recognizes, with certain exceptions, the public's right to be present at all public meetings. N.J.S.A. 10:4-7. One such exception allows public exclusion from discussion of matters including the employment, termination of employment, and evaluation of the performance of or disciplining of a public employee unless the employee whose rights could be adversely affected requests in writing that such matter(s) be discussed in public. N.J.S.A. 10:4-12(b)(8). As such, a public employee "is entitled to reasonable notice of the intention of the [public body] to consider personnel matters related to [him or her]" so that the employee may request a public hearing ("Rice notice"). Rice v. Union Cty. Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64, 73-74 (App. Div. 1977), certif. denied, Rice v. Union Cty. Reg'l High Sch. Bd. of Educ., 76 N.J. 238 (1978). Any action taken by a public body at a meeting that fails to conform to the OPMA shall be voidable, except in cases in which the non-conformity is a failure to provide advance published notice of at least 48 hours before a meeting. N.J.S.A. 10:4-15(a). Due to the Commissioner's authority to hear and determine all controversies and disputes under

the school laws, "the Commissioner has additional incidental jurisdiction to determine issues arising under the [OPMA] as they relate to controversies under the school laws." Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184, 187 (App. Div. 1979). Therefore, this tribunal must consider Potter's allegation that the Board violated the OPMA by failing to provide "adequate notice to [her] and ensure the right to attend [the October 19th Board meeting] where business affecting the public or rights of such individuals whose rights may be adversely affect [was] discussed." See Potter's Brief, Point I.

In Sukin, supra, 171 N.J. Super. 184, a former school principal appealed a trial court's judgment dismissing the count of his complaint in which he alleged defendant Northfield Board of Education violated the OPMA after the court concluded that any violations of the act had been cured by remedial action taken by Northfield. Ibid. On appeal, the Appellate Division reversed the trial court's dismissal of that count because the Appellate Division held that that count should have been transferred to the Commissioner of Education for consideration. Id. at 187. According to the court,

> [b]y virtue of the provisions of N.J.S.A. 10:4-15, any action taken by a public body which does not conform to the Open Public Meetings Act is reviewable in the Superior Court in an action in lieu of prerogative writs. That section, however, was not intended to confer exclusive jurisdiction in the Law Division or the Chancery Division. We have held that where an administrative agency of the State has primary jurisdiction to determine the underlying controversy between the parties, a trial judge should not undertake to decide the issues presented under the Open Public Meetings Act but should refer those issues to the appropriate administrative agency.
>
> The Commissioner of Education has complete power to hear and determine all controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. We are equally satisfied that the Commissioner has additional incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. [Id. at 186-87 (citations omitted).]

Based upon the above, this tribunal has jurisdiction over Potter's OPMA claim.

While the OPMA requires Rice notice to public employees before meetings at which personnel matters about them will be discussed, the Tenure Employee Hearing Law clearly provides that "the consideration and actions of the board as to any [tenure] charge shall not take place at a public meeting." N.J.S.A. 18A:6-11; N.J.A.C. 6A:3-5.1. The Board held a meeting on October 19th to consider the charges against Potter. Potter argues that the "[OPMA] mandates adequate notice to the party and ensures the right to attend [board] meetings where business affecting the public or rights of such individuals whose rights may be adversely affected is discussed," and that the Board's failure to provide adequate notice of the October 19th meeting violates the OPMA and that, as a consequence, the tenure charges against her should be dismissed. Potter's Brief, Point I.

In Cirangle v. Maywood Bd. of Educ., 164 N.J. Super. 595, 598 (Law Div. 1979), a tenured superintendent, Louis Cirangle, sued the Maywood Board of Education "to have the board's action [to certify tenure charges against him] declared void on the basis that it was taken during the course of a meeting which did not conform to the provisions of the [OPMA].[2]" Ibid. In Cirangle, the court noted the following conflict between the OPMA and the Tenure Employee Hearing Law: "[o]n the one hand, the [OPMA] requires that consideration of the charges against Cirangle be conducted at an open public meeting. On the other hand, the Tenure Employee Hearing Law prohibits consideration and action by the board in public." Ibid. Cirangle argued that under Rice, supra, 155 N.J. Super. 64, "the board was required to consider the charges against him in public" under the OPMA at N.J.S.A. 10:4-12(b)(8). Cirangle, supra, 164 N.J. Super. at 598-99. However, as the court noted, "[t]he Tenure Employee Hearing Law was neither involved nor discussed by the court [in Rice]." Id. at 599. The court observed that the Tenure Employee Hearing Law followed in time the OPMA in passage by the Legislature and included clear language regarding the closed nature of board meetings at N.J.S.A. 18A:6-11. As such, the court held that the board could "exclude the public even in the face of a demand for an open meeting by the affected tenured employee." Id. at 602.

[2] It is unclear from the court's decision whether Cirangle was notified and/or in attendance at the meeting at issue.

Here, as in Cirangle, Potter argues that, under the OPMA, she should have been notified in advance of the Board's October 19th meeting at which the Board discussed her tenure charges so that she, and other members of the public if she so chose, could be in attendance. However, as the court held in Cirangle, N.J.S.A. 18A:6-11 specifically precludes public attendance or participation at meetings at which the board considers or takes action on tenure charges. As a result, the Board did not offend Potter's rights under the OPMA by failing to provide her with Rice notice so that she could be in attendance at the October 19th meeting at which the Board considered the tenure charges against her.[3] As the court in Rice noted, "[t]he plain implication of [N.J.S.A. 10:4-12(b)(8)] is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory right if they have reasonable advance notice." Rice, supra, 155 N.J. Super. 73. However, again, as the court in Cirangle pointed out, the right to Rice notice is circumscribed by the Tenure Employee Hearing Law because N.J.S.A. 18A:6-11 requires that boards consider tenure charges in closed sessions. This conclusion is supported by Sch. Dist. of the Town of Phillipsburg v. Hamlen, 86 S.L.D. 2705, 2711 (November 17, 1986), in which the Commissioner held that "[t]here is no legal requirement that would have compelled the Board to notify respondent [tenured teacher] of the date it was considering action on the tenure charges. N.J.S.A. 18:11-6 specifically prohibits consideration and action by a board as to any tenure charges at a public meeting." Ibid. In addition, even if the Board violated Potter's OPMA rights by failing to provide her adequate notice of the October 19th meeting, OPMA clearly states that "[a]ny action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act." N.J.S.A. 10:4-15(a). As such, Potter's motion for summary decision for failure to provide adequate "Rice" notice to Potter with respect to the OPMA issue is **DENIED.**

The second request of Potter is for a finding that the Board failed to meet the threshold for tenure charges based on absenteeism. Potter argues that there are other tools available to deal with absenteeism before a teacher is suspended or discharged. However, the use of those other tools is not mandatory. Potter also argues that

[3] On October 19, 2009, Potter's counsel received notice of the October 19th meeting, but was not invited to attend.

dismissal of a tenured teaching staff member for excessive absenteeism requires a true excess of absences, and that the teacher must be given prior warning of the potential suspension or discharge. Notwithstanding, Potter presents no authority for that proposition. Finally, Potter argues that even if the facts proffered by the Board are true, these facts or proofs are not comparable to any other cases where excessive absenteeism was upheld as a reason for termination. When analyzing the aforementioned arguments in a light most favorable to the Board, a conclusion cannot be reached that there is not a genuine issue of a material fact. The Board reveals in its brief that Potter missed 183 days of school during the 2006-2007 school year, 154 days during the 2007-2008 school year, and 129 days during the 2008-2009 school year. Genuine issues of fact exist as to the propriety and reasons for those missed school days. The Board is entitled to develop at a hearing that these absences were inexcusably excessive. There are fundamental factual issues raised by the parties regarding whether Potter's actions rose to the level of unacceptable absenteeism, and consequently, genuine issues of fact remain unresolved. Therefore, because genuine issues of material fact remain unresolved, summary decision is not appropriate. Therefore, Potter's request for a finding on summary decision that the Board failed to meet the threshold for tenure charges based on absenteeism is **DENIED**.

Potter next argues that a finding should be made that the Board failed to meet the threshold for tenure charges based on insubordination. Potter correctly characterizes insubordination as actions which are disobedient to constituted authority. Potter sets forth that to sustain a charge for insubordination, the Board must be able to show that its policies and directives had been communicated to the employee and the Board must prove that the employee did not carry out such policies and directives. Genuine issues of material fact are present as to whether or not the Board can prove that it communicated its policies and directives to Potter, and that Potter failed to comply with those policies and directives, thus rising that to the level of insubordination. Whether Potter refused to see a doctor as required by the Board, or rather if a scheduling issue by the Board was the cause of a miscommunication, are genuine factual issues. As such, there are fundamental factual issues raised by the parties regarding whether Potter's actions rose to the level of insubordination, and consequently, genuine issues of fact remain unresolved. Therefore, because genuine

issues of material fact remain unresolved, summary decision is not appropriate. Accordingly, Potter's request for a finding on summary decision that that the Board failed to meet the threshold for tenure charges based on insubordination is **DENIED**.

Finally, Potter argues that a finding should be made that the Board failed to meet the threshold for tenure charges based on unbecoming conduct. Potter correctly sets forth that unbecoming conduct is a charge relating to egregious conduct whether it be directly related to job performance or not. Potter is accused by the Board of being under the influence of a controlled substance in the presence of minor children. Potter argues that the Board has not set forth any proofs to sustain these charges, and that the allegations do not rise to the level of an unbecoming conduct charge. Further, Potter denies ever teaching under the influence of controlled substances, and alleges that the Board's proofs are based on hearsay, or on instances that cannot be confirmed. Given the allegations, genuine issues of fact exist as to whether or not Potter ever taught students while unlawfully under the influence of controlled substances. There are fundamental factual issues raised by the parties regarding whether respondent's actions rose to the level of unbecoming conduct, and consequently, genuine issues of fact remain unresolved. Therefore, because genuine issues of material fact remain unresolved, summary decision is not appropriate. As such, Potter's request to dismiss on summary decision the Board's appeal based upon the Board's failure to meet the threshold for tenure charges based on unbecoming conduct, is hereby **DENIED**.

Potter's motion for summary decision is **DENIED**.

A prehearing conference shall be scheduled with the parties to confirm the schedule of future dates herein.

ORDER

I **ORDER** that respondent Potter's motion for summary decision be **DENIED**.

This order denying summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 3, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/bdt

187-10

L.M.R., on behalf of minor children, S.S.R. , AND N.A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LAWRENCE TOWNSHIP, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in December 2009. The respondent filed an answer and requested that the petition be dismissed. Petitioner received appropriate notice of a May 7, 2010 hearing, but failed to appear and provided no explanation for her nonappearance. Having received no explanation from the petitioner for her non-appearance, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice.

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

June 25, 2010

OAL DKT. NO. EDU 283-10
AGENCY DKT. NO. 370-12/09

L.M.R., on behalf of minor children, S.S.R., AND N.A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LAWRENCE TOWNSHIP, MERCER 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 parties by the OAL on May 12, 2010, providing petitioner thirteen days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|25|10

Date of Mailing: 6|25|10

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

WILLIAM NASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal charging that the Board's removal of him from the school wrestling team for violation of the school's alcohol policy as a result of a DWI, which did not occur on school grounds or during school hours, is arbitrary, capricious and unreasonable. Petitioner filed a motion for emergent relief, which was denied. Subsequently, petitioner failed to appear at the hearing scheduled in this matter on March 31, 2010, and provided no explanation for his nonappearance. Having received no explanation from the petitioner for his non-appearance, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice.

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

June 25, 2010

188-10

OAL DKT. NO. EDU 1667-10
AGENCY DKT. NO. 23-2/10

WILLIAM NASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – which includes the advisement of the failure to appear, transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and the notification sent to the parties by the OAL on May 12, 2010, providing an opportunity to submit an explanation for such nonappearance – has been reviewed. There was no explanation filed by petitioner, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|25|10
Date of Mailing: 6|25|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.* 6:4-1.1 *et seq.*

189-10

OAL DKT. NO. EDU 1842-10
AGENCY DKT. NO. 15-1/10

H.P. and G.H. on behalf of minor child R.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that neither the file nor the Settlement Agreement contains a copy of a Board resolution approving the settlement and authorizing the Board Secretary to sign the agreement on its behalf. Nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating the Board Secretary or another individual to sign on behalf of same. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|25|10
Date of Mailing: 6|25|10

* 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
SETTLEMENT
OAL DKT. NO. EDU 01842-10
AGENCY DKT. NO. 15-1/10

H.P. AND G.H., ON BEHALF OF MINOR CHILD, R.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent

H.P. and G.H.., Petitioners (*pro se)*

Cherie L. Adams, Esq., for Respondent (Adams Stern Gutierrez & Lattiboudere LLC , attorneys)

Record Closed: May 18, 2010 Decided: May 18, 2010

BEFORE **TAHESHA L. WAY**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 26, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement (J-1).

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

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

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

3. Both the claim and counterclaim have been resolved in accordance with the executed Settlement.

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 (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 18, 2010
DATE

TAHESHA L. WAY, ALJ

Date Received at Agency: 5-20-10

Date Mailed to Parties: MAY 20 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

EXHIBITS:

Joint Exhibits:

J-1 Settlement Agreement

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
1037 Raymond Blvd, Suite 710
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent Hillside Board of Education

H.P. and G.H. on behalf of minor children, R.H., Petitioners, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt. No: ***EDUOS 01842-2010N*** **SETTLEMENT AGREEMENT**

Petitioner, H.P is a resident of Hillside at 1511 Schley Street and has acted as guardian for R.H. Petitioner G.H. resides at 1 Grumman Avenue Newark, NJ and is the natural mother of R.H. Respondent, HILLSIDE BOARD OF EDUCATION ("Board" or "District"), a body corporate of the State of New Jersey, with its primary offices at 195 Virginia Street, Hillside, NJ 07205.

WHEREAS G.H. acknowledges that R.H. has resided with her in Newark during the 2009-10 school year and has not resided with H.P. although he has attended the Hillside schools during this time; and

WHEREAS H.P. and G.H. have agreed to withdraw the current appeal in consideration of the District's willingness to permit R.H. to finish the 2009-10 school year at Hillside High School without payment of tuition; and

WHEREAS, the District has agreed to waive their right to collect back tuition for the period of R.H.'s ineligible attendance at Hillside for the 2009-10 school year specifically [illegible] school year; and

WHEREAS, the parties wish to amicably resolve the litigation in this matter;

NOW THEREFORE the parties agree as follows:

1. H.P. and G.H acknowledge that R.H. has not resided in Hillside during the 2009-10 school year and that they are liable for tuition for the period of ineligible attendance.

2. H.P. and G.H. agree to withdraw the instant appeal, which will result in R.H. being disenrolled as a resident student in the Hillside school district.

3. The District shall permit R.H. to complete the 2009-10 school year only in Hillside High School without payment of tuition.

4. R.H. shall not return to Hillside High School following the 2009-10 school year except as a tuition paying student. Should G.H. attempt to register R.H. as a student in the Hillside schools at any point after the 2009-10 school year, the District reserves the right to reinstate its claim and collect back tuition for the 2009-10 school year for the period of ineligible attendance acknowledged in this Agreement.

HILLSIDE BOARD OF EDUCATION

By: _____

_____
Hyacinth Pando, Petitioner

_____
Gwendolyn Hall, Petitioner

OAL DKT. NO. EDU 05043-10
(EDU 11393-08 ON REMAND)
AGENCY DKT. NO. 265-9/08

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY BARTOLOMEO,	:	COMMISSIONER OF EDUCATION
WHARTON BOROUGH BOARD OF	:	DECISION ON REMAND
EDUCATION, MORRIS COUNTY.	:	

The record of this matter, the parties' revised settlement agreement, and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On May 4, 2010, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") did not include the requisite Board of Education approval.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. The Commissioner also concurs with the ALJ that the proposed settlement is consistent with the established standards governing the settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the 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: 6|25|10
Date of Mailing: 6|25|10

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05043-10

EDU 11393-08 **(ON REMAND)**

AGENCY REF. NO. 265-9/08

IN THE MATTER OF THE TENURE HEARING OF ANTHONY BARTOLOMEO,

Petitioner,

v.

WHARTON BOROUGH BOARD OF EDUCATION MORRIS COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner Anthony Bartolomeo (Oxfeld Cohen, attorneys)

Philip E. Stern, Esq., for respondent Wharton Borough Board of Education (Adams Stern Gutierrez & Lattiboudere, attorneys)

Record Closed: May 13, 2010 Decided: May 14, 2010

BEFORE **GAIL M. COOKSON**, ALJ:

This is a remand from the Department of Education filed with the Office of Administrative Law on May 4, 2010, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, from a settlement agreement transmitted under an Initial Deicision Settlement dated April 6, 2010, under Docket No. EDU 11393-08 concerning tenure

charges brought by the Wharton Borough Board of Education on August 28, 2008 against Anthony Bartolomeo. The charges involved allegations that Mr. Bartolomeo had abused sick time and submitted illegitimate or no medical documentation which demonstrated a pattern of conduct unbecoming during certain periods in each of the years 2005-2008, all of which allegations Mr. Bartolomeo denied.

The only objection to the Stipulation of Settlement by the Department was that it had not been provided with evidence of authorization of approval of the settlement by the Wharton Borough Board of Education. It sought such authorization in the form of either a Board Resolution or signature of the Board's authorized attorney representative. The latter has now been provided by Board counsel. Accordingly, this remand matter will not require any evidentiary hearing and resulting delay that could interfere with implementation of its terms. I **CONCLUDE** that the matter can be re-transmitted to the Commissioner for approval with this additional documentation.

I **CONCLUDE** that this settlement is in accord with the requirements of N.J.A.C. 1:1-19.1 and of In re Cardonick, 1990 S.L.D. 842, 846 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.

May 14, 2010

DATE

Gail M. Cookson

GAIL M. COOKSON, ALJ

Date Received at Agency: 5-18-10

Date Mailed to Parties: MAY 18 2010

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

Attachment

OXFELD COHEN, P.C.
60 PARK PLACE, 6TH FLOOR
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Anthony Bartoloemo

COMMISSIONER OF EDUCATION
OAL Docket No. EDU 11393-08
Agency Ref. No. 265-9/08

In the Matter of the Tenure Hearing of ANTHONY BARTOLOMEO WHARTON BOROUGH BOARD OF EDUCATION, MORRIS COUNTY	**VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE**

The Wharton Borough Board of Education ("Board") and Anthony Bartolomeo ("Mr. Bartolomeo"), agree to the following terms in full resolution of this matter:

WHEREAS, Mr. Bartolomeo disputes the allegations of misuse of sick time which resulted in the filing of the tenure charges; and

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

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

NOW, THEREFORE, the parties agree as follows:

1. Mr. Bartolomeo agrees to resign from employment with the Wharton Borough School District, effective at the close of business on June 30, 2009.

2. Mr. Bartolomeo shall continue to receive health benefits until the Commissioner of Education renders her Final Decision.

3. Pursuant to N.J.S.A. 18A:6-14, Mr. Bartolomeo will be suspended without pay from September 1, 2008 through December 31, 2008. Pursuant to N.J.S.A. 18A:6-14, Mr. Bartolomeo shall then be placed on the payroll from January 1, 2009 until the date of settlement, March 20, 2009.

4. The period between March 20, 2009, the date of settlement, and June 30, 2009, the effective date of resignation, shall be treated as an unpaid leave.

5. Mr. Bartolomeo and the Board agree that in full settlement of this matter, the Board shall pay Mr. Bartolomeo one month's salary for a total of five thousand four hundred forty-nine ($5,449.00) dollars upon the final determination of the Commissioner of Education.

6. Upon approval by the Board and the Commissioner of Education, the Board shall withdraw the tenure charges filed against Mr. Bartolomeo.

7. Mr. Bartolomeo acknowledges that the payments reflected in this agreement constitute the full financial obligation of the Board and that he shall receive no additional payments, except as set forth in this Agreement. In exchange for the above consideration, Mr. Bartolomeo, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the Board, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind or character, that he has had or may now have against any of them, including, without limitation, any and all claims related to his employment with the Board or the separation from that employment. Likewise, the Board, on behalf of itself,

its successors and assigns, hereby fully releases and forever discharges Mr. Bartolomeo, his heirs and successors and assigns, for any and all actions, claims and liabilities of whatsoever kind or character, that it has had or may now have against him, including without limitation any and all claims related to Mr. Bartolomeo's employment with the Board or the separation from that employment.

8. Mr. Bartolomeo acknowledges, as required under *In re Cardonick*, that despite the approval of this Agreement, the issue of possible revocation of his teaching certificate may be considered by the State Board of Examiners. Mr. Bartolomeo understands that the Commissioner of Education may accept, reject or modify this Settlement, and that the Commissioner of Education may forward this matter to the State Board of Examiners for consideration of revoking his certificate.

9. The parties agree that it is in the public interest to avoid the time, expense and uncertainty attendant to litigation. The parties further agree that this Settlement accomplishes the remedy which the District sought by bringing the tenure charges: Mr. Bartolomeo will be separated from his employment with the District.

10. The parties further agree that the charges at issue do not represent a danger to the public welfare.

11. This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

12. This Agreement is subject to the approval of the Wharton Borough Board of Education and the Commissioner of Education. Should the Commissioner of Education decide

not to approve the application for approval of the parties' settlement and withdrawal of the tenure charges, this Agreement, and all of its terms, shall be null and void.

Anthony Bartolomeo
Dated: 3-25-10

Wharton Borough Board of Education

By: Amy Rhead, President
Dated: 3-18-10

BY: Philip E. Stern, Board Attorney
Dated: 5/13/10

191-10

BRENDA A. CUCUKOV AND ANGELA D. D'OTTAVIO,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners – whose tenured teaching positions were abolished – claimed entitlement to positions held by allegedly less senior employees. Subsequently, the respondent Board rehired petitioner D'Ottavio – who then withdrew her petition – and offered petitioner Cucukov reemployment. Respondent filed a motion for summary decision, which petitioner Cucukov did not oppose.

The ALJ granted respondent's motion for summary decision, finding that petitioner Cucukov declined to oppose the motion; therefore her petition must be dismissed.

Upon a thorough and independent review of the record, the Commissioner found that the controversies alleged in the petition appear to have been resolved or abandoned. Accordingly, the petition was dismissed in its entirety.

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

June 25, 2010

OAL DKT. NO. EDU 6677-09
AGENCY DKT. NO. 197-8/09

BRENDA A. CUCUKOV AND ANGELA D. D'OTTAVIO,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

Upon review of the record and the Initial Decision of the Office of Administrative Law, the Commissioner adopts the Initial Decision in this case for the reasons articulated by the Administrative Law Judge. Accordingly, respondent's motion to dismiss the portion of the petition which pertains to Brenda Cucukov is granted – without petitioner's objection.[1]

Insofar as the controversies alleged in the petition appear to have been resolved or abandoned, the petition is hereby dismissed in its entirety.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6|25|10
Date of Mailing: 6|25|10

[1] As Petitioner D'Ottavio has been rehired by respondent and provided with back pay, she has withdrawn the claims which had been set forth in the petition on her behalf

[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 6677-09

AGENCY DKT. NO. 197-8/09

BRENDA A. CUCUKOV AND

ANGELA D. D'OTTAVIO,

Petitioners,

v.

BOARD OF EDUCATION OF THE

CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

Kathleen A. Naprstek Cerisano, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Adam S. Weiss, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: May 13, 2010 Decided: May 19, 2010

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

STATEMENT OF THE CASE

Petitioners appealed respondent's action terminating their employment by abolishing their positions.

PROCEDURAL HISTORY

The petitioners requested a fair hearing and the matter was transmitted to the OAL on September 29, 2009, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

FACTUAL DISCUSSION

This case comes before me on respondent's motion for summary decision. The case arises out of respondent's action terminating petitioners' employment with the school district because their positions were abolished. Subsequently, petitioner D'Ottavio was rehired by respondent, and petitioner Cucukov was offered reemployment. By letter from her attorney dated May 13, 2010, D'Ottavio withdrew her petition. Counsel further advised that Cucukov did not oppose the motion.

CONCLUSIONS OF LAW

Since Cucukov has declined to oppose the motion, respondent's motion for summary decision is **GRANTED.** The petition of petitioner Cucukov must be **DISMISSED.**

ORDER

I **ORDER** that respondent's motion for summary decision be **GRANTED.**

I **ORDER** that the petition of petitioner Cucukov 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.

5/19/10
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 5-19-10

Date Mailed to Parties: 5-19-10

/sd

DOCUMENTS CONSIDERED

For Petitioners:

May 13, 2010 Letter from Kathleen Naprstek Cerisano

For Respondent:

Motion for Summary Decision with supporting documentation

OAL DKT. NO. EDU 4457-10
AGENCY DKT. NO. 98-5/10

BOARD OF EDUCATION OF BOROUGH OF CHESILHURST, CAMDEN COUNTY,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY AND PEGGY NICOLOSI, EXECUTIVE COUNTY SUPERINTENDENT, CAMDEN COUNTY,	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), codified at *N.J.A.C.* 6A:3-1.6, with respect to petitioner's claim that it has been improperly deemed a non-operating school district, and its request for an emergent order adopting its April 17, 2010 budget. The Commissioner also agrees with the ALJ that the effective date for the elimination of the Chesilhurst school district, and its pending merger with Winslow Township, shall be stayed until respondent – the Executive County Superintendent for Camden County – complies with the statutory and regulatory provisions governing the elimination of a non-operating school district. *See N.J.S.A.* 18A:7-8(g) and *N.J.A.C.* 6A:23A-2.4.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief and granting a temporary stay of the effective date for the elimination of the Chesilhurst school district is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/10

Date of Mailing: 6/24/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON

EMERGENT RELIEF

OAL DKT. NO. EDU 4457-10

AGENCY DKT. NO. 98-5/10

BOARD OF EDUCATION OF BOROUGH OF CHESILHURST, CAMDEN COUNTY,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY AND PEGGY NICOLOSI, EXECUTIVE COUNTY SUPERINTENDENT, CAMDEN COUNTY,

Respondents.

Rocky Peterson, Esq., for petitioners (Hill & Wallack, attorneys)

Damon G. Tyner, Esq., for respondent Winslow Township Board of Education (Parker, McCay, attorneys)

Susan M. Huntley and **Shannon M. Ryan** Deputies Attorney General, for respondent Peggy Nicolosi (Paula T. Dow, Attorney General of the State of New Jersey, attorney)

BEFORE **PATRICIA M. KERINS**, ALJ:

Petitioner, the Borough of Chesilhurst Board of Education (Chesilhurst) seeks to enjoin respondent Peggy Nicolosi (Nicolosi), the Executive County Superintendent (ECS) of Camden County from taking action to eliminate Chesilhurst as of July 1, 2010, as a non-operating school district, and merging it into the Winslow Township school district (Winslow). As part of its emergent request it further seeks an Order adopting the school budget passed by Chesilhurst on April 17, 2010, and an expedited hearing on its companion petition to terminate the sending/receiving agreement with Winslow Township, under which Chesilhurst's pre-kindergarten through sixth grade students attend Winslow schools. That petition also seeks a determination that Chesilhurst is not a non-operating district slated for elimination pursuant to N.J.S.A. 18A:8-43, et. seq. The petition and request for emergent relief was filed on May 17, 2010, and transmitted to the Office of Administrative Law on May 20, 2010. Oral argument on the emergent motion was heard on May 24, 2010, and the parties were given until May 25, 2010, to submit additional legal argument and documentary evidence.

The following are the relevant facts. Chesilhurst is a small district with just a few hundred students. For some time, its students enrolled in grades seven through twelve have attended Winslow schools through a sending/receiving relationship. The district's pre-kindergarten through sixth grade students attended Chesilhurst's only school, the Shirley B. Foster Elementary School until the 2009-10 school year. In the midst of the 2008-2009 school year, Chesilhurst and Winslow began discussions on expanding their sending/receiving relationship in consideration of the new Accountability Regulations set forth at N.J.A.C. 6A:23A-2.1 et. seq. Additionally, in anticipation of further consolidation legislation, the Commissioner of Education (Commissioner) encouraged school districts to consider consolidation. Chesilhurst was one of twenty-six school districts in the state, with an established sending/receiving relationship for some of its students, for whom consolidation was being encouraged. After a fire which damaged its elementary school in January 2009, Chesilhurst passed a resolution on March 30, 2009, to expand the sending/receiving relationship with Winslow to include pre-kindergarten through sixth grade for a three-year term. Relying on the agreement, the Boards drafted their 2009-10 school year budgets to include tuition payments to Winslow for the attendance of all Chesilhurst students to its schools. Chesilhurst's

budget was approved by Executive County Superintendent Nicolosi pursuant to N.J.A.C. 6A:23-8.1.

The expanded sending/receiving agreement was implemented for the 2009-10 school year.[1] Winslow expended funds for extended school year (ESY) programs for the additional students from Chesilhurst classified as eligible for special education and related services; created class schedules for the new students; hired eight tenured teachers from Chesilhurst; provided for the bus transportation needs of the Chesilhurst students; conducted IEP (individualized education program) meetings for the students classified eligible for special education and related services; and provided financially for the out-of-district placements for those students classified eligible for special education and related services for whom Chesilhurst IEP teams had previously designated their respective placements. When the school year commenced in September 2009, Chesilhurst students from pre-kindergarten through twelfth grade were attending Winslow schools.

Chesilhurst submits that serious problems occurred in the integration of its elementary students into Winslow, serious and continuing enough to support its contention that the children should be returned to the district's now repaired elementary school. While Winslow allows that some disruptions and problems may have occurred at the start of the expanded sending/receiving relationship, it asserts that they were of a more routine nature and have been resolved. Chesilhurst further contends that although a comprehensive Memorandum of Agreement (MOA) was discussed between it and Winslow, such an agreement was never executed by the two districts. The MOA was to have expanded on the existing sending/receiving relationship between the two districts by dealing with their possible consolidation, and issues attendant to such a merger.

After Chesilhurst agreed to the expanded sending-receiving relationship with Winslow in March 2009, legislation governing the elimination of non-operating school

[1] In the summer of 2009, the Borough of Chesilhurst (Borough) and its Mayor, Michael Blunt filed a petition and request for emergent relief with the Commissioner seeking to enjoin the implementation of the expanded agreement. An Order denying that emergent relief was issued by Administrative Law Judge Anna Viscomi and the Borough subsequently withdrew the companion petition.

districts took effect on June 30, 2009. N.J.S.A. 18:7-8(g) provided that the ECS shall eliminate districts not operating schools on the effective date of N.J.S.A. 18A:8-43 which defines a non-operating district. The effective date of that provision is June 30, 2009. Immediately after the effective date of the above provisions, the Commissioner announced the elimination of thirteen such districts and listed Chesilhurst as one of another thirteen districts proposed for elimination (Exhibit B of respondent Nicolosi's submission).

During the 2009-10 school year, Chesilhurst and the ECS have met and corresponded over Chesilhurst's status, its budget and operations, as well as its elimination as a district and possible merger into Winslow. Chesilhurst contends that during the past year-and-a-half it has received "mixed messages" from the ECS regarding its status as a "non-operating" district and that the ECS has taken "unilateral" action by scheduling the district for elimination as of July 1, 2010. The ECS and Chesilhurst continued to disagree on whether the district was non-operating, with Chesilhurst submitting budgets to the ECS providing for the return of the pre-kindergarten through sixth grade students to the reopened Chesilhurst elementary school. Citing her statutory authority the ECS rejected those budgets and submitted a budget for Chesilhurst to the Department of Education (Department) reflecting its status as a non-operating district.

In addressing the relief sought by petitioner, it is important to note that Chesilhurst and the ECS begin their arguments and analyses on the underlying legal issues from different starting points. While Winslow is a party to this action and disagrees with factual assertions made by Chesilhurst, its submission states that it takes no position on the relief sought by Chesilhurst and will defer to the Commissioner's determination in this matter. Chesilhurst's petition cites N.J.S.A. 18A:38-20 and 21, provisions dealing with a sending/receiving relationship between districts. It argues that it should be allowed to terminate its agreement with Winslow and resume the operation of its elementary school, contending that its expanded agreement with Winslow did not make it a non-operating district on June 30, 2009. Arguing that its right to reopen its elementary school was not foreclosed by law or its

agreement with Winslow, it disputes that it is a non-operational district and mandated for elimination.

Respondent ECS however, begins its analysis with the statutory effect of Chesilhurst's non-operational status. Citing N.J.S.A. 18A:7-8(g), she asserts that since Chesilhurst was not operating any schools on the effective date of N.J.S.A. 18A:43, June 30, 2009, it became a district required to be eliminated. Since it is required to be eliminated under the statute, its ability to change its sending/receiving relationship is foreclosed and the elimination of the district should go forward as set forth in the legislative mandate.

In reviewing the relief requested by petitioner, the issues presented under N.J.S.A. 18:38-20 and 21, cannot be reached without an analysis of the statutory provisions regarding elimination of non-operating districts. Simply put, the issue becomes whether Chesilhurst was a non-operating district under the applicable statute on June 30, 2009, and if it was, then does it still have the ability to seek a change in that status by a request to change its sending/receiving agreement and become operational again? In its request for emergent relief Chesilhurst seeks a stay of the ECS's actions eliminating it as a district as of July 1, 2010, and requests that its budget rather than that of the ECS be adopted. Both those request for emergent relief require an analysis under the statutory provisions setting forth the power of the ECS, and providing for elimination of non-operating districts.

In order to grant all or part of petitioner's request for emergent relief, the criteria for the award of emergent relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6 must be met. Those include irreparable harm if the relief is not granted, a settled legal right underlying petitioner's claim, a likelihood that petitioner will prevail on the merits of the underlying claim, and on a balance of the equities and interest, that petitioner will suffer greater harm than the respondent.

In regard to its emergent request that a stay be entered on the determination by the ECS that Chesilhurst shall be a non-operating district as of July 1, 2010, and merge

with Winslow during the pendency of this proceeding, petitioner has not met the criteria for a stay on the determination that it is a non-operating district. Although it has made a colorable argument that its expanded sending/receiving relationship with Winslow was exigent and temporary in nature, obviating its non-operating status under the statute, neither the legal right underlying that claim, nor the likelihood of success on the merits is assured.

It has however, met the criteria for a stay of the ECS's actions setting the date for the elimination of the district and its merger with Winslow as of July 1, 2010. Although the ECS has broad powers under the statute, the elimination of a non-operating district must occur in accordance "with a plan and schedule included in the plan submitted to and approved by the commissioner." N.J.S.A. 18A:7-8(g). Respondent has not yet finalized such a plan, nor submitted it to the Commissioner for approval (Respondent Nicolosi's brief at page 6, referencing petitioner's Exhibit R). Similarly, regulations promulgated by the Department, and effective December 21, 2009, set forth the items to be addressed in the plan of elimination developed by the ECS and the Commissioner. N.J.A.C. 6A:23A-2.4. Petitioner's elimination as a district must conform under the statute and regulations to that procedure. In that regard its legal right is settled and there is a likelihood of Chesilhurst's prevailing on the requirement that the ECS cannot proceed with its elimination except in the manner required by statute and regulations. Further, the irreparable harm to Chesilhurst is that it will no longer exist, as well as the timing of its demise and the resolution of the issues attendant to its passing. Balancing the equities between the parties, Chesilhurst will suffer the greater harm.

Petitioner's emergent request for an Order adopting its budget providing for the return of its children must fail however. Such a request is bound up with the issue of whether it is a non-operating district, and as noted above, Chesilhurst's legal right underlying that claim is not settled, nor is its likelihood of success. Further, the disruption to the present sending/receiving relationship with Winslow and its effects upon the students for the upcoming school year outweigh any harm to petitioner.

Petitioner's final request for emergent relief is a request for an expedited hearing on its underlying petition. As the parties were advised at oral argument such an order may be issued under N.J.A.C. 1:1-9.4. Procedures for acceleration of cases include a finding of good cause by the Director of the OAL or the judge assigned, as well as consent of the parties, and consent by the transmitting agency to the regulation's deadlines. While petitioner's argument for expedition has merit, the remaining criteria for acceleration have yet to be met and its request is denied without prejudice.

Based on the foregoing, petitioner's request for an emergent order adopting its April 17, 2010 budget is hereby **DENIED.** Petitioner's request to stay the decision by respondent Nicolosi that it is a non-operating district is **DENIED**; however, its request to stay the elimination of the Chesilhurst school district and its merger with Winslow as of July 1, 2010, is **GRANTED** until respondent Nicolosi complies with the statutory and regulatory requirements for the approval of such elimination and merger by the Commissioner. It is **ORDERED** that respondent Nicolosi take no further action to eliminate Chesilhurst and merge it with Winslow except in accordance with the required plan submitted to and approved by the Commissioner. Finally, petitioner's request for an accelerated hearing is **DENIED WITHOUT PREJUDICE.**

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 does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Patricia M Kerins

May 26, 2010
DATE

PATRICIA M. KERINS, ALJ

/lam/mph

193-10E

OAL DKT. NO. EDU 6318-10
AGENCY DKT. NO. 125-6/10

M.K., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL, BURLINGTON COUNTY,	:	DECISION ON
RESPONDENT.	:	APPLICATION FOR EMERGENT RELIEF

The record of this matter – including the digital recording of the proceedings conducted at the Office of Administrative Law (OAL) – and the recommended decision of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). Most particularly, she has failed to demonstrate a likelihood of success on the merits of the underlying appeal and failed to show that the balance of interests and equities under the circumstances rests in her favor.

Accordingly, the recommended decision of the OAL denying petitioner's application is adopted for the reasons expressed therein. Because the parties have agreed that the present proceeding has fully disposed of all issues in dispute between the parties in this matter, 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/10

Date of Mailing: 6/24/10

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 06318-10

AGENCY DKT. NO. 125-6/10

M.K. ON BEHALF OF MINOR CHILD, J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL, BURLINGTON COUNTY,

Respondent.

M.K., petitioner, appeared pro se on behalf of minor child **J.M.**

Shannon Hudak, Esq., for respondent (Parker McCay, attorneys)

Record Closed: June 23, 2010 Decided: June 23, 2010

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

M.K., the mother of a senior in high school, J.M., filed a petition with the Commissioner of Education seeking to overturn a decision of the respondent Board of Education denying her son permission to participate in the high school graduation ceremony scheduled for Friday evening, June 25, 2010. The Board acted pursuant to a policy that provides that if a student receives a grade of less than 60 in a core subject required for graduation, the student is not permitted to participate in the graduation

ceremony, although he or she is allowed to make "other arrangements" to complete the graduation requirements and thereby become eligible to receive a diploma. In this case, J.M. failed English IV, a core course, during the first half of the school year. He then went to night school, paid for by his mother, and passed the English IV requirements. He is eligible to receive a diploma, but in accordance with the policy, the Board has informed the parent and child that he will not be allowed to participate in Friday's ceremony. Ms. K. argues that the policy is unfair and that it punishes a child who has successfully remedied the failing grade, thus undermining the feeling of achievement that would otherwise come from having obtained the passing grade.

The Board defends its policy as being fair to all students. The school operates on a block scheduling basis. If a child fails a core course in the first half of the school year, he or she can, if they choose, go to night school, as J.M. did, and pass the course, thereby making themselves eligible for a diploma prior to the graduation ceremony. But a child who, through no fault of his or her own, is assigned to take a core course in the second half of the school year, simply has no ability to pursue an alternative means of passing the course prior to the ceremony. While that child may go to summer school after the graduation and complete the requirements for a diploma, he or she cannot do what J.M. could, that is, go the alternate route and pass before the ceremony. In recognition of this, the Board points to a notice provided to students in September 2009, entitled "Graduation Requirements Acknowledgement." This notice, a copy of which it is conceded was signed by J.M. in September 2009, specifically states the policy with emphasis on the graduation ceremony issue.

> I understand that if I am within 10 credits of completing all graduation requirements but I have an average lower than a 60 in any course required for graduation, or if I am more than 10 credits from completing all graduation requirements, **I will not be permitted to participate in the graduation ceremony** and I must make other arrangements to complete graduation requirements in the future.

A letter was sent to parents in February 2010 enclosing a copy of this "graduation contract signed by your son/daughter." The letter notes that the contract addresses the requirements for participation in the graduation ceremony. The letter notes also that

the contract "has been updated and any requirements that still remain are highlighted," as indeed, the signed document does bear highlighting. Ms. K. is unsure if she received this letter, but does not deny that she may have. At the time she was suffering from a significant medical issue and may have been distracted and have not been aware of the letter, but she concedes that her son mentioned the concern about the prospect of not being allowed to participate in the graduation ceremony and she did inquire about this when he signed up for night school. It is clear that she had notice and awareness in at least February or March that J.M.'s failure in English IV at the very least threatened, if not absolutely barred, his participation in the ceremony. And it is surely clear that he knew of the policy in September, long before he failed the course.

The decision as to whether a student is permitted to participate in a graduation ceremony is within the broad discretion of the Board of Education. The Commissioner of Education will not interfere in such a decision unless the Board has acted in an arbitrary, capricious or unreasonable manner. The actions of a board of education are entitled to a presumption of correctness. It is to be presumed that such actions will be upheld by the Commissioner of Education in the absence of a showing of bad faith, illegal motive or a lack of rational basis. Kopera v. West Orange BOE, 60 N.J. Super. 288 (App. Div. 1960). Emergent relief is only available where the party seeking the relief is able to establish that, in the absence of such relief, irreparable harm is likely to occur, that there is a reasonable likelihood of success on the merits of the underlying claim put forth by the party seeking emergent relief, that the party seeking relief seeks to enforce a legal right to which they have a settled legal right, and where the balance of equities is such that the moving party will suffer greater harm than the opposing party will suffer if the requested relief is denied. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). These predicates for emergent relief are set forth in the conjunctive and therefore all must be met if such relief is to be granted. Here, conceding that there are cases that have split on whether the failure to be able to attend a graduation ceremony involves irreparable harm, the key element that must be considered is the "reasonable likelihood of success." The Board's rationale for not allowing a student to participate who, due to the fortuitous fact of having failed in the first half of the school year, has the ability to pass the course at night, while those who fail in the second half cannot avail themselves of such a pre-graduation opportunity, is sensible and evenhanded. It would

be quite unfair to do otherwise, and no doubt those who had the misfortune to fail in the second half would be quite upset to see a student who failed as they did, but did so in the first half, march while they were sidelined. It is indeed commendable that the child did pass the failed course, and that his mother went out of her way to assure that he could do so at some expense to her, but that does not suggest that in the face of enforcement of an evenhanded policy she has any likelihood of prevailing on the underlying issue, which, after all, in this type of case, is in fact whether he should or should not be permitted to participate. The parties agree that no additional testimony or material would assist either side in presenting the merits of their respective cases.

Based upon the documents offered by the Board, and the arguments of the parent and Board counsel, I **FIND** that J.M. had notice of the policy as set forth in writing at least as early as September 2009, that he signed to acknowledge his having received such notice, that he failed English IV, passed it in the early Spring in night school and that the Board has advised that he cannot participate in the graduation ceremony in accordance with the stated policy. Additionally, I **FIND** that Mrs. K. was made aware of the policy, and her son's concern about it, in either February 2010, or at the latest in March 2010. They knew then that his failure to pass English IV in the regular school, as opposed to doing so through "other arrangements" had an impact on his ability to participate. I **FIND** that the Board policy reasonably treats all students alike regarding their participation if they fail a core course. I **FIND** that there is no reasonable likelihood that the applicant for emergent relief can prevail on the merits of her claim. I also **FIND** that as the legality of the Board's action must be viewed in the broad context of its responsibilities to all students and not merely as to this one student, granting the relief sought and allowing this student to participate despite his failure to pass a core course and his knowledge of the consequence of such failure in respect to the ceremony would cause greater harm to the Board than it would denial of the relief cause to the student. If an exception to the policy were allowed here, the Board would be faced with such demands in the future, when the policy as announced to students is a fair one, notwithstanding that in the specific instances where is must be applied, such as this one, it is no doubt a harsh consequence for the particular student and parent(s) involved.

I **CONCLUDE** that the applicant for emergent relief has failed to establish the grounds upon which such relief can be granted. The application for emergent relied is **DENIED**. The parties having agreed that there is no further evidence to present on the issues in dispute, the contested case will be returned to the Commissioner of Education.

June 23, 2010
DATE

JEFF S. MASIN, ALJ

mjm

194-10

OAL DKT. NO. EDU 13079-09
AGENCY DKT. NO. 285-10/09

IN THE MATTER OF THE TENURE HEARING OF WENDE GREENBERG, SCHOOL DISTRICT OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

After reviewing the record, Settlement Agreement and Mutual Releases, and the Initial Decision of the Office of Administrative Law (OAL), the Commissioner concurs with the Administrative Law Judge that the settlement agreement meets the standards set forth in *N.J.A.C.* 6A:3-5.6 and *In re Cardonick,* 1990 *S.L.D.* 842 (State Board 1983) for the settlement of tenure matters. Accordingly, the Initial Decision approving the settlement is adopted 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: 6/25/10

Date of Mailing: 6/25/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 13079-09
AGENCY DKT. NO. 285-10/09

IN THE MATTER OF THE TENURE HEARING OF DR. WENDE GREENBERG, SCHOOL DISTRICT OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY

Jeffrey Merline, Esq., for petitioner Village of Ridgewood School District, Bergen County (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Judson L. Hand, Esq., for respondent Dr. Wende Greenberg

Record Closed: April 23, 2010 Decided: May 20, 2010

BEFORE **DANIEL B. MC KEOWN, ALJ** (t/a)

STATEMENT OF THE CASE

On December 7, 2009, the Board of Education of the Village of Ridgewood School District, Bergen County (Board), certified to the Commissioner of Education for disposition under *N.J.S.A.*18A:6-11 tenure charges of unbecoming conduct, insubordination, incapacity, and other just cause against Dr. Wende Greenberg (respondent), a teacher with a tenure status in its employ. Indeed, respondent had been in the Board's employ for 20 years. Respondent was suspended without pay under *N.J.S.A.*18A:6-14 pending disposition of the charges against her. The Commissioner of Education transferred the matter as a contested case which was

received by to the Office of Administrative Law on November 6, 2009. The matter was 1initially assigned the Honorable Joseph Paone, who was subsequently appointed to the New Jersey Superior Court. The matter w as reassigned this administrative law judge
on or about January 29, 2010. A hearing was scheduled to be conducted March 22, 2010. However, prior to the commencement of hearing the parties settled the matter and set out in writing the specific terms of the settlement as is required under N.J.A.C. 6A:3-5.6(a).

For the reasons that follow, I **FIND** and **CONCLUDE** the written terms of the settlement, approved by the parties, is an acceptable settlement of the tenure charges.

BACKGROUND

The Board certified the tenure charges against respondent on December 7, 2009. Prior to that date, however, the superintendent notified respondent on September 18, 2009, in writing, that tenure charges had been filed against her and that she had fifteen days within which to file an Answer to the charges. The superintendent also stated that the Board would then have 45 days within which to determine whether probable cause exists to credit the evidence in support of the charges and, if so, whether such conduct would warrant some discipline to be imposed by the Commissioner of Education. The superintendent concluded this writing by stating that should probable cause be determined to exist that, he, the superintendent, would certify the charges to the Commissioner for determination.

The authority to certify tenure charges to the Commissioner of Education for determination rests with the employing board of education. In this case, respondent had asked for additional time to file an Answer to the tenure charges. Respondent did not file an Answer. On December 7, 2009, the Board having considered the charges against respondent in light of the statement of evidence in support thereof, determined to certify the charges to the Commissioner for determination. At the same meeting, the Board determined to suspend respondent from her teaching duties pending disposition of the charges.

PROPOSED SETTLEMENT

The parties did reach an amicable settlement, the terms of which are incorporated into a written agreement attached hereto and incorporated herein. Counsel to the parties have detailed each and every provision of the settlement and have addressed all standards required in such matters.

The agreement, approved by the Board on April 13, 2010, and by respondent on March 29, 2010,.calls for the resignation of respondent from the Board's employ, effective June 30, 2010 at which time she will seek retirement from the Teachers' Pension and Annuity Fund. In the meantime, the Board, pending disposition of the matter by the Commissioner of Education, agrees to resume respondent's salary on April 6, 2010, as is required under N.J.S.A.18A:6-14. Should the Commissioner approve this settlement of the charges, the Board would then consider respondent to have been on a paid medical leave as of February 1, 2010, through June 30, 2010, the date of her intended resignation and retirement. The settlement agreement calls for no admission of liability by either side, general releases from future liability for conduct arising from this case, and other standard provisions of settlement agreements.

The acceptance of settling agreements in public school tenure cases are governed by the cited New Jersey Administrative Rule above.

N.J.A.C. 6A:3-5.6(a) provides as follows:

> Once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):

1. Accompaniment by documentation as to the nature of the charges;
2. Explication of the circumstances justifying settlement or withdrawal;
3. Consent of both the charges and charging parties;\indication that the charged party entered into the agreement with a full understanding of his or her rights;
4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;
5. A showing that the agreement is in the public interest; and
6. Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Applying those standards to the present case, the Statement of Charges against respondent reveals the following. None of the 16 specifications to the charge of Unbecoming Conduct, or Charge One, relate to an incident that may be considered moral turpitude, or dishonesty, or improper physical or emotional misconduct towards students or to anyone else. The specifications do allege an antagonistic attitude towards staff and students, and various failures to follow administrative rules and regulations regarding her role as a teacher including reporting for scheduled instruction periods, using student computers without authorization, failing to meet with the building principal, bringing her dogs to school without prior approval, and so on.

Charge Two, the charge of Insubordination, carries two specifications, one of which includes the specifications set above regarding unbecoming conduct, while the second specification addresses in the main respondent's alleged failures to follow administrative directives related to her role as a teacher. Charge Three, Incapacity, incorporates the specifications to the first two charges, and an additional specification

that respondent engaged in the abandonment of student supervision, engaged in unacceptable use of Friday and Monday absences, failed to report for scheduled instruction periods, and failed to submit medical examinations, and an alleged failure to submit "an HIPAA-Compliant Authorization form". Charge Four, Other Just Cause, merely incorporates the specifications to Charges One, Two, and Three.

An essential component of respondent's defense to the charges is to be based on her medical condition. Respondent asserts she is subject to mental illness making her prone to episodes of paranoia. Respondent claims this illness is treatable and has been aggravated by the conduct of the school environment as created by school administrators and others. Respondent claims she has been harassed by school personnel and by the Board for, at best, minor rule infractions. Respondent had a psychiatric examination, but the Board did not receive the evaluation until after it had filed the tenure charges.

A term of the proposed settlement of the matter includes respondent's irrevocable resignation from the Board's employ, effective June 30, 2010, subject to the approval of this settlement by the Commissioner of Education. The nature of the charges as discussed above do not constitute complained of behavior that demands a public hearing into the truth or falsity of the allegations, in light of respondent's resignation. Rather, if required to proceed to hearing, more than three days would be required for both sides to present their case. During such a lengthy hearing would take witnesses away from their school duties, and would incur legal costs thereby taking scarce resources away from school programs for diversion to an expense not called for in the total circumstances of this case.

These circumstances, **I FIND** in addition to the details of salary payment to which respondent is to be entitled by law and as more fully explained in the attached settlement, do justify allowing this case to be settled under the terms specified by the parties in the attached document.

The parties accepted the terms of the settlement, and have knowingly and voluntarily accepted those terms as a full and final disposition of the matter. Respondent acknowledges the duty of the Commissioner to refer tenure matters to the

State Board of Examiners for possible suspension or revocation of her certificates to teach and is aware and accepts that that referral is a contingency in this matter.

FINDINGS AND CONCLUSIONS

I **FIND** and **CONCLUDE** that while the Board certified tenure charges to the Commissioner of Education for determination seeking respondent's removal from its employ, that respondent has been in its employ for more than 20 years, and that no one of the charges allege moral turpitude, dishonesty, or relate to physical or emotional misconduct with a student or any other person, that a full hearing into the matter would consume costs better spent in the furtherance of a school program, that the result sought by the Board of ending the employment relationship between it and respondent would be achieved by this settlement, that the public interest is better served in accepting the settlement than requiring a financial burden on the Board, the agreement reached by the parties and as attached hereto, is an acceptable resolution in this matter.

Therefore, the attached settlement agreement is accepted as a full and final disposition of the matter. The parties are directed to comply with the terms of the settlement as stated in their agreement.

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

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

May 20, 2010
DATE

DANIEL MC KEOWN ALJ (t/a)

Date Received at Agency: 5-24-10

Date Mailed to Parties: MAY 24 2010

Laura Dardes

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF THE TENURE MATTER OF WENDE GREENBERG, RIDGEWOOD PUBLIC SCHOOLS, BERGEN COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO.: EDU 13079-2009N AGENCY DKT. NO.: 285-10/09 **SETTLEMENT AGREEMENT AND MUTUAL RELEASES**

WHEREAS, the Board of Education of the Ridgewood School District, ("the Board"), having administrative offices located at 49 Cottage Place, Ridgewood, New Jersey is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, and is empowered, under N.J.S.A. 18A:11-1 & 2, to do all things and take all actions to ensure the proper operation and management of the School District, consistent with law and the regulations of the State Board of Education; and

WHEREAS, Wende Greenberg ("Dr. Greenberg" or "Respondent") for the past 20 years has been employed by the Board as a tenured English teacher; and

WHEREAS, on September 18, 2009, Dr. Daniel Fishbein, Superintendent of Schools, filed sworn tenure charges of unbecoming conduct, insubordination, incapacity, exhibiting a series or pattern of unbecoming incidents and other just cause against Dr. Greenberg, together with a sworn statement of evidence in support of the charges, with Angelo J. DeSimone, Board Secretary; and

WHEREAS, the Board determined to certify the said Charges to the state Commissioner of Education (the "Commissioner") on December 7, 2009, as well as to suspend Dr. Greenberg at that time for 120 days without pay, and

WHEREAS, the Commissioner transmitted the within matter to the Office of Administrative Law, as a contested case; and

WHEREAS, a hearing was set in this case for March 22, 23 and 24, 2010 before the Hon. Daniel McKeown, A.L.J. (t/a); and

WHEREAS, Dr. Greenberg has submitted a letter to the Superintendent of Schools, dated March 15, 2010, (attached as Exhibit A) advising that she would be resigning from her employment with the Board effective June 30, 2010, contingent upon the approval by the Commissioner of this Settlement Agreement and Mutual Releases (the "Agreement"); and

WHEREAS, following extensive discovery, the parties now have determined that it is in their mutual best interest, as well as in the public interest, to compromise their claims through this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, the parties, wishing to resolve the within matter without the need for further litigation, while achieving the goals of both parties and protecting the public interest, hereby stipulate to settle same. Subject to the terms and conditions set forth herein, and to approval by the Court and the Commissioner, they agree as follows:

1. **Tenure Charges to be Moot**

The Board agrees that, upon execution of this Agreement by the parties, Dr. Greenberg's fulfillment of the obligations set forth herein, and final approval by the Commissioner, the subject tenure charges shall be moot and shall be abandoned.

2. **Resignation**

Dr. Greenberg, by submitting her letter of March 15, 2010 attached hereto as Exhibit A, has tendered her irrevocable resignation for the purpose of retirement from all employment with the Board, effective as of the close of business on June 30, 2010, subject only to the Commissioner's approval of the Agreement. This resignation from all employment by the Board shall remain irrevocable and in effect notwithstanding any denial, or approval and subsequent denial, or any disability pension for which Dr. Greenberg may apply.

3. **Payment**

Dr. Greenberg's current suspension without pay expires on or about April 6, 2010. As of on or about that date, she shall be paid with benefits, including medical benefits, until either the Commissioner approves the Agreement or a final determination is made on the tenure charges. Effective as of approval by the Commissioner, and in view of Dr. Greenberg's medical condition, she shall be and hereby is placed on paid medical leave, with medical and dental insurance benefits, as of February 1, 2010 through the date of her intended retirement, June 30, 2010. Upon her retirement, Dr. Greenberg shall receive payment for any unused sick days to the extent that she is qualified pursuant to the collective bargaining agreement between the Board and the Ridgewood Education Association. The Board not less than 14 days before that date shall provide Dr. Greenberg with an accounting of her sick days, which will include days she received on September 1, 2009.

4. **No Admissions**

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

5. **Mutual General Releases**

Except as otherwise prohibited by law, and contingent upon the approval of the Agreement by the Commissioner, the Parties hereby release, waive and forever discharge any and all past, present or future claims that related to any action that predates this Agreement that they may have against each other as follows, subject only to approval of the Agreement by the Commissioner, as set forth more fully in the releases attached respectively as Exhibit B (by Dr. Greenberg) and Exhibit C (by the Board).

6. **Stipulation as to Justification of Settlement**

Pursuant to *N.J.A.C.* 6A:3-5.6, the parties hereby stipulate that the within Agreement comports with the standards established by the State Board of Education in *In re Cardonick*, 1990 SLD 842, 846.

A. Accompaniment by documentation as to the nature of the charges.

The Sworn Tenure Charges are annexed hereto as Exhibit D.

B. Explication of the circumstances justifying settlement or withdrawal.

(i) The first day of hearing for this matter was scheduled for March 22, 2010. Additional hearing dates were scheduled for March 23 and 24, 2010. The parties, having reached an understanding on key settlement terms, so advised the Court on Wednesday, March 17, 2010. Assuming that the hearing was to have taken place as scheduled originally, the parties anticipated several dozen witnesses and many additional days of testimony. Assuming that all of the requisite statutory timelines were followed for the submission of post-hearing briefs, the ALJ's Initial Decision and the Commissioner's Decision, it is likely that the matter would not have been resolved until late September or early October. Under the terms of the proposed Agreement, Dr. Greenberg's resignation would become effective by the end of June, several months earlier. In addition, as her 120-day suspension is due to expire on or about April 6, 2010, the five additional months of pay she might receive under this Agreement would likely be largely offset because she would have been paid anyway during the period from April 6, 2010 through June 30, 2010. In addition, the conduct of the hearing and related proceedings, plus a possible appeal to the Appellate Division from the

Commissioner's decision, would increase those costs to the Board substantially. Such costs would be avoided under the Agreement. The Board, therefore, and would achieve a guaranteed result at a relatively small cost.

(ii) The within matter involves extensive medical expert testimony which will cost both parties significant sums of money and is expected to result in a complicated hearing and extensive post-hearing briefing.

(iii) Just prior to the filing of tenure charges, the Board requested that Dr. Greenberg undergo a psychiatric evaluation, because the Board had concerns about whether her performance as a teacher was affected by some sort of mental condition. Due to Dr. Greenberg's initial objections to the psychiatrist initially chosen, Dr. Vicki Fiore of Englewood, N.J. and to ongoing discussions about Dr. Greenberg's possible retirement, the Board did not receive a medical report until after it filed tenure charges. During the pendency of the tenure charges, the Board received the examination report of Dr. Greenberg's chosen psychiatrist, Dr. Francis Mondimore of Johns Hopkins Hospital in Baltimore, Md. At the Board's request, Dr. Fiore has also examined Dr. Greenberg. The Board has concluded, based upon these examinations, that many or most of the incidents described in the tenure charges were likely brought about or made worse by a mental condition that would likely benefit from treatment. Furthermore, throughout most of her 20 years of teaching at Ridgewood, evaluations of Dr. Greenberg's classroom performance have ranged from "satisfactory" to "outstanding," with her recent troubles largely related to her mental condition.

C. Consent of both the charged and the charging parties.

The parties have mutually consented to the resolution contained herein. The Board Resolution approving the Agreement is annexed hereto as Exhibit E.

D. Indication that the charged party entered into the agreement with a full understanding of her rights.

Dr. Greenberg has been represented by independent legal counsel throughout. The terms and conditions of the within Agreement have been fully explained to her and she hereby indicates her understanding and acceptance of same by signing this Agreement and represents further that she does so of her own free will and accord, and without duress, and that she is fully satisfied with the legal representation she has received.

E. The agreement is in the public interest.

As discussed above, the Agreement would be highly cost effective to the Board and, therefore, to the taxpayers. This is especially significant in light of the state's recently proposed substantial cuts in funding to school districts. Second, the terms of this Agreement fully achieve the Board's original objective of removing Dr. Greenberg from her tenured teaching position. Were the Board to proceed with the litigation, it is uncertain whether this goal could be fully achieved. Third, should the Agreement be approved by the Commissioner, Dr. Greenberg intends to apply for a disability pension. Therefore, should Dr. Greenberg ever wish to return to teaching in New Jersey, it would be after her mental ailment was properly treated and properly accommodated, so that her mental condition would likely not interfere with her teaching performance. Throughout most of her 20 years of teaching at Ridgewood, evaluations of Dr. Greenberg's classroom performance have ranged from "satisfactory" to "outstanding," with her recent troubles largely related to her mental condition.

F. Commissioner's duty to refer matter to State Board of Examiners for possible suspension or revocation of certificate.

Dr. Greenberg hereby acknowledges that she has been apprised of the Commissioner's duty to refer tenure matters to the State Board of Examiners for possible suspension or revocation of her certificate(s), notwithstanding the settlement of the subject tenure proceeding, and that she knowingly accepts that contingency in entering into this Agreement.

7. Application For Pension And/Or Disability Benefits

To the extent permitted by law, the Board agrees to cooperate with any application for pension benefits and/or disability income submitted by Dr. Greenberg, including without limitation applications to the New Jersey Teachers Pension and Annuity Fund and the federal Social Security Administration. The Board will not cooperate with any accidental disability pension application by Dr. Greenberg and she hereby waives any claim against the Board for damages or any other relief based on work-related illness, injury or disability.

8. Entire Agreement

This Agreement contains the entire agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except to the extent that the Agreement must be approved by the state Commissioner of Education and to the extent that the Parties reserve their right to enforce this Agreement, if necessary.

9. Choice Of Law

This Agreement shall be governed by the laws of the State of New Jersey and disputes involving the enforcement of this agreement may be brought only in the state or federal courts of New Jersey.

10. Severability

If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

11. Binding Effect

The Parties shall be bound by the terms and conditions of this Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

12. Voluntary Agreement

The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

13. Modifications

This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by both Parties.

14. No Drafting Presumption

The parties hereby agree that this Agreement was drafted with substantial input from counsel for each party. Therefore, in any construction or interpretation of the Agreement, neither party is entitled to a presumption regarding the other party's drafting of the Agreement.

15. Admission of Liability

It is understood that neither the execution of this Agreement nor any other action taken by either party in connection with this Agreement constitutes an admission by that party or any other person or entity identified in the General Releases and Waiver as a releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to Dr. Greenberg's employment was unwarranted, unjustified, retaliatory, discriminatory, arbitrary or otherwise unlawful. The Parties have entered into this Agreement solely to compromise disputed claims.

16. **Opportunity to Consult With Counsel**

Dr. Greenberg acknowledges that she has the opportunity to consult with her legal counsel and representatives of her choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that she represents that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Dr. Greenberg has also acknowledges that she has been given a reasonable period of time within which to consider the terms of this Agreement and General Release and Waiver prior to executing them.

17. **Breach**

If either party breaches this agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including reasonable attorneys' fees.

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:

Wende Greenberg
WENDE GREENBERG

Date: 3/29/10

STATE OF MASSACHUSETTS :
: SS:
COUNTY OF BERKSHIRE :

I CERTIFY that on March 29, 2010, Wende Greenberg personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document.

Dated: March 29, 2010

By: Harold S. Wong

HAROLD S. WONG
Notary Public
Commonwealth of Massachusetts
My Commission Expires
August 20, 2016

FOR THE RIDGEWOOD BOARD OF EDUCATION:

Date:

JOSEPH VALLERINI, BOARD PRESIDENT

ATTEST:

Date: 4-13-10

ANGELO J. DESIMONE,
Board Secretary

Wende L. Greenberg
37 Bliss Street
North Adams, MA 01247

March 15, 2010

Dr. Daniel Fishbein, Superintendent
Ridgewood Board of Education
49 Cottage Place
Ridgewood, New Jersey 07451

RE: Contingent Letter of Retirement

Dear Dr. Fishbein:

I hereby submit my resignation from my employment with the Ridgewood Board of Education (the "Board"), effective June 30, 2010. This resignation is contingent upon the approval by the state Commissioner of Education of the settlement agreement between the Board and me in regard to the tenure charge matter now pending.

Respectfully submitted,

Wende Greenberg

Wende Greenberg

cc: Joseph Tondi, Ridgewood Education Association (via email)

GENERAL RELEASE AND WAIVER BY DR. GREENBERG

In consideration for the promises and undertakings described in the Separation of Service Agreement dated March 29, 2010, and except as otherwise provided by law, I hereby release, waive and discharge the Ridgewood Board of Education, and its present and former board members, officers, employees and representatives, and their estates and/or heirs thereof from any and all claims which I, my estate and/or heirs may have against any of them. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now, including my personal claims (but not the claims of the Law Offices of Alan L. Zegas) for attorneys' fees in the action presently pending before the Office of Administrative Law bearing Docket No. EDU-07538-2009N.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted by me. I also release and waive all claims relating to or arising out of any aspect of my employment to date with the Ridgewood Board of Education, including but not limited to, all claims under Title VII of The Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Retirement Income Security Act of 1974; the Immigration Reform Control Act; the Fair Labor Standards Act; the Occupational Safety and Health Act; the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Americans with Disabilities Act; the Family and Medical Leave Act of 1993; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Act, and any related federal, state or local law claims, and any claims of discrimination based on race, age, sex, religion, color, creed, handicap or disability, citizenship, national origin and any other

factor prohibited by any federal, state or local law, rule, regulation or guideline; any claim for wrongful discharge; any contract of employment, express or implied; any provision of the Constitution of the United States or the State of New Jersey; and any other law, common or statutory, of the United States, the State of New Jersey or any other state; any claims for the negligent and/or intentional infliction of emotional distress or specific intent to harm; any claims for attorneys' fees, costs and/or expenses; any claims for unpaid or withheld wages, severance pay, benefits, bonuses, deferred compensation, stock option awards, restricted stock awards, commissions and/or other compensation of any kind; and/or any other federal, state or local human rights, civil rights, wage and hour, wage payment, pension or labor laws, rules and/or regulations, and all claims growing out of any legal restrictions on the Ridgewood Board of Education's right to hire and/or terminate its employees, including all claims that were asserted and/or that could have been asserted by me in this cause of action.

I acknowledge that the parties also promise not to sue and waive all claims against each other based upon any claims covered by the Separation of Service Agreement and this General Release and Waiver. If one party breaches this promise by suing the other for any such claims, the breaching party will pay all costs and expenses the other party incurs defending against the suit, including reasonable attorneys' fees and costs. Notwithstanding the foregoing, the Parties reserve their right to enforce the terms of the Separation of Service Agreement and General Release and Waiver.

I acknowledge that I was advised to consult with attorneys regarding this General Release and Waiver; and that I have read this General Release and Waiver and fully understand it and agree to be bound by it. I also acknowledge that I have been given a reasonable period of time

within which to consider this Agreement and the terms of this General Release and Waiver prior to executing it.

ACKNOWLEDGMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE AND WAIVER WITH ANYONE OF MY CHOOSING, AND TO DISCUSS WITH SUCH PERSONS THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER AND MY RIGHTS UPON EXECUTION. I AGREE AND ACKNOWLEDGE THAT NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE WERE MADE BY THE RIDGEWOOD BOARD OF EDUCATION OR ITS ATTORNEYS OTHER THAN AS SET FORTH IN THE DOCUMENT AND THAT I HAVE VOLUNTARILY SIGNED THIS RELEASE AND WAIVER AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME.

DATED: Wende Greenberg
WENDE GREENBERG

STATE OF MASSACHUSETTS :
:-SS:
COUNTY OF BERKSHIRE :

I CERTIFY that on March 29, 2010, Wende Greenberg personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document.

Dated: March 29, 2010 By: Harold S. Wong

HAROLD S. WONG
Notary Public
Commonwealth of Massachusetts
My Commission Expires
August 20, 2010

RIDGEWOOD
PUBLIC SCHOOLS

Dr. Daniel Fishbein
Superintendent of Schools

DFishbein@ridgewood.k12.nj.us
201-670-2700
Fax: 201-670-2668

September 18, 2009

VIA FEDEX
Dr. Wende Greenberg
37 Bliss Street
North Adams, MA 01247

Dear Dr. Greenberg:

You are herewith advised that Tenure Charges of the following: Unbecoming Conduct; Insubordination; Incapacity; Exhibiting a "Series" or Pattern of Unbecoming Incidents; and other Just Cause (the "Charges") have this day been filed against you. Enclosed please find one (1) copy of each of the following: 1) Statement of Charges; 2) Statement of Evidence in Support of Charges; and 3) Appendix of Exhibits Supporting the Statement of Evidence.

You are further advised that pursuant to N.J.S.A. 18A:6-11, you are granted the opportunity to submit a written statement of position and a written statement of evidence under oath with reference to the filed charges. You shall have fifteen (15) days from the date of receipt of this letter to submit your written position and documentation in support thereof.

Further, please be advised that at the expiration of that time, pursuant to statute, the Ridgewood Board of Education shall consider the charges and the statement of evidence that you have submitted, and make a determination within 45 days as to whether there is probable cause to credit the evidence in support of the charges and whether, if such charges are credited, they are sufficient to warrant dismissal or reduction in salary. In the event of a determination of probable cause, I will certify the matter to the Commissioner of Education for hearing, pursuant to N.J.S.A. 18A:6-16.

You will be notified in writing the determination of the Board of Education.

Very truly yours,

Dr. Daniel Fishbein
Superintendent of Schools

Cc: Judson L. Hand, Esq. (Via Fedex)
G. Hall
Personnel file

STATEMENT OF CHARGES

I, Dr. Daniel Fishbein, Superintendent of the Ridgewood Public Schools (the "District"), do herewith charge Dr. Wende Greenberg, a tenured teacher employed by the Ridgewood Board of Education at Ridgewood High School, with UNBECOMING CONDUCT; INSUBORDINATION; INCAPACITY; EXHIBITING A SERIES OR PATTERN OF UNBECOMING INCIDENTS; and other JUST CAUSE pursuant to N.J.S.A. 18A:6-10, et. seq., sufficient to require termination of her employment with the Ridgewood Board of Education.

CHARGE ONE

Dr. Greenberg engaged in conduct unbecoming a teacher at Ridgewood High School. (Exhibits 1 through 47) She has, among other things:

1. threatened and/or exhibited antagonistic behavior towards staff and students, including incidents occurring in November 2002 (Ex. 1), April 2005 (Exs. 5-7), September 2006 (Exs. 8-9), October 2008 (Ex. 21), December 2008 (Exs. 26-29), January 2009 (Exs. 30-32), and June 2009 (Exs. 38-41);

2. failed to report for scheduled instruction periods in 2004-2005 School Year (Exs. 2-4);

3. inappropriately used student computers in October 2008 (Exs. 22-23);

4. failed to respond to the Building Principal's directive to schedule a meeting with the Building Principal in October 2008 (Ex. 23);

5. failed to follow proper procedures for requesting approval of field trips and professional leave in the Fall of 2008 (Ex. 24);

6. exhibited unacceptable "Friday and/or Monday" absence patterns and failed to use AESOP substitute assignment system during the 2008-2009 School Year (Exs. 25; 35-36);

7. failed to properly use the AESOP substitute system in 2004-2005 and 2005-2006 School Years as well (Ex. 2, Exs. 10-12);

8. inappropriately brought her dogs to work (Ex. 13);

9. improperly confiscated a student's cellular telephone (Exs. 13-19);

10. refused to send a student from her class to the Grade Advisor's office when requested to do so via Public Announcement system in January 2009 (Ex. 31);

11. abandoned her student supervision responsibilities in July 2007 (Ex. 12) and in January 2009 (Exs. 30-32);

12. failed to keep her district e-mail account storage clear enough to receive important work-related messages during the 2008-2009 School Year (Ex. 33);

13. failed to submit to a psychiatric and physical medical examination(s) by District-designated doctors, at District expense, as authorized by N.J.S.A. 18A:16-2 in the Summer of 2009 (Exs. 42-46);

14. failed to supply the District with a HIPAA-compliant "Authorization for Health Information Disclosure form for the District to assess her fitness for work for the 2009-2010 School Year (Exs. 42-26);

15. failed to communicate with District Administration to develop an appropriate 2009-2010 School Year Action Plan that facilitates her effective return to work (Exs. 42-26); and

16. has engaged in other conduct that provides just cause sufficient to require that her employment with the Ridgewood Board of Education be terminated (Exs. 1-47).

WHEREFORE, Dr. Greenberg's misconduct as set forth above constitutes unbecoming conduct and other sufficient cause sufficient to warrant dismissal.

CHARGE TWO

Dr. Greenberg acted in insubordination as a teacher at Ridgewood High School. (Exhibits 1 through 47) She has, among other things:

1. The allegations in Charge One are incorporated by reference as if set forth at length herein.

2. Dr. Greenberg's failure to follow directives, including failing to report for scheduled instruction periods; failure to respond to Building Principal meeting requests; failure to follow field trip and professional leave approval procedures; failure to use the AESOP substitute system; refusal to send a student in her class to the Grade Advisor's office; failure to keep her e-mail account storage clear; failure to submit to a medical examination; failure to submit a HIPAA-Compliant Authorization form; and failure to communicate with the

Administration regarding development of an Action Plan, are all examples of insubordination constituting just cause for her dismissal.

WHEREFORE, Dr. Greenberg's insubordination as set forth above constitutes unbecoming conduct and other sufficient cause sufficient to warrant dismissal.

CHARGE THREE

Dr. Greenberg has demonstrated incapacity as a teacher at Ridgewood High School. (Exhibits 1 through 47) She has, among other things:

1. The allegations in Charges One and Two are incorporated by reference as if set forth at length herein.

2. Dr. Greenberg's abandonment of student supervision; unacceptable use of Friday/Monday absences; failure to report for scheduled instruction periods; and failure to submit to a medical examination or submit an HIPAA-Compliant Authorization form are all examples of incapacity constituting just cause for her dismissal.

WHEREFORE, Dr. Greenberg's incapacity as set forth above constitutes unbecoming conduct and other sufficient cause sufficient to warrant dismissal.

CHARGE FOUR

Dr. Greenberg has exhibited a pattern of unbecoming incidents as a teacher at Ridgewood High School. (Exhibits 1 through 47) She has, among other things:

1. The allegations in Charges One, Two and Three are incorporated by reference as if set forth at length herein.

WHEREFORE, Dr. Greenberg's pattern of unbecoming incidents as set forth above constitutes unbecoming conduct and other sufficient cause sufficient to warrant dismissal.

Dr. Daniel Fishbein, Superintendent
Ridgewood Public Schools

Sworn and Subscribed
Before Me This 18th
Day of Sept., 2009

JOAN C. HARTMANN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Sept. 26, 2013

STATEMENT OF EVIDENCE

Documentary evidence in support of the charges that Dr. Wende Greenberg is guilty of Unbecoming and Unprofessional Conduct is found in correspondence, investigation reports, and other materials prepared by the Ridgewood Board of Education. These materials are contained in the Appendix of Exhibits attached hereto.

Dr. Daniel Fishbein, Superintendent
Ridgewood Public Schools

Sworn and Subscribed
Before Me This 18th
Day of Sept , 2009

JOAN C. HARTMANN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Sept. 26, 2013

APPENDIX OF EXHIBITS

No.	Date	Description

1. 01/15/2003 Correspondence from Robert A. Weakley, Director of Human Resources to Dr. Greenberg regarding harassment complaint

2. 06/01/2004 Correspondence from Brian M. Bulger, Manager of Human Resources and Quality Improvement to Dr. Greenberg regarding professional behavior

3. 06/10/2004 Correspondence from Brian M. Bulger, Manager of Human Resources and Quality Improvement to Dr. Greenberg confirming meeting regarding professional behavior

4. 06/25/2004 Correspondence from Brian M. Bulger, Manager of Human Resources and Quality Improvement to Dr. Greenberg regarding request for medical evaluation

5. 04/06/2005 Memorandum from Dr. John Mucciolo, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding harassment complaint

6. 06/07/2005 Memorandum from Dr. John Mucciolo, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding office protocol

7. 07/25/2005 Correspondence from Dr. John Mucciolo, Office of the Principal, Ridgewood HS and Jane Blakely, Area Supervisor, English and Social Studies to Dr. Greenberg regarding summative evaluation for 2004-2005

8. 09/14/2006 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Brian M. Bulger, Manager of Human Resources and Quality Improvement regarding Dimitriadis Incident of September 1, 2006

9. 09/19/2006 Correspondence from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding professional behavior

10. 09/25/2006 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Brian M. Bulger, Manager of Human Resources and Quality Improvement regarding dates of absence May 25th and May 26th 2006

11. 09/27/2006 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Substitute Procedures/Arrival Times

12 07/23/2007 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Early Dismissal

13. 07/24/2007 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding concerns, professional behavior, phone incident

14. Unknown Hand written notes from Dr. Wende Greenberg regarding phone incident

15. 07/05/2007 Duplication of item 14, signed and dated by Peg Loonam, regarding phone incident

16. 07/05/2007 Typed notes from Basil Pizzuto regarding phone incident

17. 07/17/2007 Hand written notes from Christopher Metzger regarding phone incident

18. 07/24/2007 Typed notes from Peg Loonam regarding meeting with Dr. Greenberg: Discussion of Jury Duty, Early Dismissal, and Phone Incident

19. 07/26/2007 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Brian M. Bulger, Manager of Human Resources and Quality Improvement regarding Greenberg Phone Incident

20. 12/18/2007 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding insubordination

21. 10/23/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding harassment complaint of Oct. 21, 2009

22. 10/23/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding computer usage

23. 10/29/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding meeting request

24. 11/05/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Field Trip Procedures

25. 11/11/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding meeting of November 11, 2008

26. 12/15/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Professional Behavior Incident

27. 12/18/2008 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding meeting of December 18, 2009

28. 12/11/2008 Typed notes from Matt Cheplic to Jane Blakely, regarding harassment incident December 10, 2008

29. 12/11/2008 Typed notes from Kate Pinches regarding harassment incident of December 10, 2008

30. 01/27/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Fay Shields Incident on January 15, 2009

31. 01/30/2006 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Grade Level Advisor request

32. 02/11/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding meeting of February 4, 2009 and discussion of Fay Shields Incident

33. 02/22/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding email communications

34. 04/01/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding meeting request for April 2, 2009

35. 05/18/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding absences

36. 05/19/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding absence of May 18, 2009

37. 06/08/2009 Memorandum from John A. Lorenz, Office of the Principal, Ridgewood HS to Dr. Greenberg regarding Student Incident

38. 06/09/2009 Correspondence from Dr. Daniel Fishbein to Dr. Greenberg regarding professional conduct and/or performance

39. 06/09/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding RICE Notice

40. 06/19/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding Increment Withholding for 2009-2010 and Medical Evaluation Directive

41. 07/07/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding Increment Withholding for 2009-2010 and Medical Evaluation Directive

42. 07/14/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding Medical Evaluation (Psychiatric)

43. 07/29/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding Medical Evaluation (Psychiatric) – Follow-Up

44. 08/03/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding Medical Evaluation (Psychiatric) – Clarification

45. 08/10/2009 Correspondence from Gary P. Hall, Manager of Human Resources to Dr. Greenberg regarding Medical Examination (Psychiatric) – Follow-Up

46. 08/21/2009 Correspondence from Dr. Daniel Fishbein, Superintendent to Dr. Greenberg regarding Medical Examination (Psychiatric) – Follow-Up

47. 2008-2009 Mission Statement and School Philosophy

EXCERPT FROM THE MINUTES OF A REGULAR MEETING OF THE BOARD OF EDUCATION OF RIDGEWOOD BERGEN COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session Monday, April 12, 2010 at 7:31 p.m. in the Education Center, 49 Cottage Place, Ridgewood, New Jersey.

The following members of the Ridgewood Board of Education were present:

Ms. Sheila Brogan; Ms. Laurie Goodman; Ms. Michele Lenhard; Mr. Robert Hutton, Vice-President; Mr. Joseph Vallerini, Board President

The following members were absent: None

VI. CONSENT ITEMS

D. HUMAN RESOURCES

vii. <u>Approval: Settlement Agreement</u>
It is recommended that the Board approve a settlement agreement between the Board and Employee No. 017388 to resolve litigation.

Ms. Brogan moved approval of Consent Item D – Human Resources.

Ms. Lenhard seconded the motion, which carried by the following roll-call vote:

AYES: Ms. Brogan, Ms. Goodman, Ms. Lenhard, Mr. Hutton, Mr. Vallerini

NAYES: None

I certify that this is a true and correct excerpt from the Ridgewood Board of Education minutes.

4/13/10
Date

Jennifer Daviet
Assistant Board Secretary

EXCERPT FROM THE MINUTES OF A REGULAR MEETING OF THE BOARD OF EDUCATION OF RIDGEWOOD BERGEN COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session Monday, April 12, 2010 at 7:31 p.m. in the Education Center, 49 Cottage Place, Ridgewood, New Jersey.

The following members of the Ridgewood Board of Education were present:

Ms. Sheila Brogan; Ms. Laurie Goodman; Ms. Michele Lenhard; Mr. Robert Hutton, Vice-President; Mr. Joseph Vallerini, Board President

The following members were absent: None

VI. CONSENT ITEMS

D. HUMAN RESOURCES

ii. **Resignations for the Purpose of Retirement**
Employee No. 017388 – effective July 1, 2010, contingent upon approval by the Commissioner of Education of a Settlement Agreement.

Ms. Brogan moved approval of Consent Item D – Human Resources.

Ms. Lenhard seconded the motion, which carried by the following roll-call vote:

AYES: Ms. Brogan, Ms. Goodman, Ms. Lenhard, Mr. Hutton, Mr. Vallerini

NAYES: None

I certify that this is a true and correct excerpt from the Ridgewood Board of Education minutes.

4/13/10
Date

Jennifer Daviet
Assistant Board Secretary

EXCERPT FROM THE MINUTES OF A REGULAR MEETING OF THE BOARD OF EDUCATION OF RIDGEWOOD BERGEN COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session Monday, April 12, 2010 at 7:31 p.m. in the Education Center, 49 Cottage Place, Ridgewood, New Jersey.

The following members of the Ridgewood Board of Education were present:

Ms. Sheila Brogan; Ms. Laurie Goodman; Ms. Michele Lenhard; Mr. Robert Hutton, Vice-President; Mr. Joseph Vallerini, Board President

The following members were absent: None

VI. CONSENT ITEMS

D. HUMAN RESOURCES

iii. Leaves of Absence

Employee No. 017388 – personal leave of absence for medical reasons, effective February 1, 2010 through June 30, 2010, contingent upon approval by the Commissioner of Education of a Settlement Agreement.

Ms. Brogan moved approval of Consent Item D – Human Resources.

Ms. Lenhard seconded the motion, which carried by the following roll-call vote:

AYES: Ms. Brogan, Ms. Goodman, Ms. Lenhard, Mr. Hutton, Mr. Vallerini

NAYES: None

I certify that this is a true and correct excerpt from the Ridgewood Board of Education minutes.

4/13/10
Date

Jennifer Daviet
Jennifer Daviet
Assistant Board Secretary

196-10

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.S. AND W.S., on behalf of minor children, A.S. and E.S. and BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner Englewood Cliffs Board of Education appealed the determination of the Bergen County Executive County Superintendent (ECS) that Englewood Cliffs is responsible for providing E.S. and A.S. with a free education and transportation. The ECS concluded that E.S. and A.S. and their parents are homeless and that their last domicile was in Englewood Cliffs rather than Teaneck. Petitioner contended that the family has not been homeless since November 2008 when the family moved to the house Teaneck that they still occupy, and that respondent Teaneck Board of Education is responsible for the children's public education. Respondents claim that the family is homeless, that the Teaneck residence is only temporary; and that they have been forced to remain there because of credit problems.

The ALJ found that: the S. family has lived at the same address on Fairview Avenue in Teaneck for more than seventeen months; the house in which the family resides is small and in need of repairs, but is habitable, and the family had previously lived in the same house from February 2001 until early 2002, before moving to Stuyvesant Avenue in Teaneck from early 2002 through 2006; the family had lived in Englewood Cliffs for less than two years before they were evicted from the house they rented there; and the family does not suffer from the typical financial hardships that are often related to homelessness, as both parents have been steadily employed for many years with a combined annual gross income of approximately $104,000. Accordingly, the ALJ concluded that E.S. and A.S. are not homeless; the Fairview Avenue house has been the family's domicile since November 2008; and the Teaneck Board of Education is the school district responsible for the education and transportation of A.S. and E.S from that date to the present. The ALJ ordered that: E.S. may be disenrolled upon issuance of this final decision; the Teaneck Board of Education must reimburse the Englewood Cliffs Board of Education for the costs of E.S.'s education and transportation since November 2008; and respondents W.S. and E.S. must reimburse the Englewood Cliffs Board of Education for the costs of transporting A.S. to her private high school.

Upon full and careful consideration, the Commissioner concurred with the ALJ's determinations, 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 30, 2010

OAL DKT. NO. EDU 11601-09
AGENCY DKT. NO. 184-8/09

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.S. AND W.S., on behalf of minor children, A.S. and E.S. and BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full review, the Commissioner concurs with the Administrative Law Judge that the Fairview Avenue, Teaneck, N.J. house has been the domicile of E.S. and W.S. since November 1, 2008 and, therefore, the Teaneck Board of Education – not the Englewood Cliffs Board of Education – is the school district responsible for the education and transportation of minor children A.S. and E.S., Jr. from that date to the present.

Accordingly, the Initial Decision of the OAL is adopted for the reasons well-stated therein. The Board of Education of the Township of Teaneck is hereby ordered to reimburse the Board of Education of Englewood Cliffs for the cost of E.S., Jr.'s education and transportation from November 2008 to date. Respondents W.S. and E.S. are hereby ordered to reimburse the Board of Education of Englewood Cliffs for the costs of transporting A.S. to her private high school during this period.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|30|10
Date of Mailing: 6|30|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11601-09

AGENCY DKT. NO. 184-8/09

ENGLEWOOD CLIFFS BOARD OF EDUCATION,

Petitioner,

v.

E.S. AND W.S. ON BEHALF OF MINORS A.S. AND E.S.,

AND THE TOWNSHIP OF TEANECK BOARD OF EDUCATION,

Respondents.

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

Joanne Butler, Esq., for respondent Teaneck Board of Education (Schenck, Price, Smith & King, attorneys)

W.S., respondent, pro se

Record Closed: April 16, 2010 Decided: May 20, 2010

BEFORE: **CARIDAD F. RIGO,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Englewood Cliffs Board of Education, appeals from the determination of the Bergen County executive county superintendent (hereinafter

referred to as "ECS") that Englewood Cliffs is responsible for providing minors E.S., Jr., and A.S. with a free education and transportation. The ECS determined that the respondent minors and their parents were homeless and that their last domicile was in Englewood Cliffs, and not in the township of Teaneck.

The ECS made his determination on May 5, 2009. On or about August 5, 2009, petitioner filed its petition appealing the ECS's determination. The matter was then transferred to the Office of Administrative Law (OAL) as a contested case. It was received at the OAL on October 7, 2009.

Petitioner filed a Notice of Motion for Summary Decision on or about December 15, 2009, and respondents filed opposition papers. The motion for summary decision was denied and the matter was set down for a plenary hearing. Hearings were conducted on January 12, and 25, and March 5, 2010. Closing briefs were submitted after receipt of the transcripts, and the record closed on April 16, 2010.

ISSUES

Is the S. family homeless? Is the Teaneck residence the family's domicile? Which school district is responsible for the cost of educating and transporting the two S. children?

BACKGROUND

E.S. and W.S. are the parents of A.S. and E.S., Jr. The S. family resided in Englewood Cliffs from December 2006 until October 17, 2008. In October 2008 the property they were living in, in Englewood Cliffs, was foreclosed on and they were evicted. The family lived in a motel from October 17, 2008, until November 19, 2008, after which they moved to a house on Fairview Avenue in Teaneck, New Jersey. The family is still residing at that house in Teaneck.

E.S., Jr., has been enrolled in the Englewood Cliffs school district from January 2007 up to the present. A.S. was enrolled in the Englewood Cliffs school district from

January 2007 until June 2008. In September 2008 A.S. entered a private high school. The Englewood Cliffs school district has provided transportation for A.S. to the private high school since September 2008.

Petitioner contends that the S. family is not homeless and has not been homeless since November 2008, when the family moved to Teaneck. Therefore, Englewood Cliffs is not responsible for the education and transportation of the two children. Englewood Cliffs also contends that respondent Teaneck Board of Education is responsible for the S. children's public education.

The Teaneck Board of Education contends that the family is homeless, and that the Teaneck residence is not and has not been their permanent home. Teaneck contends that it is Englewood Cliffs' responsibility to educate and transport the S. children since the family's last permanent residence, before the family became homeless, was in Englewood Cliffs.

The S. family contends that the family is homeless and that the Teaneck residence is only temporary.

SUMMARY OF THE TESTIMONIAL EVIDENCE

Dominic Mucci

Dominic Mucci is the superintendent of schools for Englewood Cliffs. Mucci said that the S. family currently has one child in the Englewood Cliffs district. A.S., the older child, attends Paramus Catholic High School. Englewood Cliffs does not have a high school, and typically Englewood Cliffs students go out of district after eighth grade. Englewood Cliffs currently provides transportation for A.S. to Paramus Catholic. He said that Englewood Cliffs is obligated to provide transportation for Englewood Cliffs students to attend high school outside of the district. E.S., Jr., is currently in the eighth grade and he is currently being transported from Teaneck to the Englewood Cliffs school he is attending.

One of Mucci's duties is to review and make residency determinations. Mucci stated that in September 2008, just after he became superintendent, he undertook a re-registration process of all of the students in the district. The district had on file a copy of the S. family's lease for when the family was residing in Englewood Cliffs. The lease went from January 1, 2007, until January 1, 2008. He needed to substantiate the family's residence from January 2008 until January 2009. Mucci stated that it was when he began inquiring about the current lease that he discovered that the S. family was no longer living in Englewood Cliffs, but in Teaneck.

Mucci stated that he sent letters to Mr. and Mrs. S. at the Englewood Cliffs address, but never received a response from them. The letters he sent were returned and marked as "undeliverable." Mucci said that on or about January 30, 2009, Dawn Smith informed him that Mrs. S. called her to say that the family was homeless. Mucci said he then called Mrs. S. at her place of employment, and verified her continued employment. Mucci said Mrs. S. told him that the family was living in Teaneck, and confirmed that they were homeless. Mucci said Mrs. S. told him that the housing situation in Teaneck was temporary. Mrs. S. said that she preferred that E.S., Jr., remain in school in Englewood Cliffs. She wanted him to finish his elementary education there.

Mr. Mucci testified that he continued to investigate W.S.'s claim of homelessness, and discovered that on February 12, 2009, W.S. submitted a transportation application to Englewood Cliffs on behalf of A.S., and listing the Englewood Cliffs address as their home address. Mucci said he asked W.S. to provide him with motel receipts for the claimed period of homelessness, but he never received any. Nor did he ever receive any updated documentation that the family was still living in Englewood Cliffs.

Mucci stated that after further inquiry he determined that the S. family was not homeless and that the arrangements in Teaneck were not temporary. He stated that he confirmed that the S. family was residing in a regular house in Teaneck; they were paying rent and utilities; both parents were gainfully employed; A.S. was attending a

private high school; and the S. family had been residing in the Teaneck house since November 2008.

Mr. Mucci testified that Englewood Cliffs has provided transportation for E.S., Jr. since May 2009 at the cost of $23,000. He said that E.S., Jr., is the only student on his bus. Englewood Cliffs has provided round-trip transportation for A.S. to her private parochial school in Paramus since November 2008. He could not state the cost because transportation for A.S. is through a cooperative consortium. However, he testified that Englewood Cliffs was not aware that A.S. had been and is currently being transported by her father. Neither the school nor the parents notified Englewood Cliffs.

Sheila Spector

Sheila Spector is employed by the Englewood Cliffs Board of Education as a school nurse and health teacher.

Ms. Spector recalled that in January 2007 she requested health records from the Teaneck school system for the S. children. (P-13; P-14.) She noted that the records from Teaneck show a Teaneck address.

She stated that she had known E.S., Jr., since January 2007. She testified that E.S., Jr., told her that he had been in another school, but that he did not like it so he returned to the Englewood Cliffs school.

Dawn Smith

Dawn Smith is employed by the Englewood Cliffs district as the school social worker, homeless liaison, and student assistance counselor.

Ms. Smith testified that Mrs. S. called her on January 30, 2009, to say that she and her family were homeless. Mrs. S. told her that they were no longer living in Englewood Cliffs and that they had been homeless for a few months. Smith said this

was the first time Mrs. S. communicated their homelessness to the district. Smith said she gave Mrs. S. some referrals to assist her in finding adequate housing.

Ms. Smith stated that she initially became involved with the S. family in 2007, when A.S. was classified.

W.S.

W.S., who represented herself and her husband, testified. W.S.'s direct testimony was in narrative form. She was then cross-examined by counsel.

W.S. testified that the house the family rented in Englewood Cliffs was foreclosed on in October 2008. As a result of the foreclosure the family was dispossessed of housing. She said they lived in two hotels/motels for about one month. Because they were unable to rent another place, V.N. offered them his house in Teaneck. She stated that they had previously lived in V.N.'s house.

They lived in the Englewood Cliffs house from December 2006 until on or about October 17, 2008. From on or about October 17, 2008, until on or about November 19, 2008, they lived in a motel/hotel. The family moved to Teaneck, into V.N.'s house, sometime in November 2008.

W.S. provided the following addresses as places the family had lived:

Fairview Street, Teaneck, November 2008–present

Hotels/motels, October 17, 2008–November 2008

Anderson Avenue, Englewood Cliffs, January 2007–October 2008

Stuyvesant Avenue, Teaneck, early 2002–December 2006

Fairview Street, Teaneck, February 2001–early 2002

W.S. testified that she and her husband have two children, E.S., Jr., and A.S. Her daughter A.S. attends a private parochial high school. W.S. said that she paid two years of that school tuition in advance. The next tuition is due for the school year beginning September 2010. W.S. explained that A.S. is classified for special education services. A.S. initially had problems at the Englewood Cliffs school, but since attending the parochial high school she has overcome certain problems. W.S. also said that she kept her son E.S. in the Englewood Cliffs school after they moved to Teaneck because of the housing uncertainty they were experiencing. She wanted her children to have some stability, and not be moved from school to school.

W.S. further testified that they never intended to stay at V.N.'s house, and they do not consider that house their permanent residence. They are still living there because they are unable to get other housing because of their poor credit. They are not related to V.N. The house has two bedrooms and one bathroom. V.N. stores his equipment at the house, and reserves one of the bedrooms for himself.

Mrs. S. provided photos of the house they are currently living in on Fairview Avenue in Teaneck. (R-1(a), 1–29.) She said she took the photos to show their living conditions. W.S. stated that they are living there temporarily.

Under cross-examination by Mr. Fogarty, W.S. testified as to the following:

The family lived at two different addresses in Teaneck between 2001 and December 2006. In December 2006 they moved to Englewood Cliffs, and they lived there until they were evicted in October 2008. They returned to Teaneck in November 2008 and are still there.

The Teaneck school records show that the children attended kindergarten in Teaneck when they were living on Fairview Avenue in Teaneck.

The family is currently living on Fairview Avenue, Teaneck, in a house that has two bedrooms, one bathroom, a living room and a kitchen. They are month-to-month tenants, paying $800 per month, plus utilities.

W.S. is employed as an assistant/secretary/clerk for a law firm in New York City. She has worked for the same firm for the last twelve years. Her yearly gross salary is $64,000. Her husband, E.S., has worked for the County of Passaic for twenty-six years and earns a yearly gross salary of $40,478. They have a combined gross income of approximately $104,000. They do not receive any kind of public assistance.

W.S. testified that the rent at the Englewood Cliffs house was $2,300 per month. She stated that she first learned about the house being in foreclosure sometime in August 2008. W.S. admitted that they did not pay rent for the Englewood Cliffs house from January 2008. She testified that the reason they did not pay rent was because she was told the landlord had died.

She further testified that she sent her daughter A.S. to a parochial high school because Englewood Cliffs does not have a high school. She knew that Englewood Cliffs had a sending/receiving relationship with the town of Englewood, and that her daughter would have been able to attend Englewood High School. She wanted to send her daughter to a private high school. The tuition at the private high school is $7,000 per year, and W.S. stated that she paid two years of that tuition in advance.

W.S. further stated that she and her husband have bad credit because a car was repossessed. They now rent a car at $945 per month. They have their personal furnishings in storage, paying $215 a month. The utility bill averages $262 a month.

According to W.S., A.S. is transported to and from school by her husband, E.S. She acknowledged that in the application for private-school transportation for the 2009–2010 school year she listed the Anderson Avenue, Englewood Cliffs, address. (See P-11.) She also acknowledged that she never notified the Englewood Cliffs school district that A.S. was not going to use the school bus that Englewood Cliffs provided to transport her to and from the private high school.

W.S. admitted that various documents show the family's various addresses. For example, her driver's license shows her Englewood Cliffs address. The storage receipt

has the current Teaneck address. The application for her son's school-bus transportation shows the Englewood Cliffs address. E.S.'s 2008 W-2 form shows a previous Teaneck address, and W.S.'s 2008 W-2 form shows the Englewood Cliffs address.

W.S. stated that V.N. reserves a room in the house, which he uses as a storage room. She stated that it is the same room he used when the family was living there back in 2001.

W.S. admitted that she and her family have been living at the Teaneck house on Fairview Avenue for the past seventeen months.

Ms. Butler, the attorney for the Teaneck Board of Education, also cross-examined W.S., and W.S. testified to the following:

At the Fairview Avenue, Teaneck, house, W.S., her husband and the two children sleep in the same room. The room is too small to include a bed so they all sleep on the floor. There is no dresser or any kind of bedroom furniture in the room. There is only a television and a stand. She uses the living room to store clothing, exercise equipment, paintings, a computer, appliances and other household items.

W.S. said that the house's one bathroom has plumbing problems. The bathtub leaks into the kitchen. The house has two floors, and the bedrooms and bathroom are on the second floor. W.S. said the oven in the kitchen does not work, and the stove has to be lit with matches. The kitchen has numerous electrical problems; the sockets are all overloaded and circuits breakers are tripped all the time.

She again reiterated that the house in Teaneck was never intended to be their permanent home, and they consider their living arrangement temporary. She explained that the only reason they are living at the Fairview Avenue residence is because they have poor credit (due to car repossession and subsequent garnishments) and they cannot pass the necessary credit checks to rent a regular place in which to reside.

W.S. stated that her daughter is sixteen years old and her son is fourteen years old. Her daughter is depressed, and her son is not doing well in school. Her children don't have normalcy or stability.

She testified that it was sometime in January 2009 when she spoke to the Englewood Cliffs people and told them the family was homeless. W.S. said that she did not know that she had to notify the Englewood Cliffs school district that her daughter was being transported to school and back by her husband. She said she told the school, and she thought the school would tell Englewood Cliffs.

V.N.

V.N. is the landlord of the house on Fairview Avenue, Teaneck. He was a witness for the petitioner, the Englewood Cliffs Board of Education.

V.N. testified that he has owned the subject property for approximately twelve years. He lived in the house until May 2008. He now lives in an apartment in Englewood with his wife and their children. He described the Fairview house as a house with two bedrooms, one bath, a living room, a kitchen and an enclosed porch in a residential-zoned part of town. He said he is a self-employed contractor who does home repairs and building.

He testified that the S. family moved into his house in November 2008; it was the second time the S. family lived there. He is not related to the S. family. He believed that the S. family also lived in the house in 2006. He said the first time the S. family lived there he also occupied the house with them. He had one bedroom, and the S. family had the other.

V.N. stated that since the first time the S. family lived in the house he has completed numerous repairs. The house has a new front door, windows, hot water heater (two years old) and electric wiring. The boiler is four years old. He said that as far as he knows the essential systems in the house are in working order. He stated that

the S. family decided not to use the oil-heat boiler, so although it works it is not used. He said the boiler shut down because there is no oil in it, not because it is broken.

V.N. testified that he has let Mr. and Mrs. S. know that if there is anything in the house that needs to be repaired or replaced they are to let him know. He testified that the S. family generally does not give him much time to do the repairs. He can only get access to the house on Sundays between 8 and 9 a.m., or at 2 p.m. He said the family wants its privacy.

He also said the S. family has use of only one bedroom in the house because he uses the smaller bedroom for storage of some of his contracting equipment and personal things. He goes there when the S. family allows him to go into the house. He said he has free access to the outside areas, like the garage.

V.N. said that as far as he is concerned, the S. family can stay in the house as long as they want. They pay $800 per month as rent and they pay their own utilities. The PSE&G account is in his name, and he gives the S. family a copy of the bill every month. They give him the money in cash and he pays the bill.

V.N. said he built a rack across the porch so the S. family could hang their clothes. He said they never told him the rack in the closet was broken. He saw it broken and fixed it. He said he found out on January 12, 2010, that the sheetrock in the enclosed porch showed that there was a leak. On that date he also found out about the leak in the drainpipe in the bathtub. He said he is willing to repair those things if given access to the house. He said the ceiling in the living room is sheetrocked but not spackled, and some walls have cracks in them. To his knowledge there are no roof leaks. He said that in order for him to make the repairs the family would need to leave for one day, mainly because of the bathroom; they would be unable to use the bathroom for a day. V.N. said that the house is insured, and that it has been inspected by the insurance inspectors.

V.N. also testified that he is willing to give the S. family a lease, and was willing to do so fourteen months ago, but the S. family told him they did not want one. He said it was then that he knew that the family intended to be there permanently.

He testified that as far as he is concerned there is no reason for the S. family to live the way they do. Things are disorganized, and it was the same when they lived together in 2006. He said that the last time they lived there he did ask them to leave.

Under cross-examination, V.N. admitted that the house is too small for four people.

Karla Starks

Karla Starks testified for respondent Teaneck Board of Education. She is a twenty-year veteran of the school system. She is an assistant to the school administrator, and she has been in that position for two years. She was a coordinator of physical services. She served for fifteen years as supervisor of accounts payable. Basically, she is responsible for overseeing the financial aspects of the school's operation. She is also the homeless liaison.

Ms. Starks testified that most of the homeless students in the district come from a local shelter for abused women, some are sent by the Board of Social Services, and some are students relocated because of the Katrina disaster.

Ms. Starks stated that the S. family's situation is not unusual, in that there have been children who are homeless for more than one year.

According to Ms. Starks, the Teaneck Board of Education records have two addresses for the S. family. One address is Stuyvesant Avenue, Teaneck, which was valid in 2001–02, and the other is Fairview Avenue, Teaneck.

Starks said that Teaneck determined that the S. family is homeless based on the May 2009 letter from Dr. Graham. She said that she has not before had a homeless

case like that of the S. family. The closest situation to the S. family's situation was a student that had been living in a shelter for more than one year. She was not aware of the S. family's situation until early 2009.

FINDINGS OF FACT

Based upon the testimonial and documentary evidence presented, I **FIND** the following to be the **FACTS**:

1. The S. family resided at the Anderson Avenue, Englewood Cliffs, New Jersey, residence from January 2007 until on or about October 17, 2008.

2. The S. children, E.S., Jr., and A.S., attended the Englewood Cliffs school district.

3. The S. family was homeless from on or about October 17, 2008, until on or about November 19, 2008. The family resided in a motel/hotel for approximately four weeks.

4. The S. family moved to a house owned by V.N. on Fairview Avenue in Teaneck on or about November 19, 2008, and they are still residing in that house.

5. The S. family is a month-to-month tenant at the Fairview Avenue, Teaneck, house, in that they do not have a written lease. They pay monthly rent of $800 and they pay their own heat and utilities.

6. Mr. and Mrs. S. are employed full time. Mr. S. is a public servant and Mrs. S. works for a law firm. The family's combined gross annual income is approximately $104,000.

7. The Fairview Avenue, Teaneck, residence, although in need of repairs and organization, is adequate and habitable.

8. The S. family has lived at the Fairview Avenue, Teaneck, residence for more than seventeen months.

9. Prior to residing in Englewood Cliffs at the Anderson Avenue address, the family lived in Teaneck twice, at two different addresses. When the family lived at those two Teaneck residences, the S. children attended Teaneck schools. When the family moved to Englewood Cliffs in January 2007, the children attended Englewood Cliffs schools.

10. A.S. attends a private parochial high school. E.S., Jr., attends a school within the Englewood Cliffs school district.

11. E.S. and W.S. paid two years of A.S.'s private-school tuition in advance, which was approximately $14,000.

12. The Englewood Cliffs school district has been providing the cost of transportation for E.S., Jr., between the Upper School in Englewood Cliffs and his residence in Teaneck.

13. The Englewood Cliffs school district has been providing transportation for A.S. between the private parochial high school in Paramus and her residence in Teaneck. However, E.S. has been transporting A.S. to and from her private school, and the S. family never notified the Englewood Cliffs school district that A.S. was not going to use the transportation provided by Englewood.

14. The S. family is not homeless.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Petitioner, the Englewood Cliffs school district, contends that the S. family is not homeless and that the family is domiciled in Teaneck. Englewood Cliffs argues that the

family does not exhibit any of the indicia of homelessness. The parents are gainfully employed, they have been living in Teaneck since November 2008, they pay rent and utilities in Teaneck, and they receive pertinent mail in Teaneck.

The Teaneck Board of Education contends that the S. family is homeless because the living conditions at the Fairview Avenue residence are deplorable. Teaneck also contends that because the S. family does not consider the Fairview Avenue, Teaneck, house their permanent home, it is not their domicile. Pursuant to N.J.S.A. 18A:7B-12(c), the district of residence for children whose parents temporarily move 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. Therefore, the Englewood Cliffs school district is the district responsible for the education of the S. children.

E.S. and W.S. contend that the family is homeless because they were dispossessed from a residence in Englewood Cliffs and lived in a motel/hotel for approximately four weeks. They also claim that the residence on Fairview Avenue, Teaneck, is temporary and not their permanent domicile. The house is inadequate, in that the four members of their family sleep in one room. The house needs repairs. Further, they share the house with V.N. They assert that because they are homeless, and Englewood Cliffs is the school district in which the family last resided prior to becoming homeless, Englewood Cliffs is responsible for the education of their children.

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955) (citation omitted). The domicile of an unemancipated child is that of the parents, custodian or guardian. P.B.K. ex rel minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super., 419, 427 (App. Div. 2001).

N.J.S.A. 18A:38-1 also sets out conditions under which a free public education shall be provided to a child even though that child may not be domiciled in a particular school district. Specifically, the statute states:

> Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section.
>
> [N.J.S.A. 18A:38-1(d) (emphasis added).]

N.J.S.A. 18A:7B-12(c) says "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence. 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. The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

In this particular case, the S. family has lived at the Fairview Avenue, Teaneck, address for more than seventeen months. Although the house is in need of repairs, it provides a roof over their heads, and the roof does not leak. The house has an oil-boiler heating system that works, but the S. family chooses not to use it and gets their heating from another source. The basic parts of the stove work. They have access to electricity and hot water. There is a bathroom in the house that is adequate.

I found V.N. credible when he said that the S. family limits his access to the house, making it difficult if not impossible for him to make the necessary repairs, if and when he is advised of items that need repair.

W.S.'s testimony and documentary evidence are not credible. The determination of credibility must be made based upon the totality of the evidence, including an assessment of the witnesses by the judge who had the opportunity to see and hear the witnesses at the hearing. In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002). It was not until on or about January 30, 2009, that Englewood Cliffs discovered that the S. family had not completed the re-registration process. Correspondence sent to the Englewood Cliffs address was returned as undeliverable. It was after receiving the returned mail that petitioner began investigating the family's residency. And, it was when questioned that W.S. claimed homelessness. The updated residency information provided by W.S. was misleading and otherwise incorrect. (See P-7 through P-12.)

Homelessness is very often equated to financial hardship due to a chronic illness, injury or loss of employment. This is not the case here. The parents here have been gainfully employed in their respective jobs for numerous years. The combined annual gross income of this family is approximately $104,000. The record is void of any claims of illnesses or injuries.

It is important to note that this was not the first time this family lived in the Fairview Avenue, Teaneck, house. This family knew the size of the house and what the living arrangements were. Therefore, the family's decision to move back to the Fairview Avenue, Teaneck, house was not made out of hardship or necessity, but because it was convenient and easier. Also of note is the fact that E.S. and W.S. made a conscious decision to pay, in advance, two years of A.S.'s private-school tuition, totaling $14,000.

CONCLUSION

Based upon the above findings and legal authority, I **CONCLUDE** that the Fairview Avenue, Teaneck, house has been E.S. and W.S.'s domicile since November 19, 2008. I therefore **CONCLUDE** that the Teaneck Board of Education, not the Englewood Cliffs Board of Education, is the school district responsible for the education and transportation of A.S. and E.S., Jr., from that date to the present.

ORDERS

It is hereby **ORDERED** that:

1. Petitioner may **DISENROLL** E.S., Jr., upon the issuance of the Final Decision in this matter.

2. Petitioner's demand that respondent Teaneck Board of Education reimburse the Englewood Cliffs Board of Education for the costs of E.S., Jr,'s education and transportation since November 2008 is **GRANTED**.

3. Petitioner's demand that respondent Teaneck Board of Education reimburse the Englewood Cliffs Board of Education for the costs of A.S.'s transportation since November 2008 is **DENIED**.

4. Respondents W.S. and E.S. are to reimburse the Englewood Cliffs Board of Education for the costs of transporting A.S. to her private high school.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 20, 2010
DATE

CARIDAD F. RIGO, ALJ

Date Received by Agency: May 20, 2010

Date Mailed to Parties:

lr

APPENDIX

WITNESSES

For Petitioner

Dominic Mucci

Sheila Spector

Dawn Smith

V.N.

For Respondent S. Family

W.S.

For Respondent Teaneck Board of Education

Karla Starks

EXHIBITS

For Petitioner

P-1 Student Transfer Card

P-2 Letter dated January 6, 2009, from Englewood Cliffs to S. family

P-3 Residential Lease dated January 1, 2007, to January 1, 2008, three pages

P-4 Englewood Cliffs registration forms dated August 20, 1998

P-5 Money Orders

P-6 Memo from E.S. dated November 19, 2008

P-7 Letter dated February 26, 2009, from Englewood Cliffs to S. family

P-8 Letter from Englewood Cliffs to S. family dated April 23, 2009

P-9 Landlord Affidavit & PSE&G bill

P-10 Ten pages of correspondence, starting with letter dated April 28, 2009

P-11 Application for Private School Transportation

P-12 Acknowledgement dated June 4, 2009

P-13 Health History records from Teaneck school records

P-14 Health History records from Teaneck school records

P-15 S. family response to Englewood Cliffs initial petition

P-16 S. family responses to interrogatories

P-17 Employment and salary verifications for S. adults

P-18 Letter dated January 2, 2010, and W-2's for 2008

P-19 Homeless status

P-20 Transportation records from Englewood Cliffs, 2009–2010, three pages

For Respondent S. Family

R-1(a) Photos of the interior of the Fairview Avenue, Teaneck, house, numbered 1 through 29

For Respondent Teaneck Board of Education

None

#198-10

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

SYNOPSIS

Petitioner – formerly employed by the district as a non-tenured World Languages teacher – appealed the Board's decision not to renew her employment contract. Petitioner claimed, *inter alia*, that the Board's nonrenewal determination was made in retaliation for a workers' compensation claim against the district, relating to an injury sustained in the course of her work. Respondent denied petitioner's allegations, asserting the right of a school district to release non-tenured employees at will, barring a violation of the law or the constitutional rights of the employee.

The ALJ found that: the evidence as a whole did not support petitioner's contention that she was discriminated against as a result of her injury; the testimony of respondent's assistant principal regarding the district's attempts to make feasible accommodations for the petitioner following her injury was credible, while the testimony of petitioner lacked credibility; the district acted properly with respect to petitioner's request for an accommodation for her injuries; and the negative evaluations of petitioner's work performance were not issued in retaliation for the workers' compensation claim. The ALJ concluded that petitioner had not met the burden of establishing that respondent's elimination of her non-tenured position was arbitrary, capricious, or unreasonable, and affirmed the action of the district in not renewing her contract.

Upon a thorough and independent review of the record, the Deputy 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. The petition was dismissed.

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

July 2, 2010

OAL DKT. NO. EDU 9952-08
AGENCY DKT. NO. 238-8/08

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

The record of this matter – including the transcripts from seven days of hearings in the Office of Administrative Law (OAL) – and the Initial Decision of the OAL have been reviewed by the Deputy Commissioner to whom this case has been delegated pursuant to *N.J.S.A.* 18A:4-33.[1] The Deputy Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner failed to show that respondent's decision not to renew her employment was improper.

As the ALJ explained, "a non-tenured teacher has no viable appeal from being released from a teaching position unless the release constitutes a violation of law or constitutional provision. The issue has been settled since the decision in *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* (App. Div. 1982)." The laws which petitioner relied upon to

[1] No exceptions were filed by either party.

challenge her non-renewal were those that bar discrimination based upon disability.[2] More specifically, petitioner alleged that in not renewing her employment, respondent was motivated by 1) the workers' compensation claim that she filed in consequence of a March 22, 2007 injury to her knee, 2) an injury-related absence from September 2007 to January 2008, and 3) her January 2008 request for accommodations upon her return to work.[3]

After considering the testimony presented by the nine witnesses during the OAL hearing, and the numerous exhibits, the ALJ found that the evidence as a whole did not support petitioner's contention that she was discriminated against as a result of her injury. First, the ALJ found that Assistant Principal Robert Brower, whose responsibility it was in January 2008 to identify feasible accommodations for petitioner, was a credible witness. She accepted his testimony that 1) he offered petitioner the opportunity to work in a building with an elevator, 2) upon her refusal he changed petitioner's schedule – as reflected on page 2 of P-11 – to significantly reduce the amount of stair-climbing that was required of her, and 3) he explained to her that she could not be set up in the school library – with her classes brought to her – because the library was needed for other purposes.

Second, the ALJ did not regard petitioner's testimony as credible. She found no basis in the record to accept petitioner's contention that her 2007-2008 negative evaluations from Supervisor Mercedita Dacanay, Principal Jeanette Ayala and Assistant Principal Brower were "lies and fabrications." Rather, the ALJ found that several of petitioner's evaluations prior to 2007 had contained notations that various teaching categories needed improvement, thus supporting the possibility that petitioner's performance could have been ultimately assessed as

[2] It would appear that petitioner also filed a complaint with the New Jersey Division on Civil Rights on or about October 10, 2008, but the case was closed prior to the hearing in this matter.

[3] Petitioner also implied in her petition and in her OAL testimony that the negative evaluations that she received during 2007 and 2008 were also driven by her workers compensation claim, medical leave and requests for accommodations flowing from the March 2007 injury.

unsatisfactory. The Deputy Commissioner's perusal of the exhibits revealed that many of the evaluations themselves contain specific descriptions of incidents that support negative assessments.

Further, the ALJ recognized that the record revealed that the first of petitioner's negative evaluations in the 2007-2008 school year occurred before petitioner's injury on March 22, 2007. The Deputy Commissioner notes, in particular, that Supervisor Dacanay's February 23, 2007 evaluation assigned unsatisfactory grades in several categories. When asked why that evaluation of petitioner was much worse than the prior two, Dacanay testified that she saw – and recorded on the evaluation – performance that had regressed. 5T139[4] Her detailed evaluation notes described a lack of classroom management, difficulty in communicating lessons clearly and providing appropriate feedback, and an absence of proper assessments and recordings of student progress. Dacanay's notes depict petitioner's classroom as unruly and out of control. (Petitioner's Exhibit 1-K)

Nonetheless – as the ALJ observed – despite petitioner's admission that Dacanay's negative evaluation preceded her injury, leave of absence and request for accommodations, she did not abandon her claim that the negative evaluations by respondent's representatives and the non-renewal were driven by her knee injury. This rigidity was a recurring theme in petitioner's testimony.

The Deputy Commissioner agrees with the ALJ that Petitioner's other witnesses were not useful. Frank Conti and Marcia Hernandez offered no helpful material facts and, as the ALJ found, Noritza Andino's "testimony was riddled with comments reflecting a personal bias against the principal of School No. 23" – where petitioner taught. By way of example, Andino attributed negative connotations to facially neutral facts and statements by that principal.

[4] 5T designates the OAL hearing transcript for November 9, 2009.

In summary, petitioner failed to provide evidence sufficient to support her claim that her non-renewal had an improper basis. Nor has the Deputy Commissioner found anything in the record that would suggest that the ALJ's credibility determinations were arbitrary, capricious, or unreasonable based on the available facts. Absent such a finding, the Deputy Commissioner may not disturb those determinations. *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) and *N.J.S.A.* 52:14B-10c.

In light of the foregoing, the Deputy Commissioner adopts the Initial Decision of the OAL and dismisses the petition.

IT IS SO ORDERED.[5]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 7/02/10

Date of Mailing: 7/02/10

[5] 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 9952-08
AGENCY DKT. NO. 238-8/08

VICTORIA RAMIREZ,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan L. Krumholz, Esq., for Petitioner (Krumholz Dillon, attorneys)

Robert J. Pruchnik, Assistant General Counsel, for Respondent (Paula Mercado Hak, General Counsel)

Record Closed: March 5, 2010 Decided: May 21, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is appealing the Board's decision to not renew her teaching contract. The determination of a District to not renew the contract of an untenured employee is to

be reviewed under a limited standard. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) where it was filed on September 2, 2008, 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 record closed on March 5, 2010; therefore, the forty-five day period to issue an Initial Decision expired on April 19, 2010. I requested and was granted additional time for filing the Initial Decision to June 3, 2010.

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.

1. Petitioner, Victoria Ramirez, began her career in education as a teacher's assistant in the Jersey City Public Schools in the 1997-98 school year. She became employed as a Spanish teacher in the primary grades in the District during the 2001-2002 school year.

2. She taught first grade and later the second grade and kindergarten. In 2005, she taught the fifth grade.

3. During her employment as a teacher of world languages, Petitioner pursued an alternate-route certification program at Saint Peter's College in Jersey City to qualify for New Jersey certification. As such, she did not obtain tenure within the timelines prescribed by N.J.S.A. 18A:28-5.

4. As a non-tenured teaching staff member, Petitioner was subject to three evaluations per year between the 2001-02 school year and the 2007-08 school year.

5. At the conclusion of the 2007-08 school year, the principal of the No. 23 Public School recommended to the superintendent of schools that Petitioner's employment contract with the District not be renewed for the 2008-09 school year. That recommendation was ultimately accepted by the superintendent of the Jersey City Public Schools.

6. On February 23, 2007, Petitioner was evaluated by Ms. Dacanay, a supervisor of world languages, who found her to be unsatisfactory in two of four domains[1] in which teachers are rated. Petitioner was teaching a second grade class at the time. During the previous November, i.e., November 2006, Ms. Andino, another supervisor, had evaluated Petitioner as satisfactory in all categories while teaching a second grade class.

7. On March 23, 2007, Petitioner was injured at School 23 when a bookcase fell striking her left leg and waist. Petitioner reported the accident but was able to report to work after seeking medical intervention.

8. An observation was conducted on April 26, 2007, and once again in May 2007. Both of these evaluations reflect numerous areas in which Petitioner needed improvement.

9. Petitioner returned to work in September 2007; however, she was compelled to stop and seek medical treatment for her knee with Concentra, the carrier for Worker's Compensation for Jersey City.[2] Although treatment with Concentra continued until May 2008, Petitioner was permitted to return to work in January 2008. At that time, Petitioner presented a physical therapy document from Concentra dated December 18, 2007, indicating she should refrain from climbing stairs.

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[1] There are four domains, or areas in which teachers are evaluated. Each domain has a number of subtopics which are given ratings of S, NI, or U. The "S" means satisfactory; "U" is unsatisfactory.

[2] The parties stipulated that there was a claim for medical benefits under Worker's Compensation for the period from March 2007 to June 2007; however, there was no request for an accommodation at that time.

10. Upon her return in January 2008 from her leave, Petitioner requested an accommodation because of her leg injury.

11. On January 22, 2008, Petitioner was evaluated by Ms. Dacanay who found her to be unsatisfactory in three of the four domains by which teachers were evaluated. In addition, she was found to need improvement in the fourth domain. In March, she was evaluated by Mr. Brower; there were two further evaluations by Ms. Ayala.

DISCUSSION AND CONCLUSIONS

As Respondent asserts, a non-tenured teacher has no viable appeal from being released from a teaching position unless the release constitutes a violation of law or constitutional provision. The issue has been settled since the decision in Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. (App. Div. 1982). In Dore, the hearing examiner recommended reinstatement of the teacher because the loss of tenure was not related to the evaluations of his teaching performance but to matters which were extrinsic to that performance; the Commissioner agreed; however, the State Board disagreed and reversed, finding that there were insufficient grounds for overriding the managerial prerogative of the local board. Stressing the wide discretion of a district board the Appellate Division held " . . . absent constitutional restraints or legislation effecting 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. Following Dore, there is a line of cases which consistently holds that non-tenured teaching staff members "are not entitled to litigate their terminations . . . unless the reason for the board's action is in violation of constitutional or legislatively conferred rights." (Citations omitted).

In the case before me, Petitioner is asserting bad faith on the part of the Board in that the Board is retaliating against her for making a Worker's Compensation claim against the District for an injury sustained in the course of her work. In addition, it appears she alleges that the Board failed to provide her with an accommodation upon her return to work in January 2008. Accordingly, Petitioner bears the burden of

demonstrating the District violated the law or a constitutional provision when it failed to renew her contract for the 2008-2009 school year for the reasons, according to her petition:

> [T]he denial of tenure and reappointment is based upon discriminatory conduct against her on a continuous basis by Assistant Principal Robert Brower and Principal Jeanette Ayala following the occurrence of a work related injury in an accident of March 22, 2007 and need for treatment under the Workers' Compensation Act and complaints of failure to accommodate Petitioner's disabilities, said disability resulting from such injury which caused the Petitioner to be on Workers' Compensation Disability Leave from September 2007 until January 2008.
>
> [(See Ramirez Pet. at ¶ 2.)]

In addition, Petitioner also alleges a bad faith motive against superintendent and other members of his administration by including the following in her petition:

> [P]rior to [her injury of] March 2007, [Ms. Ramirez] received evaluations from various members of the school system which were substantially satisfactory in many categories, including evaluations by M.G. Dacanay on or about may 12, 2003 and November 13, 2002 and by Assistant Principal Jeanette Ayala on June 12, 2002, on March 22, 2005, by Mrs. Menzel which was satisfactory in all respects and Assistant Principal Noritza Andino on November 10, 2006.
>
> [(See Ramirez Pet. at ¶ 4.)]

The issues to be resolved are whether the District retaliated against Petitioner by failing to give her an accommodation and by giving her poor evaluations. Petitioner bears the burden of proving both by a preponderance of the evidence.

The resolution of the issue of the accommodation turns on the testimony of Petitioner and Assistant Principal Brower. The testimony from each of these witnesses is in direct opposition to the other. Accordingly, the issue must be resolved by a determination of each witness's credibility.

Credibility is the value that a factfinder gives to a witness's testimony, requiring an overall assessment of the witness's story in the light of its rationality, internal consistency, and manner in which it hangs together with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as 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). A factfinder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

In this case, the determination of whether an appropriate accommodation was offered to Petitioner while she completed her recovery from her disability requires a determination of credibility of two witnesses; the first is the credibility of Assistant Principal Brower; the second, is that of Petitioner. Turning first to the issue of the credibility of Assistant Principal Brower, he testified that he had not worked directly with Petitioner prior to her return to work in January 2008. Upon his becoming aware that she should not be climbing stairs, he immediately offered to transfer her to the main building of Public School 23 which had an elevator. The transfer to the main building would have meant that she would have been teaching the upper-primary grades, five through eight. Petitioner refused, saying she was not comfortable teaching the upper grades, although she was certified to teach grades K-8. Instead, she asked to be allowed to have her classes brought to her in the library at the Duncan Avenue School rather than have her travel from classroom to classroom. Brower advised her that this would not be possible since, according to his testimony, the library was used for library purposes. Upon her refusal of his proposal, he testified that he rearranged her schedule so that he minimized the amount of stair climbing she would have to do on any day.

On the other hand, Petitioner testified that there was never an offer to transfer her to the main building and, of course then, she could not have refused such an offer. She was indignant that she was not allowed to use the library since there were various other teachers in there using the library according to her. She did not seem to

understand that those were teachers bringing their classes in there to do library-related work.

As noted above, Brower was not acquainted with Petitioner prior to her return to work from her medical leave of absence in January 2008. In addition, Brower's testimony was clear, concise and straightforward. When he could not answer a question or did not remember, he said so. In addition, Petitioner's program for the second half of the 2007-08 year reflects the changes he made to the program to minimize her need to use the stairs.

On the other hand, Petitioner insisted that she had never been offered the accommodation of working in the main building; further, she insisted that other teachers were permitted to use the library for their classes but she was not. The record is replete with instances where Petitioner characterizes the testimony of the supervisors who evaluated her as "a bunch of lies and fabrications." For example, Ms. Dacanay, who, as a supervisor of world languages, had evaluated Petitioner a number of times throughout her career, had, in an evaluation dated May 12, 2003, given Petitioner four "NI"s,[3] an increase over the three she had given Petitioner the previous November, rated Petitioner as unsatisfactory in two domains in February 2007, one month prior to Petitioner's work-related accident. Although this evaluation predated the accident, Petitioner's testimony with regard to this evaluation reflected a theme which would continue throughout Petitioner's testimony. Petitioner agreed that Ms. Dacanay's February evaluation could not have been influenced by the accident which occurred one month later, however, she still insisted that Dacanay's testimony was lies and fabrications; Petitioner's attitude reflected rigidity and an inability to accept direction and constructive criticism.

Based on the opportunity to observe the demeanor and attitude of Petitioner, as well as that of Mr. Brower, I **FIND** the testimony of Brower to be more credible than that of Petitioner, with regard to the offer of the transfer to the main building which had the elevator as an accommodation for her disability as well as his testimony with regard to

[3] "NI" means needs improvement.

the changes he made in her program to minimize the number of times per day she would have to climb the stairs at the Duncan Avenue Annex upon her refusal of the transfer to the main building.

Moreover, it would appear that the accommodation that Brower implemented did help in her rehabilitation. I further note on the Physician Activity Status reports that the date of maximum-medical improvement in Petitioner's condition was reached as of October 25, 2007, which would belie any restriction would, at a later date, serve to help with an improvement. Moreover, there are no further requests for any kind of accommodation for this Petitioner after the status report of December 18, 2007, although the Physician Activity Status Reports continue until May 5, 2008. Accordingly, I **FIND** that the District acted properly with respect to this Petitioner's request for an accommodation for the injuries sustained.

Turning now to Petitioner's assertion that the negative evaluations she received were in some way related to her Workers' Compensation claim and were in retaliation for her making that claim, it is clear that her evaluation immediately proceeding the occurrence of the accident in March 2007, which took place on February 23, contained negative evaluative data.

A review of her evaluations prior to that date indicates that on several occasions she had been given the "NI" rating for various aspects of Domain 2. On the February 23, 2007, evaluation, immediately preceding her accident, Petitioner received a "U" rating on all but one of the aspects of Domain 2. Her May 2007 evaluation which occurred after the accident but before her leave of absence also reflects, generally, a substandard performance with a rating of "NI" in three of the four domains and an "S" in the fourth.

Upon her return from her leave of absence, she was evaluated three times. The first was on January 22, 2008, at which time she was given a rating of "U" in all four domains. In the second evaluation on March 8 which was done by Mr. Brower, she received three "NI" ratings and one "U," thus, perhaps indicating an improvement. In the third evaluation, however, Petitioner was once again rated "U" or unsatisfactory in all

domains. As a result, her Summative Evaluation for the year was a rating of "U" in all domains except one.

Petitioner presented a witness to support her contention that the negative evaluations were retaliatory. Ms. Andino, asserted that she had been told, when evaluating Petitioner, "you know what you have to do" by the principal of the school. Ms. Andino, who was an assistant principal at the time, testified that she interpreted the instruction to mean she was to give a negative evaluation. Once again, the credibility of this witness is critical to determine the weight to accord her testimony. A review of Ms. Andino's testimony reveals that she imputed a negative interpretation to the instruction she was given. Those words are neutral on their face; as an administrator presumably with the appropriate certifications but with little experience in the position of assistant principal, she was expected to know how to conduct an evaluation. The words on their face can be interpreted as a reminder of her professional responsibility. Andino, however, had lost one appeal at the OAL and had, at the time she testified, another pending. In addition, her testimony is riddled with comments reflecting a personal bias against the principal of PS No. 23. Therefore, I **FIND** that her testimony was tainted with personal animus and I accord it no weight.

Based on the fact that evaluations which preceded the Workers' Compensation claim contained negative evaluation data, especially that of February 23, 2007, I **FIND** that the negative evaluations were not issued in retaliation for the Workers' compensation claim.

Based on all of the foregoing, I **CONCLUDE** Petitioner has failed to sustain her burden of proving a violation of law or constitutional provision.

As noted above, it is well established by case law that a non-tenured teacher has no viable appeal from being released from a teaching position unless the release constitutes a violation of law or a constitutional provision. Since such is not the case here, where the record clearly reflects a performance which deteriorated over time from

being substantially satisfactory to becoming increasingly unsatisfactory at the end, I **CONCLUDE** the action of the district in not renewing this contract should be affirmed.

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, 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 21, 2010
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency:

May 21, 2010
DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

Date Mailed to Parties: MAY 24 2010

jb

APPENDIX

Witnesses:

Victoria Ramirez

Frank Conti

Marcia Hernandez

Noritza Andino

Robert Brower

Mercedita Dacanay

Jeanette Ayala

*Exhibits:

P-1A	Evaluation dated January 9, 2002
P-1B	Evaluation dated February 27, 2002
P-1C	Evaluation dated June 12, 2002
P-1CC	Corrected P-1C
P-1D	Evaluation dated November 13, 2002
P-1E	Evaluation dated May 12, 2003
P-1F	Evaluation dated October 30, 2003
P-1G	Evaluation dated March 31, 2004
P-1H	Evaluation dated April 1, 2004
P-1I	Evaluation dated March 22, 2005
P-1J	Evaluation dated November 10, 2006
P-1K	Evaluation dated February 23, 2007
P-1L	Evaluation dated April 26, 2007
P-1M	Summative Evaluation dated May 24, 2007
P-1N	Evaluation dated January 22, 2008
P-1O	Evaluation dated March 6, 20089
P-1P(a)	Lesson Plan

*These enumerated "P" exhibits are those which were referenced in the hearing. By agreement, the entire Petitioner exhibits binder was accepted into evidence.

P-2E	Pre-Observation Form dated February 20, 2007
P-3A	Concentra Status Report dated September 18, 2007
P-3EE	Concentra Status Report dated December 18, 2007
P-3FF	Concentra Status Report dated March 11, 2008
P-3GG	Concentra Status Report dated March 13, 2008
P-3LL	Concentra Status Report dated March 25, 2008
P-4	Letter from Rubano to Ramirez dated May 12, 2008
P-5	Not in Evidence
P-6	Letter from Ramirez to Board of Education dated July 15, 2008
P-7	Letter to To Whom It May Concern (undated)
P-8	Letter from Ramirez dated May 14, 2008
P-9	Letter from Ramirez to Brower dated April 28, 2008
P-10	Not in Evidence
P-11	Teacher Daily Schedule
P-12	Petition
P-13	Not in Evidence
P-14	Evaluation dated June 2, 2008
P-15	Letter from Junior National Young Leaders dated February 6, 2008
P-16	Letter from Rubano to Ramirez dated June 23, 2008
P-17	Not in Evidence
P-18	Not in Evidence
P-19	Not in Evidence
P-20	Contract Agreement from September 1, 2006, to August 31, 2009

R-1 to 21	Not in Evidence or duplicative items in evidence in Petitioner's case
R-22	Evaluation dated May 12, 2003
R-23	Not in Evidence
R-24	Evaluation dated November 13, 2002

Hearing Dates:

April 7 and 8, 2009; October 6 and 7, 2009; November 9 and 10, 2009; and December 7, 2009

199-10

OAL DKT. NO. EDU 9714-07
AGENCY DKT. NO. 222-8/07

DR. JACK PERNA,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, : DECISION

RESPONDENT. :

:

The record of this matter, the papers memorializing 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: 7|02|10

Date of Mailing: 7|02|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09714-07

AGENCY DKT. NO. 222-8/07

DR. JACK PERNA,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Jack A. Perna, Ph.D., pro se

Robert E. Murray, Esq., for respondent

Record Closed: May 19, 2010 Decided: May 20, 2010

BEFORE **CARIDAD F. RIGO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on September 19, 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 January 12, 2009. Prior to the hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.

Having reviewed the contents of the attached 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 (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 20, 2010

DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 5-24-10

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 24 2010

DATE

OFFICE OF ADMINISTRATIVE LAW

CFR/lr

attachment

January 5, 2009

Luis M. Rojas Jr.
Director of Human Resources
33 Church Street
Paterson Public Schools

Re: Settlement of Litigation before the Office of Administrative Law/Commissioner of Education, Agency Reference No. 222-8/07/OAL Dkt. No. EDUOA 09714-2007N

Let this letter serve as a supplement to my letter of December 18, 2008 expressing my agreement to the terms outlined in the Personnel Action, dated 12/16/08:

Please be advised that I agree with the terms and language outlined in the above mentioned Personnel Action and consider this matter fully resolved.

Further, I understand that this settlement is subject to the approval of the State Commissioner of Education.

Sincerely,

Jack A. Perna, Ph.D.

December 18, 2008

Luis M. Rojas Jr.
Director of Human Resources
33 Church Street
Paterson Public Schools

Let this letter serve to express my agreement to the terms outlined in the Personnel Action, dated 12/16/08, you have proposed to settle litigation before the Office of Administrative Law/Commissioner of Education, Agency Reference No. 222-8/07/OAL Dkt. No. EDUOA 09714-2007N. This agreement is contingent on the approval of the New Jersey State Commissioner of Education for the Action to reclassify my title to reflect Supervisor of Grant Acquisition and Management effective January 1, 2008.

Sincerely,

Jack A. Perna

Jack A. Perna, Ph.D.

_____

Paterson Public Schools
PERSONNEL TRANSACTION REQUEST & PERSONNEL ACTION FORM

(Please Type)

Date: *12/18/2008*

1. INITIATOR: Mr. Luis M. Rojas Jr. School/Dept: Human Resource Position: Director Signature:

*** PLEASE NOTE**: Action **WILL NOT** occur until the Golden Rod is returned

2. PURPOSE(S) _____ Fill Vacancy _____ Transfer (s) _____ Create/Abolish Position
_____ Resignation _____ Retirement _____ Suspension _____ Dismissal _____ Death
__X__ Other Describe: **Reclassify position in settlement of litigation**

3. EXPLANATION: *Provide a detailed explanation of personnel transaction/request. For all appointments and/or transferrs; section 4 or 5 **MUST** be completed.*

Action to reclassify the title of Dr. Jack Perna (SS# 080-36-5574) to reflect Supervisor of Grant Acquisition and Management in settlement of litigation before the Office of Administrative Law/Commissioner of Education, Agency Reference No. 222-8/07/OAL Dkt. No. EDUOA 09714-2007N. Title reclassification will occur upon approval of the settlement by the Commissioner of Education. Dr. Perna shall remain in the PAA bargaining unit upon the reclassification of his job title and shall maintain his present salary for the remainder of the 2008-2009 school year. Dr. Perna's salary for successor years will reflect PAA salary increases.

ccount # _____ Not to exceed $ _____

4. APPOINTMENT(S): In PC#: _____ Position: _____ Location: _____

Name of Appointee: _____ New Hire: YES NO

Eff. Date: _____ If the employee is **NOT** a new hire please indicate current salary - _____

Salary Guide: _____ Salary: _____ Level: _____ Step: _____

Comments: _____

5. TRANSFERS:

	Name	Position to be back filled Y/N	From Location	From PC#	From Position	To Location	To PC#	To Position	EFF. DATE
A.									
B.									
C.									
D.									

APPROVALS REQUIRED

	Signature	Date		Signature	Date
Principal/Admin.			Asst. Sup for Per	M Burgos	12/18/08
Asst. Superintendent			Superintendent		
Position Control			State Monitor		18
Director of HR		12/18/08			

White-Original-To Board Office Green-Superintendent Yellow-Personnel Pink-Payroll Gold Initiator

204-10SEC

AGENCY DKT. NO. 106-5/10

IN THE MATTER OF JIMMY GARCIA,	:	COMMISSIONER OF EDUCATION
UNION CITY BOARD OF EDUCATION,	:	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. 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 such review, the Commissioner concurs with the penalty of censure recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite disclosure statements, in that such delay has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent shall be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/10

Date of Mailing: 7/07/10

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, 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**
JIMMY GARCIA	:	**ETHICS COMMISSION**
UNION CITY BOARD OF EDUCATION	:	
HUDSON COUNTY	:	
	:	**Docket No. D14-09**
	:	**DECISION ON REMAND**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) on October 30, 2009, through regular and certified mail, return receipt requested, directing the respondent to show cause as to why the Commission should not find him in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., for failing to file Personal/Relative and Financial Disclosure statements required by N.J.S.A. 18A:12-25 and 26. The Commission therein provided notification that the respondent had 20 days to respond to the OTSC, and that the failure to respond would be deemed an admission of the facts set forth in the Order. The respondent was further notified that, upon receipt of the response or upon expiration of the 20-day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (*i.e.*, without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

The respondent failed to reply to the Order to Show Cause.[1] Accordingly, at its meeting on December 15, 2009, the Commission found that the respondent violated 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 filed the disclosure statements, removal if the disclosure statements were not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements were filed prior to issuance of the Commissioner's decision.

Pursuant to N.J.A.C. 6A:4-1 et seq., the respondent appealed the Commission's findings and recommended penalty to the Commissioner of Education. On appeal, the respondent argued that, as a Senior Network Administrator, the Act does not apply to him because he does not meet the definition of "administrator" set forth at N.J.S.A. 18A:12-23. He further asserted that he was not aware that he was required to file the disclosure statements until he received the Commission's December 15, 2009 decision finding him in violation of the Act. In this connection, he asserts that he did not receive the "warning letter" dated August 21, 2009 issued by the Commission, nor did he receive the Commission's October 30, 2009 Order to Show Cause which was sent by both regular and certified mail. (I/M/O Jimmy Garcia, Board of Education of the City of Union, Hudson County, Commissioner Decision No. 99-10ASEC, decided March 26, 2010, at p. 2) In support of his appeal, the respondent supplemented the record with a copy of a job posting for the position of Network Administrator dated December 1, 1999; a copy of the a notice from the U.S. Post Office dated November 3, 2009 indicating that

[1] It is noted in this connection that while the certified mail copy of the Order was returned as "unclaimed," the copy sent by regular mail was not returned and is, therefore, deemed received.

there was an attempted delivery of a letter sent via certified mail; and a sworn certification signed by the respondent on January 11, 2010. In his decision, the Commissioner found that:

> [T]he central issues raised by the respondent's appeal [are] whether he is subject to the requirements of the School Ethics Act and, if so, the credibility and effect of his representations as to why he failed to respond to the Order to Show Cause or to timely file disclosure statements ***." (Garcia, supra at p. 3)

Accordingly this matter was remanded to the Commission for consideration "with the benefits of a full record." (Id. at pp. 3-4) The Commissioner did not retain jurisdiction.

By letter dated March 31, 2010, the Commission notified respondent's counsel that it would place this matter on its agenda for consideration at its meeting on April 20, 2010. The respondent was invited to attend. The Commission provided a copy of that letter to the Board Secretary, also inviting his attendance, as well as the submission of "any documentation relevant to the determination that, for the 2009 calendar year, the respondent was subject to the School Ethics Act as a school administrator, together with any documentation to show that the respondent was duly apprised of the same." (Commission's March 31, 2010 letter)

On April 9, 2010, counsel for the Board supplemented the record with, *inter alia*, a statement of the job responsibilities for the Senior Network Administrator provided by the Board's Supervisor of Technology & Information Systems, as well as a certification from the Board Secretary and supporting exhibits. The respondent attended the Commission's meeting on April 20, 2010, with counsel, Mary J. Hammer, Esq.

At the outset, counsel for the respondent noted that the respondent filed his 2009 Personal/Relative and Financial Disclosure statements during the pendency of his appeal before the Commissioner of Education and also filed his 2010 Personal/Relative and Financial Disclosure statements due on April 30, 2010 in order to avoid sanction. Counsel argued that the respondent did so irrespective of his belief as to whether the Act requires him to file the statements. In this connection, counsel argued that the respondent is not a school administrator as contemplated by the Act; she likened his respondent's job duties to buying a car. That is, the respondent would tell the District that it needed to purchase a six cylinder sedan, but would not recommend the particular model to be purchased.

The respondent testified that he was initially hired in 1996 as a Programmer/Systems Administrator and in 2000 he became a Network Administrator. In 2004, he became the Senior Network Administrator. The respondent stated that he obtained the 2009 Personal/Relative and Financial Disclosure forms around February 2009 when they were placed in an envelope to be filled out. He stated that he was told to fill out the forms. The respondent testified that he did not understand why he was required to complete the forms since he had been employed in the position for 12 years and had not previously been asked to complete the statements. When he received the form, he went to his Human Resources office and was directed to the School Ethics Commission's website. He testified that he read the statute and did not think that it applied to

him. Additionally, the respondent testified that Assistant Superintendent Caputo informed him that he did not think that he had to file the forms.

The respondent testified that he then spoke to the Board Secretary's administrative assistant who indicated that she did not know why he was being asked to complete the forms, but his name was on the list of school administrators who needed to complete the form. The respondent stated that he then asked the Board secretary why he was required to complete the forms, but the Board Secretary did not get back to him with a response. In response to questioning from the Commission, the respondent acknowledged that when the Board Secretary did not directly respond to his inquiry, he made the decision not to fill out the forms because he believed that the statute did not require that he do so. As to the emails that were submitted to the Commission by the Board Secretary showing that the respondent was repeatedly reminded of his duty to file the statements, the respondent affirmed that although the email address was his, he "never saw those emails." The respondent asserted that these emails were in memo format and could have been typed.

The respondent testified that after receiving the Commission's December 15, 2009 decision, he discussed the matter with the Executive County Superintendent because, according to the respondent, he heard nothing from the District. He stated that although the Commission's August 2009 warning letter and October 2009 Order to Show Cause were sent to the correct mailing address, he did not receive either.

The respondent disputed that his job requires him to make recommendations as to the purchase of goods or services, as set forth in the Board Secretary's certification submitted to the Commission, although he acknowledged that after 2006, he played "a big role," from a technology standpoint, in construction being done in the District. The respondent testified that, in accordance with the District's technology plan, it was his role to ensure that any new construction would be compatible with existing infrastructures and warrantees. However, the respondent stated that the Board decides what products to purchase and what vendors to hire; he never interacted with the vendors. The respondent indicated that he did not have a job description that would show his duties and responsibilities in 2009.

In response to a question from the Commission, the respondent acknowledged that he and his supervisors have a different perception of his role and that in the future, if the District requires that the disclosure statements be completed, he will complete them. The respondent testified that he completed the 2010 disclosure statements so as to avoid being sanctioned.

After hearing testimony from the respondent, at the Commission's public session, it voted to find that the School Ethics Act applied to the respondent in that he satisfied the definition of "school administrator" as set forth in N.J.S.A. 18A:12-23. The Commission found that the respondent was accorded proper notice that he was required to file 2009 Personal/Relative and Financial Disclosure Statements and consequently violated N.J.S.A. 18A:12-25 and 26 when he failed to file those statements until January 2010. The Commission recommended a penalty of censure.

FINDINGS OF FACT

Based on the documentary and testimonial evidence, the Commission finds the following facts on remand. In so doing, the Commission found the respondent's testimony ineffective as a rebuttal to the District's position, as set forth within, that he is subject to the School Ethics Act and particularly lacking in credibility with respect to his claims that he did not receive any notice that he was required to file 2009 Personal/Relative and Financial Disclosure Statements.

1. The respondent is a Senior Network Administrator employed by the Board.

2. The Board's Supervisor of Technology & Information Systems provided a job description for Senior Network Administrator as follows:

> As Senior Network Administrator, Mr. Garcia's responsibilities include the management/direction of the Technical Support Specialists (full and part time employees) for infrastructure, design, management, maintenance and repair for both the local and wide area networks (LAN and WAN). In addition, he is responsible for the configuration, upgrades/maintenance, security and back-ups of district servers, the configuration, upgrades/maintenance and security of switched electronics, routers, firewall, faltering services, VPN Access, email system, computer imaging, hardware and software trouble shooting. Mr. Garcia also managed the district telephone system until the system was replaced. (Completed in 2009). Finally, in the commission of his job responsibilities, Mr. Garcia recommended/specified the equipment and/or supplies to be ordered. (Lavelle letter, February 5, 2010 at p. 2)

3. The Board Secretary, Anthony Dragona, certified that in 2009, the respondent's job responsibilities "included involvement in the development, recommendation (of vendors, contracted services and equipment purchases) and specifications of technology hardware, equipment, supplies and services for the District" in connection with a school construction project. As such, the respondent "was in the position to impact the purchasing decisions of the Technology phase of the new construction projects ***"(Dragona Certification at paragraph 4).

4. By email dated March 17, 2009, the Board Secretary's office forwarded to the respondent's correct email address the following statement:

> Please accept this email as a reminder for filing your financial disclosure statement which was due on March 16, 2009. Please kindly submit your forms to the Board Secretary's office as soon as possible. (Dragona Certification at Exhibit A).

5. By email dated April 3, 2009, the Board Secretary's office forwarded to the respondent's correct email address the following statement:

> Please accept this email to remind you that the deadline for the filing of your financial and personal/relative disclosure statements was March 16, 2009. To date, I have not received your completed statements. Please bring your completed statements to my office as soon as possible. Your original disclosure statements will be date-stamped upon receipt, and you will be provided with a copy of the date-stamped statements for your records. The disclosure statements may be downloaded from the School Ethics Commission's website at www.nj.gov/education/ethics/fdform.htm. If you lack internet access, you may come to my office to receive a form.
>
> The School Ethics Commission has asked me to advise you that if the completed statements are not filed in my office by April 30, 2009, it has the right to issue an Order requiring you to Show Cause why you have not filed. It has further asked me to advise you that failure to timely file your disclosure statements may result in the Commission finding you in violation of N.J.S.A. 18A:12-25 and 26 of the School Ethics Act.
>
> Thank you. (Dragona Certification at Exhibit B).

6. By email dated March 3, 2009, the office of the Board Secretary alerted Board Counsel, as follows:

> In reference to ethics disclosure statements—I was informed to hand a form to Jimmy, which I did.
>
> He came back to me on 2/29 informing me that he never filed an ethics disclosure form out before and that he didn't have to this year. He also questioned me of why he was given the form.
>
> I showed him the ethics disclosure memo from the state and a section of the memo explains who has to file. I explained to him that because he makes recommendations on purchase of services he has to file.
>
> He doesn't think that he has too [sic] and I informed him that it was not a big deal just fill out the form and don't leave any questions blank.
>
> He mention [sic] to me that he was going to speak to Tony and Janice about this.

As of today, I have not received the filled out form. (Dragona Certification at Exhibit D).

7. By email dated April 23, 2009, the Board Secretary's office forwarded to the respondent's correct email address the following statement:

> Please accept this email to remind you that the deadline for the filing of your financial and personal/relative disclosure statements was March 16, 2009. To date, I have not received your completed statements. Please bring your completed statements to my office as soon as possible. Your original disclosure statements will be date-stamped upon receipt, and you will be provided with a copy of the date-stamped statements for your records. The disclosure statements may be downloaded from the School Ethics Commission's website at www.nj.gov/education/ethics/fdform.htm. If you lack internet access, you may come to my office to receive a form.
>
> The School Ethics Commission has asked me to advise you that if the completed statements are not filed in my office by April 30, 2009, it has the right to issue an Order requiring you to Show Cause why you have not filed. It has further asked me to advise you that failure to timely file your disclosure statements may result in the Commission finding you in violation of N.J.S.A. 18A:12-25 and 26 of the School Ethics Act.
>
> Thank you. (Dragona Certification at Exhibit C).

8. By letter dated August 21, 2009, the School Ethics Commission directed a "warning letter" to the respondent's correct home address, which stated, in relevant part:

> Your board secretary has identified you as a school official required to file the disclosure statements. However, to date, your Executive County Superintendent's office has not received your completed disclosure statements or, your statements were received but were returned to you because they were not properly completed. **Please immediately bring your completed disclosure statements to your board secretary's office where the statements should be date stamped and copied.** The board secretary will forward the original statements to the county office. The county office will report to the Commission when the statements are filed. ***
>
> **If the completed disclosure statements are not received in the office of the Executive County Superintendent by September**

> **30, 2009, the Commission may issue an Order requiring you to show cause why you have not filed, which may result in the Commission finding you in violation of N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommending that the Commissioner of Education impose a penalty in accordance with the statute.** *** (August 21, 2009, School Ethics Commission; emphasis in text)

9. On October 30, 2009, an Order to Show Cause was issued by the Commission via regular and certified mail to the respondent's correct home address directing the respondent to show cause as to why the Commission should not find him in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., for failing to file Personal/Relative and Financial Disclosure statements required by N.J.S.A. 18A:12-25 and 26.

10. On December 15, 2009, a decision was issued by the Commission finding that the respondent violated 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, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

11. The August 21, 2009 warning letter, the October 30, 2009 Order to Show Cause and the December 15, 2009 decision were all forwarded to the respondent at the same address, which is the respondent's correct address.

12. On January 7, 2010, the Hudson County Office notified the office of the School Ethics Commission that the respondent filed his 2009 disclosure statements. (email from Hudson County Office to School Ethics Commission dated January 7, 2009)

13. The respondent filed his 2010 Personal/Relative and Financial Disclosure statements that were due on April 30, 2010.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file both a Personal/Relative Disclosure Statement and a Financial Disclosure Statement with their local board secretaries or charter school designees. Indeed, N.J.S.A. 18A:12-25 and 26 place an affirmative duty on the individual school official to file the required statements. The term "school official" is defined as a board member (or charter school trustee), an administrator or a managerial employee or officer of the New Jersey School Boards Association. N.J.S.A. 18A:12-23 and 23.1. Pursuant to N.J.S.A. 18A:12-23:

> "Administrator" means any officer, other than a board member, or employee of a local school district who:

(i) holds a position which requires a certificate that authorizes the holder to serve as school administrator, principal, or school business administrator; or

(ii) holds a position which does not require that the person hold any type of certificate but is responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district; or

(iii) holds a position which requires a certificate that authorizes the holder to serve as supervisor and who is responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district. (emphasis added)

Additionally, the Commission's regulations provide that:

> In order to comply with the filing requirement, each local district board secretary or charter school designee shall annually, on or before February 1, file with the executive county superintendent a written list of names of those school officials, by office and position, **whose responsibilities would require the filing of the Financial and Personal/Relative Disclosure Statements pursuant to the criteria contained in N.J.S.A. 18A:12-21 et seq. and these rules.** Offices and positions vacant or to become vacant by virtue of expiration of terms or personnel leaving the district are to be listed. (N.J.A.C. 6A:28-3.2(a); emphasis added)

Thus, it is the Board Secretary, in the first instance, who determines which individuals are subject to the filing requirement, notwithstanding that it is clearly the individual school official's duty, as set forth in statute, to meet the filing mandate.

Here, the Board Secretary determined that the respondent should file disclosure statements in the 2009 calendar year because he was responsible for making recommendations regarding "the purchase or acquisition of any property or services by the local school district." The Commission finds sufficient support for the Board Secretary's determination in the record as supplemented on appeal and thus determines that the respondent was required to file both a Personal/Relative Disclosure Statement and a Financial Disclosure Statement in 2009, but failed to do so until January 2010. In this connection, although the respondent argued that he cannot be considered a school administrator under the Act because it is only the Board which is authorized to make decisions about the purchase of goods and services, the Commission notes that the statute requires only that the non-certificated person is *responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district.* To the extent the respondent disputes the Board Secretary's certification or the job description for Senior Network Administrator offered by the Board's Supervisor of Technology & Information Systems which specifically stated that the respondent recommended/specified the equipment and/or supplies to be ordered in connection with his job duties (Factual Finding #2),

the Commission notes that the respondent failed to offer any documentation as to his *current* job duties that contradicts the District's position.

Additionally, contrary to his contention on appeal, the Commission finds that the respondent was fairly notified that he was expected to file the disclosure statements. The respondent forthrightly admitted that he was told in February 2009 that he was expected to file the statements. He also testified that after receiving the forms, he consulted the statute. Thus, the Commission finds it fair to conclude that the respondent was: (1) timely notified that he was expected to file and (2) aware that he must do so by April 30, 2009. However, as acknowledged in his testimony, he made the decision *not* to complete the disclosure statements because the Board Secretary did not directly respond to his inquiry and he believed that the statute did not require that someone in his position do so.

The Commission further finds that once the respondent was fairly notified that he was expected to file the statements, the District was under no legal obligation to continually remind him of his duty. Thus, the respondent's claim that he never received the email correspondences from the Board Secretary's office, even if true, is without legal consequence. Similarly, the respondent's assertion that he did not receive the Commission's August 21, 2009 warning letter, if true, is without legal consequence, where such a letter is not required to be sent to a delinquent filer.

Respondent's claim that he did not receive the Commission's Order to Show Cause presents a more difficult question, since the Order is the basis for the Commission's original action. N.J.A.C. 6A:28-1.6. However, the Commission is satisfied that, absent the return of the regular mailing for an improper address, or some other plausible explanation from the respondent, the Order sent by regular mail *was* properly delivered and is, therefore, deemed received. New Jersey Court Rule 1:5-4(b). The Commission finds that the respondent's assertion that "The first time I learned that I was required to file the statements was when I received the December 16, 2009 letter from the School Ethics Commission enclosing their decision finding me in violation of the Act" strains credibility. (Garcia Certification at paragraph 11) In this connection, the Commission is persuaded that the respondent's statements on appeal, and on remand, were motivated by his desire to avoid a sanction.

DECISION

Based on the record supplemented on appeal, the Commission finds that the respondent was required to file both a Personal/Relative Disclosure Statement and a Financial Disclosure Statement in 2009, but failed to timely do so. Accordingly, the respondent violated N.J.S.A. 18A:12-25 and 26.

PENALTY

In its decision dated December 15, 2009, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official filed the disclosure statements, removal if the disclosure statements were not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements were filed prior to issuance of

the Commissioner's decision. As noted above, the respondent filed his 2009 disclosure statements in January 2010, prior to the issuance of the Commissioner's decision on March 26, 2010. Accordingly, consistent with its prior decision and noting that the respondent, on remand, offered no testimony that would persuade the Commission that a lesser penalty was warranted, the Commission finds that censure is the appropriate 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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: May 26, 2010

Resolution Adopting Decision – D14-09

Whereas, the School Ethics Commission has considered this matter remanded by the Commissioner of Education, including the record on appeal, all documents submitted to the Commission on remand and the respondent's testimony on April 20, 2010; and

Whereas, at its meeting on April 20, 2010, the Commission found that the respondent was required to file both a Personal/Relative Disclosure Statement and a Financial Disclosure Statement in 2009, but failed to timely do so, in violation of N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting on April 20, 2010, the Commission recommended a penalty of censure; and

Whereas, at its meeting on May 25, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on May 25, 2010.

Joanne Boyle, Executive Director

205-10

F.P. on behalf of minor child F.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought home schooling for his child after he was allegedly attacked at school, claiming that F.P. could not continue to attend classes because of nervousness and vomiting. An emergent relief hearing in the matter was scheduled for June 1, 2010.

Subsequently, both petitioner and respondent failed to appear at the scheduled hearing despite appropriate notice, and neither provided any explanation for their nonappearance. Having received no explanation from either party, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice.

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

July 7, 2010

OAL DKT. NO. EDU 4614-10
AGENCY DKT. NO. 103-5/10

F.P. on behalf of minor child F.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter, including a copy of the notification sent to the parties by the Office of Administrative Law (OAL) on May 27, 2010, informing them that the emergent hearing in this matter would be held on June 1, 2010, and the June 3rd memorandum of the OAL advising that both parties failed to appear at the emergent hearing scheduled for June 1, 2010. The Commissioner also notes that, pursuant to *N.J.A.C.* 1:1-14.4(a), the Administrative Law Judge (ALJ) held the matter for two days after the hearing to give the parties the opportunity to offer explanations for their nonappearance. There being no explanations filed with the ALJ, she directed that the matter be returned to the Commissioner of Education and provided notice dated June 4, 2010 to the parties that any excuses for non-appearance should henceforth be sent to the Commissioner of Education.

The Commissioner has to date received no explanations for the parties' nonappearances. Accordingly, for failure to prosecute, the petitioner's appeal is herewith dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7|07|10
Date of Mailing: 7|07|10

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

OAL DKT. NO EDU 4289-10
(EDU 8561-09 ON REMAND)
AGENCY DKT. NO. 157-7/09

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE PICCOLI,	:	
NEW JERSEY STATE DEPARTMENT	:	COMMISSIONER OF EDUCATION
OF CORRECTIONS, ALBERT C. WAGNER	:	DECISION
YOUTH CORRECTIONAL FACILITY.	:	
	:	

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.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|07|10
Date of Mailing: 7|07|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04289-10
(ON REMAND EDU 08561-09)
AGENCY DKT. NO. 157-7/09

IN THE MATTER OF THE TENURE HEARING OF SALVATORE PICCOLI, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY.

Ellen M. Hale, Deputy Attorney General, for petitioner, New Jersey State Department of Corrections, Albert C. Wagner Youth Correctional Facility (Paula T. Dow, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent, Salvatore Piccoli (Weissman & Mintz, attorneys)

Record Closed: May 28, 2010 Decided: June 3, 2010

BEFORE **LAURA SANDERS,** Acting Director and Chief ALJ:

This matter was initially transmitted to the Office of Administrative Law (OAL) on August 4, 2009, which matter was assigned OAL Dkt. No. EDU 08561-09 and has now been assigned OAL Dkt. No. EDU 04289-10 on remand.

On May 4, 2010, the decision of the Commissioner of Education remanded the matter to the OAL indicating that the handwritten alterations to the typewritten stipulation of settlement did not sufficiently indicate the parties' acceptance of the document and the alterations. The parties have now resubmitted the stipulation of settlement, initialing the agreement in compliance with the Commissioner's remand.

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 3, 2010
DATE

Laura Sanders
LAURA SANDERS, Acting Director and Chief ALJ

JUN - 7 2010

Date Received at Agency: JUN - 7 2010

Date Mailed to Parties:

/caa

PAULA T. DOW
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)633-7786

In the Matter of the Tenure Hearing of Salvatore Piccoli, Department of Corrections	:	Agency Dkt. No.: EDUTH 08561-2009S
	:	Agency Ref. No.: 157-7/09
	:	STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), represented by Paula T. Dow, Attorney General of New Jersey, Ellen M. Hale, Deputy Attorney General, appearing; and Salvatore Piccoli, a tenured employee of the NJDOC represented by Rosemarie Cipparulo, Esq., appearing; by way of this Stipulation of Settlement say:

WHEREAS, the Department initiated the filing of tenure charges against Mr. Piccoli, having filed the charges with the Commissioner of Education on or about June 29, 2009; and

WHEREAS, Mr. Piccoli was charged with Conduct Unbecoming a Teacher as defined in N.J.S.A. 18A:6-10; N.J.A.C. 6A:3-5.1, N.J.A.C. 4A:2-2.3(a) and Human Resources Bulletin 84-17, as amended, C-4 verbal abuse of an inmate, patient, client resident, or employee; C-9 insubordination: intentional disobedience or

refusal to accept order, resisting authority, disrespect or use of insulting or abusive language to a supervisor; C-11 conduct unbecoming an employee; C-24 interfering with fellow employees on State Property; and D-4 having an inmate present during a union consultation; and

WHEREAS, the tenure charges alleged that on March 17, 2009 and June 15, 2009, Salvatore Piccoli, a Teacher I within the New Jersey Department of Corrections, violated the above-noted statute, regulations and Policies; and

WHEREAS, the NJDOC sought the suspension of Mr. Piccoli for ninety (90) days without pay for the above set of charges;

WHEREAS, Mr. Piccoli disputed the charges;

WHEREAS, the matter was initially referred in June 2009 to the Office of Administrative Law for a plenary hearing;

WHEREAS, a hearing has been scheduled.

WHEREAS, Mr. Piccoli has not yet served any suspension time;

WHEREAS, the petitioner has concluded that it may be time consuming and expensive to prove the tenure charges against Mr. Piccoli;

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Piccoli;

WHEREAS, Mr. Piccoli entered into the agreement with a full understanding of his rights;

WHEREAS, Mr. Piccoli is not owed any pay, counsel fees or any other costs associated with this matter;

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. Piccoli admits to the charges and underlying conduct as set forth above.

2. As the penalty, Mr. Piccoli shall be suspended ten (10) days without pay. The suspension time shall be scheduled consistent with Operational needs and at the management's discretion. The suspension will be completed and served consistent with Department Policy.

3. Mr. Piccoli's personnel record shall reflect a twenty (20) day suspension.

3a. Mr. Piccoli agrees to attend anger management classes.

3b. Mr. Piccoli will be placed on the next available transfer list.

3c. Mr. Piccoli agrees to withdraw his appeal of the Final Notice of Disciplinary Action dated June 15, 2005 (5 working days). (Settlement Agreement attached as Exhibit A.)

4. This Agreement shall be part of Mr. Piccoli's official personnel file and Mr. Piccoli'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.

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. Piccoli 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 ninety day suspension to ~~fifteen~~ 10 days to be without pay and 20 days is on the record equitable in exchange for eliminating the expense, time and uncertainty connected with a contested tenure hearing.

7. This Agreement shall 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:

Salvatore Piccoli — Dated:

Rosemarie Cipparulo, Esq. — Dated: 4/13/10
Weissman & Mintz, LLC

Attorney for Piccoli

For the Department of Corrections:

_____ Dated:
Kenneth Green, Director

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

_____ Dated: 4/13/10
By: Ellen M. Hale
Deputy Attorney General

Exhibit A

Salvatore Piccoli Appellant Vs	} } } }	SETTLEMENT AGREEMENT
AC Wagner Youth Correctional Facility Respondent	} }	

The parties hereto agree to settle this matter in accordance with the following terms:

1. The appellant will withdraw his appeal of the Final Notice of Disciplinary Action dated 6-15-05 (5 working days) on the following charges:

A. N.J.A.C. 4A: 2-2.3 (a) 6 Conduct unbecoming an employee
B. N.J.A.C. 4A: 2-2.3 (a) 11: Other sufficient cause
C. Human Resource Bulletin 84-17 (as amended) C-11 Conduct unbecoming an employee
D. Human Resource Bulletin 84-17 (as amended) C-31 Violation of the NJDOC policy prohibiting racial and/or sexual harassment, discrimination and/or retaliation

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

3. The appellant will not receive any back pay, counsel fees, costs or any other monetary relief as a result of this settlement.

4. The personnel file for the Department of Corrections will indicate that the appellant received a 5 working day suspension for the charges above.

5. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

6. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal, or administrative in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including, but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract expressed or implied.

7. All internal records of the Department of Corrections that concern this matter will be kept intact. Nothing herein shall preclude the Respondent from releasing information on this matter to anyone who has a release executed by appellant, or as consistent with the law. Any information regarding the underlying charges may be provided to the Division of Pensions upon request pursuant to N.J.S.A. 43:1-3 as amended effective April 14, 2007.

Authorization has been given by the Department to agree to this settlement. The parties have read the settlement agreement and freely and voluntarily agree to its provisions.

Ellen Hale 4/13/10
Appointing Authority Representative (Date)
Ellen Hale

Appellant (Date) 4/13/10

Appellant's Representative (Date) 4/13/10

CERTIFICATION

I, Salvatore Ricco II, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey, Department of Corrections.

Salvatore Ricco II 4/13/10

Appellant's Signature Date

207-10L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BRET SCHUNDLER
Commissioner

July 7, 2010

M[redacted] A[redacted] C[redacted], *Pro Se*
[redacted]
Jersey City, NJ 07302

Board Secretary
Jersey City Board of Education
346 Claremont Avenue
Jersey City, NJ 07305

Dear Parties:

Upon review of the petition of appeal filed in connection with the matter entitled *M.C. on behalf of minor child, S.H.. v. Board of Education of the City of Jersey City, Hudson County*, Agency Dkt. No. 87- 5/10, and based upon the board's failure to submit an answer to the petition, I have determined to grant summary decision in favor of petitioner.[1]

On May 4, 2010, petitioner – a grandmother to S.H. – filed a petition of appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that S.H. was entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the petition of appeal was served upon the board secretary via facsimile on May 4, 2010, together with an acknowledgment of filing and notice that an answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5. Because the board failed to respond to the initial notice, a second notice was sent on May 21, 2010 to the board secretary – via certified and regular mail – clearly indicating that, absent receipt of an answer to the petition of appeal within 10 days, each count in the petition would be deemed admitted and this matter could be decided on a summary decision basis. *N.J.A.C.* 6A:3-1.5(e). To date, no answer has been filed on behalf of the board.

Accordingly, petitioner's claim that S.H. is entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the board. The board is hereby ordered to continue to admit S.H. into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.[2]

Sincerely,

Willa Spicer
Deputy Commissioner of Education

C: County Superintendent

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

[2] This decision may be appealed to the Superior Court, Appellate Division pursuant to *P.L.* 2008, *c.* 36.

Mailed 7/08/10

#208-10SEC

IN THE MATTER OF FRANK MINNITI,	:	COMMISSIONER OF EDUCATION
GREENWICH TOWNSHIP BOARD	:	DECISION
OF EDUCATION, CAMDEN COUNTY.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Board of Education of the Township of Greenwich – violated *N.J.S.A.* 18A:12-24(c) of the Code of Ethics for School Board Members of the School Ethics Act when he voted to approve the contract of the Business Administrator to whom his wife reported. The Commission recommended the penalty of reprimand in this matter.

Upon review, the Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – concurred that reprimand is the appropriate penalty for the violation found. Accordingly, the Commissioner directed that respondent be reprimanded as a school officer 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.

July 12, 2010

AGENCY DKT. NO. 107-5/10

IN THE MATTER OF FRANK MINNITI,	:	COMMISSIONER OF EDUCATION
GREENWICH TOWNSHIP BOARD	:	DECISION
OF EDUCATION, CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Frank Minniti, member of the Greenwich Township 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(c) of the School Ethics Act when, on February 23, 2009, he voted to approve the contract of the Business Administrator to whom his wife – a secretary in the District – reported.

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. Minniti.

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, which did not happen here. Therefore, 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. Consequently, 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 reprimand is the appropriate penalty in this matter. As clearly stated in its decision, the Commission finds this penalty congruent with that imposed in previously decided similar cases. As such, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly, IT IS hereby ORDERED that Frank Minniti is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/12/10

Date of Mailing: 7/12/10

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL**
FRANK MINNITI	:	**ETHICS COMMISSION**
GREENWICH TOWNSHIP BOARD OF	:	
EDUCATION	:	**Docket No. C08-09**
GLOUCESTER COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on March 27, 2009 by Frederick Reel alleging that Frank Minniti, a member of the Greenwich Township Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The respondent filed an answer on April 9, 2009. The matter was scheduled for a probable cause determination by the Commission on January 26, 2010, at which time the Commission voted to find probable cause to credit the allegation in the complaint. The Commission also determined to resolve this matter on a summary basis pursuant to N.J.A.C. 6A:28-6.8(b), in that the material facts are not in dispute.[1]

Pursuant to N.J.A.C. 6A:28-6.8(b), the respondent was accorded 30 days from the mailing date of the Probable Cause Notice (February 24, 2010) to submit a written statement of the reasons he should not be found in violation of the Act based on the undisputed facts set forth in this Probable Cause Notice. On March 23, 2010, the respondent filed his statement. Therein, the respondent quoted from his answer to the complaint where he stated:

> I do not believe it is reasonable for the public to expect a Board Member, with a spouse who is employed as a secretary in the district, who chooses to vote on the Business Administrator's contract for said secretary to gain any financial benefit or special privilege especially since said secretary is governed by a collective bargaining agreement. (Responsive Statement at p. 1, citing to answer at page 2)

The respondent explains that by the term "governed," he meant that any salary increment his wife receives is "directly tied to the bargaining agreement." Thus, if the bargaining agreement calls for a 3% salary increase, his wife would get the same. (Id.)

In his statement, the respondent underscored that he was never involved "either directly or indirectly" with negotiations regarding the contract for the Business Administrator. Rather, three days prior to the meeting, he received a copy of the Business Administrator's contract, with instructions from the chief school administrator to review the contract prior to ratification. The

[1] On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed on March 27, 2009, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

respondent asserts this was the first time he saw the document. Respondent affirms that in Executive Session, prior to reviewing the contract, he made a statement that if any negotiations were to take place, he would have to remove himself from the proceedings. According to the respondent, it was then that the Chief School Administrator recommended that the contract be ratified." (Id. at pp. 1-2).

The respondent notes that there have been five Chief School Administrators in the District since he has served as a Board member and none has advised him not to vote on the Business Administrator's contract. Neither has the Board solicitor advised him of the same. (Id. at p. 2) He continues:

> The complainant, at the time of the vote, was politically driven along with other Board members, to remove the current Business Administrator from his position and said board members were in a lengthly [sic] and ugly contract negotiation with the Business Administrator. *** In response to my vote, my spouse's position was used as a ploy to retaliate against me. (Ibid.)

The respondent concludes by stating that he has never acted in any capacity where a member of his family has benefited financially or in any other capacity. He affirms that he "has taken great pride as a school board of education member to never violate the public's trust" and has always been aware of his ethical and moral responsibility to the school district and to himself. (Ibid.)

At its April 20, 2010 meeting, and upon consideration of the respondent's arguments, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c), as set forth below, and recommended a penalty of reprimand.

FINDINGS OF FACTS

The undisputed facts are as follows:

1. At all times relevant, the respondent was a Board member.

2. The respondent's spouse is employed in the District as a secretary who reports to the Business Administrator. (Complainant's July 13, 2009 submission, Attachment: Minutes of Regular Meeting, Greenwich Township Board of Education, June 29, 2009 at page 3.)

3. At the Board's meeting on February 23, 2009, the respondent voted to approve the contract of the Business Administrator. The vote was five to two in favor of ratifying the contract. (Minutes of Regular Meeting, Greenwich Township Board of Education, February 23, 2009 at page 13.)

4. Minutes from the meeting on February 23, 2009 show that the Board went into Executive Session at 7:48 p.m. and returned from closed session at 9:10 p.m. The next item on the agenda was Personnel. The minutes read, in relevant part:

Motion: (Minniti/LaPalomento) to approve the following:

B. The approval of the contract for Scott A. Campbell, School Business Administrator/Board Secretary, at a salary of $88,525.00, retroactive to July 1, 2008.

Roll Call Vote:
Frederick Reel – Yes
Louis Fabiani – No
Robyn Glocker Hammond – Yes
Loraine LaPalomento – Yes
Frank Minniti – Yes
Michael Myers – Yes
Patrick Lani, Jr. – No
(Id.)

ANALYSIS

Based on the undisputed facts set forth above, the Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) when, on February 23, 2009, he voted to approve the contract of the Business Administrator. N.J.S.A. 18A:12-24(c) provides that:

> 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 School Ethics Act at N.J.S.A. 18A:12-23 defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. The Commission's regulations at N.J.A.C. 6A:28-1.2 define "spouse" as "the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33. Thus, the respondent's spouse is a member of his immediate family.

The material facts in this matter are not disputed. The respondent's wife is a secretary to the Business Administrator and on February 23, 2009, the respondent voted in public session to approve the contract of the Business Administrator. The Commission has advised that a Board member whose spouse works in the District may not participate in discussions or vote on employment issues concerning the employee's supervisors, including the Superintendent. *Advisory Opinion* A10-00 (June 27, 2000); *Advisory Opinion A30-05* (March 10, 2006). In *A30-*

05, the Commission advised that Board member B, whose spouse worked as a secretary in the High School nurse's office, "would violate N.J.S.A. 18A:12-24(c) if he were to participate in employment issues regarding the principal of the High School and the Superintendent." (*A30-05* at p. 4) The Commission further advised that Board member B must recuse himself "from all discussions **and votes** with regard to those administrators." (Id., emphasis added) See also, School Ethics Commission v. Gunning, C15-93 (September 22, 1994).

Recently, the Commission found that a Board Member violated N.J.S.A. 18A:12-24(c) when he voted to extend the contract of the Superintendent, where his wife was employed in the District as a truant officer, reporting directly to the Superintendent. I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10, decided March 11, 2010. In I/M/O Charles Carey, Pennsauken Bd. of Ed., C33-08 (March 23, 2010),[2] the Commission similarly found that a Board Member violated N.J.S.A. 18A:12-24(c) when he voted to approve the 2008-2009 salary for the Superintendent, notwithstanding that the Board member's spouse, who was employed in the District as a secretary in the nurse's office, did not report directly to the Superintendent. In I/M/O Thomas Guarascio, Township Bd. of Ed., C40-08, April 20, 2010,[3] the Commission found that a Board member violated N.J.S.A. 18A:12-24(c) when he voted at the Board's reorganization meeting to reappoint the Vice-Principal, Principal and Supervisor of Elementary Education where his wife was a tenured teacher in the District. The Commission finds, therefore, that when the respondent voted on February 23, 2009 to approve the contract and salary of the Business Administrator, he was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c).[4]

The Commission further notes that, in his statement, the respondent acknowledges that he was present in Executive Session when the Business Administrator's contract was discussed. The Commission, therefore, cautions the respondent 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." SEC v. Michael Kilmurray, Lacey Twp. Bd. of Ed., C12-94 (January 27, 1998), Commissioner of Education Decision No. 155-98 (April 15, 1998), where the Commission therein advised that full recusal requires the conflicted school official to leave the room. See also, I/M/O Richard Filipek, Saddlebrook Bd. of Ed., C18-07 (June 24, 2008) Commissioner of Education Decision No. 317-08, decided July 23, 2008, where the Commission found that the respondent Board member, whose spouse was employed in the District, violated N.J.S.A. 18A:12-24(c) by being present in his capacity as president of the Board and running

[2] This decision is pending review by the Commissioner of Education, pursuant to N.J.S.A. 18A:12-29(c).

[3] This decision is pending review by the Commissioner of Education, pursuant to N.J.S.A. 18A:12-29(c).

[4] In this connection, it is also noted that the respondent made the motion to approve the contract and salary of the Business Administrator. (See, Factual Finding #4.) The Commission has found that making a motion may be considered "official action." See, I/M/O Alexander Sipos, Garfield Bd. of Ed., C20-99 (May 23, 2000) Commissioner of Education Decision No. 221-00SEC, decided July 10, 2000.

two closed session meetings of the Board when the tenure appointment of the middle/high school principal, his wife's direct supervisor, was discussed, *notwithstanding that he did not participate in the vote.* The Commission found that the respondent had 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.

DECISION

For the reasons set forth above, the Commission finds that Frank Minniti violated N.J.S.A. 18A:12-24(c) when, on February 23, 2009, he voted to approve the contract and salary of the Business Administrator.

PENALTY

The Commission recommends a penalty of reprimand, as it did in matters which were both factually analogous and comparable in violation to the matter herein, for the reasons set forth in the above analysis, see, I/M/O Charles Carey, Pennsauken Bd. of Ed., C33-08 (March 23, 2010), I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10, decided March 11, 2010 and because a penalty of reprimand is consistent with those decisions where there a respondent was found to have violated N.J.S.A. 18A:12-24(c) in a single instance of voting on matters where they were conflicted. See, I/M/O Stewart, Atlantic City Bd. of Ed., Atlantic County, C20-07 (August 26, 2008), Commissioner of Education Decision No. 410-08, decided October 9, 2008; I/M/O Diana Lobosco, Passaic County Educational Services Commission, Passaic County, C31-05 (November 22, 2005), Commissioner of Education Decision No. 7-06, decided January 10, 2006.

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.

Robert W. Bender
Chairperson

Mailing Date: May 26, 2010

Resolution Adopting Decision – C08-09

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

Whereas, at its meeting on February 23, 2010, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; 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 April 20, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended a penalty of reprimand; and

Whereas, at its meeting on May 25, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the 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.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
May 25, 2010.

Joanne Boyle, Executive Director

209-10

F.J., on behalf of minor child, A.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought to transfer his son, A.J. to another school district based on respondent district's alleged failure to appropriately respond to an assault on A.J., and the district's failure to comply with applicable statutes and regulations governing school safety. The charges stem from a single incident in March of 2009, wherein A.J. was assaulted by an older student on the school bus. The OAL hearing in this matter was held on May 25, 2010.

The ALJ found that: the assault on the bus was an isolated incident, which was handled appropriately by the district; petitioner cites no legal basis for ordering the transfer of A.J. to another school; there are no other schools in the district; there is no legal basis for transferring A.J. to another school outside the district; A.J. testified that the other student did not bother him before or after the one incident, and that they continue to ride the bus together; there is no continuing evidence of bullying; and A.J. is progressing well in school. The ALJ concluded that the petition should be dismissed.

Upon full review of the record in this matter, the Commissioner concurred that the petition must be dismissed as there is no legal basis upon which the requested relief can be granted.

This synopsis is not part of 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 12, 2010

209-10

OAL DKT. NO. EDU 806-10
AGENCY DKT. NO. 22-2/10

F.J., on behalf of minor child, A.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND 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 and considered by the Commissioner.[1]

Petitioner's exceptions continue to express dissatisfaction with the way the District handled the March 26, 2009 incident involving his son. He charges that the District and its administrators have "a habit of falsifying information" and that if they had done a thorough investigation, they would have found that A.J. continues to be bullied. (Petitioner's Exceptions at 1) He further urges that the letters from the District's witnesses regarding the incident be ignored because these individuals "intimidates [sic] their staff and students" (*Id.* at 2); he expresses his frustration at the Judge not being educated on the law of this particular matter (*Id.* at 3); and maintains that justice demands that A.J. receive a transfer. (*Ibid.*)

[1] It is noted, however, that petitioner's exceptions attempt to introduce for the first time a number of documents which were not a part of the hearing below. As such a submission is clearly contraindicated by *N.J.A.C.* 1:1-18.4(c), these documents were not considered herein.

Upon full review, the Commissioner is compelled to concur with the Administrative Law Judge (ALJ) – for the reasons presented on pages 4-5 of his decision – that there is no legal basis upon which the Commissioner can grant petitioner's requested relief.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7|12|10

Date of Mailing: 7|12|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 806-10
AGENCY DKT. NO. 22-2/10

F.J. O/B/O MINOR CHILD, A.J.,
Petitioner,
v.
FAIRFIELD TOWNSHIP BOARD OF EDUCATION,
Respondent.

F.J., petitioner, pro se

Frank DiDomenico, Esq., for respondent

Record Closed: May 25, 2010 Decided: May 28, 2010

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

Petitioner, F.J., seeks to transfer his son, A.J., to another school district based on respondent district's alleged failure to appropriately respond to an assault on A.J. and the district's failure to comply with applicable statutes and regulations governing school safety. For the reasons discussed below the relief sought by petitioner is **DENIED**.

PROCEDURAL HISTORY

The respondent requested a fair hearing and the matter was transmitted to the OAL on March 22, 2010, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was scheduled for a hearing on April 15, 2010, but was adjourned at the request of petitioner to enable him to retain the services of an attorney. The matter was rescheduled for hearing on May 25, 2010. The basis for emergent relief became moot. Petitioner appeared without counsel. Accordingly, the hearing proceeded on that date and the record closed.

FINDINGS OF FACTS

A.J. is currently an eleven year old, sixth grade student at the Fairfield Township School district. He as been a student in the Fairfield district since fourth grade. Fairfield is a kindergarten to eighth grade school district with 615 students.

On March 26, 2009, A.J. was in fifth grade and riding the bus to school. Student D. approached A.J. in the aisle. D. stated "move". A.J. moved but also called D. "dude." A.J. then sat or knelt on his seat. When D. passed by A.J. called him "dude" again. While A.J. was kneeling in his seat, D. pushed A.J.'s head into the window, causing his right cheek to hit the emergency latch. A.J. immediately felt blood running down his face.

The bus driver was alerted. She was at the last stop before reaching school. She radioed ahead for the nurse to meet A.J. outside when the bus arrived at the school. The remaining trip took only a few minutes. The nurse met A.J. at the bus and was taken to the nurse's office for treatment. The wound was cleaned and pressure placed on the wound to stop the bleeding. A.J.'s parents were contacted but neither parent responded to the calls. He was taken to the local emergency room for additional treatment. The nurse accompanied A.J to the emergency room. A.J. received about five stitches. (P-1).

The district investigated the incident and notified A.J.'s parents of its findings. The district disciplined D. This was summarized as follows:

> Please be advised that on March 26, 2009 your son, [A.J.], was assaulted on the school bus. It was reported that a male student pushed [A.] into the window causing an injury to his face. [A.] was seen by the nurse upon arrival to school. The emergency/rescue squad was called to transport him to South Jersey Hospital.
>
> [A.] reported that while he was looking for his book bag on the bus, the male student came in the aisle and said, "Move!" [A.] reported saying, "OK, Dude!" The male student told him not to call him dude because he is older. The male student walked toward the front of the bus. [A.] reported calling him dude again. The male student then pushed his head and cheek into the bus' window frame.
>
> The male student involved in the incident has been disciplined according to school district policies. Please feel free to contact me if you have any questions or concerns.
>
> (P-2.)

A.J. testified. His testimony substantially agreed with the district's assessment of the incident. A.J. added that D. did not bother him before or after the incident. A.J. and D. continue to ride the bus together.

In April or May 2010, A.J. was in D.'s seat. D. told A.J. to move out of his seat. This scared A.J. because D. seemed agitated. But nothing further happened.

D. and A.J. live within a close range of each other (about 5 minutes by bike ride). They have not had any problems outside of school.

A.J. likes most of his teachers. He grades are good (As-Cs) and have improved since the 2009 incident. (R-10, 11, and 12). He is participating in the after school mentoring or tutoring program, which he enjoys. His parents have also been working with him on improving his grades.

A.J.'s father asserts that the district showed no compassion to his son during the incident. The police should have been called and the superintendent should have consoled A.J. A.J. remains afraid of D.[1] Therefore, A.J. is entitled to be transferred to another district. A.J.'s father insists that the district can and has transferred other students.

The district provided proof it fully investigated the incident, provided A.J. immediate and appropriate medical attention, and took disciplinary action. D. was suspended. Further, the district looked for evidence of bullying, and found it was not present. Many staff members were interviewed. (R-2 to R-4). The district supplied proof that its staff members are regularly trained and instructed on bullying. (R-6 to R-16.)

The district only has one school. There is nowhere else A.J. can be transferred. Fairfield has transferred other students out of district for special educations reasons. And the district does pay tuition for former homeless students. Otherwise, no student receives tuition payments resulting from a transfer.

FINDINGS OF FACTS

1. On March 26, 2009, A.J. was injured while riding the bus to school.

2. D. pushed A.J. into the widow.

3. The district immediately attempted to contact A.J.'s parents and provided immediate medical attention.

4. D. was disciplined for his actions.

5. D. and A.J. have not had any altercations since March 26, 2009, either in or outside of school.

[1] D. is currently in the seventh grade.

6. The district conducted an investigation whether A.J. was being bullied.

7. No evidence of bullying was found.

8. The district is not designated as a persistently dangerous school invoking the provision of No Child Left Behind (NCLB). (See, Respondent's Answer.)

The material facts as offered by all witnesses were consistent and undisputed. Thus no credibility issues were present.

CONCLUSIONS

Petitioner cites no legal basis for ordering the transfer of his son, A.J., to another school. He simply urges that his son be transferred to another school out of frustration or dissatisfaction with the district's handling of the March 2009 incident. But the district has no other school. And there is no legal basis for transferring A.J. to another school outside the district. There is no school choice or voucher system. Petitioner, on his own, may choose to go to a charter school.

A.J. is progressing adequately, his grades are improving, he likes most of his teachers, and enjoys the after school programs. The district has an anti-bullying policy and trains its staff member in violence prevention. N.J.S.A. 18A:37-15; N.J.AC. 6A:16-(b)13. This is no evidence of bullying. The incident in question was isolated. Over one year has passed without further violence, harassment, cyber bullying, belittling, or other offensive conduct.

ORDER

Based upon the foregoing, the action filed by petitioner is **DISMISSED**. Petitioner may elect to go to a charter school or may request that his son take a different bus to school, if it is possible. This decision on petitioner's application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary.

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

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

5-28-10
DATE

W. TODD MILLER, ALJ

Date Received at Agency: JUN – 7 2010

Date Mailed to Parties: JUN – 7 2010

sd

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Photograph of A.J.

P-2 Letter to F.J. from Fairfield Township School, March 26, 2009

For Respondent:

R-1 Letter to F.J. from Department of Education, February 8, 2010

R-2 Letter to Whom it May Concern from Peggy Fernandez (bus driver), April 12, 2010

R-3 Letter to Principal Clark from S. Wheaton, April 13, 2010

R-4 Letter to Whom it May Concern from Judy Stanford, April 13, 2010

R-5 Letter to Whom it May Concern from Alesha Taylor, April 13, 2010

R-6 E-mail from Principal Clark, May 22, 2009

R-7 "No More Bullies" Flyer, February 26, 2008

R-8 Staff In-service Agenda, February 4, 2008

R-9 Staff In-Service Agenda, February 2, 2009

R-10 Report Card of A.J., Grade 5

R-11 Report Card of A.J., Grade 4

R-12 Report Card of A.J., Grade 6

R-13 N.J. Child Assault Prevention Grant Application 2009/2010

R-14 Department of Education List of Dangerous Schools

R-15 Fairfield Board of Education Policy 5131.9 (Harassment)

R-16 Fairfield Board of Education Policy 5142 (Safety)

R-17 Electronic Violence & Vandalism Report,

R-18 Memorandum of Agreement between Education & Law Enforcement 2009/2010

By the Court:

C-1 Department of Education Complaint Policy and Procedures

WITNESSES

For Petitioner:

A.J.

V.J. (sister of A.J.)

F.J. (father of A.J.)

For Respondent:

Tanya Clark, Principal

OAL DKT. NO. EDE 4479-07
STATE BOARD OF EXAMINERS DKT. NO. 0607-156
AGENCY DKT NO. 9-12/09A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF DEAN HOWARTH BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	
	:	

Order of Revocation Decision by the State Board of Examiners, December 2, 2009

For the Respondent-Appellant, Richard A. Friedman, Esq. and Jason Sokolowski, Esq.

For the Petitioner-Respondent State Board of Examiners, Jennifer L. Campbell, Deputy Attorney General (Paula T. Dow, Attorney General of New Jersey)

I have thoroughly reviewed the record and the papers filed in connection with respondent's appeal of the State Board of Examiners' order of December 2, 2009 revoking his Teacher of Social Studies and Teacher of the Handicapped certificates.

After full consideration of the record and all submissions, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7|15|10
Date of Mailing: 7|15|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDE 4479-07
AGENCY DKT. NO. 0607-156

IN THE MATTER OF THE CERTIFICATES OF DEAN HOWARTH.

Jennifer L. Campbell, Deputy Attorney General, for petitioner, State Board of Examiners (Anne Milgram, Attorney General of New Jersey, attorney)

Richard A. Friedman, Esq., and **Jason Sokolowski**, Esq. for respondent (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: June 3, 2009 Decided: July 20, 2009

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was brought before the Board of Examiners as a result of the Commissioner of Education's referral of tenure charges brought against respondent, Dean Howarth, by his then-employer, the Maple Shade Board of Education. (Order to Show Cause, ¶2) The tenure matter was resolved when the school district withdrew the tenure case and Howarth agreed to resign from his tenured position in the school district. (Order to Show Cause, ¶4)

On February 22, 2007, the Board of Examiners issued an Order to Show Cause why Howarth's Teacher of Social Studies and Teacher of the Handicapped certificates should not be revoked or suspended based upon the allegations set forth in the tenure charges. Howarth filed an answer dated April 3, 2007, and the matter was transmitted to the Office of Administrative Law (OAL) on June 8, 2007, for hearing as a contested case. The matter was scheduled for hearing and hearings took place on May 27, July 24 and 29, and December 19, 2008, and on January 7, 2009. After the parties' submission of written closing arguments, the record was closed on June 3, 2009.

FACTUAL DISCUSSION

The following is intended to be a summary of the testimony and evidence presented in this case. I also note that with certain minor exceptions, the essential facts relating to this case are not in dispute.

Stipulated facts

The parties entered into a Joint Stipulation of Facts (J-1) which are as follows:

1. Dean Howarth is the holder of a Teacher of Social Studies Certificate, issued in April 1987, and a Teacher of the Handicapped Certificate, issued in December 1994.

2. Howarth was employed as a special education teacher at the Maple Shade Jr./Sr. High School ("MSHS") from 1995 through 2005.

3. The MSHS Staff Acceptable Use Policy states, in part: The use of the information network must be in support of education and research consistent with the educational objectives of the district, school, and teacher.

4. Pursuant to the MSHS Staff Acceptable Use Policy, it is a violation of the policy to use the network for inappropriate purposes including, but not limited to

"accessing sites that contain pornography, vulgar or obscene language, racist, sexist or ethnic remarks, or any other uses deemed objectionable in a public school environment."

5. Pursuant to the MSHS Staff Acceptable Use Policy, teachers are not permitted to "store files on network drives that are not consistent with the adopted curriculum and educational objectives of the district."

6. The MSHS Staff Acceptable Use Policy is incorporated in the MSHS Teacher Handbook.

7. P-5 is an e-mail, which contains a photograph of a nude woman, and was forwarded by Howarth from his personal e-mail account to his school e-mail account on January 15, 2005, and thereafter saved into the e-mail folder "Jokes".

8. P-6 is an e-mail, which contains photographs of partially nude women on bicycles, and was received on Howarth's school e-mail account on November 6, 2003.

9. P-7 is an e-mail, which contains a photograph of a woman performing oral sex upon a man, and was forwarded by Howarth from his personal e-mail account to his school e-mail account on January 21, 2004.

10. P-8 is an e-mail, which contains ten photographs of nude or partially nude women exercising, and was forwarded by Howarth from his personal e-mail account to his school e-mail account on January 21, 2004.

11. P-9 is an e-mail that was sent by Howarth from his school e-mail account on March 16, 2004 at 1:45 p.m.

12. P-10 is an e-mail that was sent by Howarth from his school e-mail account on March 18, 2004 at 12:57 p.m.

13.P-11 is an e-mail, containing photographs of a partially nude woman, which was received on Howarth's school e-mail account on March 31, 2004.

14.P-12 is an e-mail that was received on Howarth's school e-mail account April 12, 2004.

15.P-13 is an e-mail, containing a photograph of a partially nude woman, and was forwarded by Howarth from his personal e-mail account to his school e-mail account; Howarth forwarded this e-mail from his school e-mail account on October 13, 2004 at 1:06 PM.

16.P-14 is an e-mail, containing multiple attachments that was received on Howarth's school e-mail account on October 26, 2004; Howarth forwarded this e-mail from his school e-mail account on November 29, 2004 at 1:08 p.m.

17.P-15 is an e-mail, containing a photograph of a woman with her breast partially exposed; which was received on Howarth's school e-mail account on November 29, 2004 and, thereafter saved into the e-mail folder "jokes".

18.P-16 is an e-mail, containing a photograph of a nude woman, which was received on Howarth's school e-mail account on December 3, 2004; Howarth forwarded the e-mail from his school e-mail account on December 3, 2004 at 1:12 pm; Howarth saved the e-mail into the e-mail folder "jokes."

19.P-17 is an e-mail that was received on Howarth's school e-mail account on December 9, 2004.

20.P-18 is an e-mail that Howarth forwarded from his home e-mail account to his school e-mail account on January 15, 2005 and, thereafter saved into the e-mail folder "jokes".

21.P-19 is an e-mail, containing a photograph of a nude woman and a partially nude woman, which Howarth forwarded from his school e-mail account on January 18, 2005 at 1:09 pm.

22.P-20 is an e-mail, containing multiple photographs, which Howarth forwarded from his home e-mail account to his school e-mail account on January 15, 2005 and, thereafter saved to the e-mail folder "jokes".

23.P-21 is an e-mail that was received on Howarth's school e-mail account on March 7, 2005.

24.P-22 is an e-mail, which contains 16 photographs of a nude or partially nude woman, and was received on Howarth's school e-mail account on March 8, 2005; Howarth forwarded the e-mail from his school e-mail account on March 9, 2005 at 11:27 am.

25. P-23 is an e-mail that Howarth sent from his school e-mail account on March 22, 2005.

26.P-24 is an e-mail that Howarth sent from his school e-mail account on March 24, 2005.

27.P-25 is an e-mail that was received on Howarth's school e-mail account on March 29, 2005.

28.P-26 is an e-mail that was received on Howarth's school e-mail account on March 29, 2005.

29.P-27 is an e-mail that was received on Howarth's school e-mail account on March 30, 2005.

30.P-28 is a group of e-mails that were sent to and from Howarth's personal e-

mail account on April 1, 2005; e-mails were received on Howarth's personal e-mail account at 8:22 a.m., 11:01 a.m., 11:49 a.m., 12:05 p.m., 12:09 p.m. Howarth sent e-mails at 10:34 a.m., 11:41 a.m., 11:51 a.m., 12:04 p.m. and 2:21 p.m.

31. P-29 is a group of e-mails that were sent to and from Howarth's school e-mail account on April 4, 2005. Howarth sent e-mails at 8:37 a.m., 8:43 a.m., 9:07 a.m., and 9:21 a.m. E-mails were received on Howarth's school e-mail account at 8:48 a.m., 9:03 a.m., and 9:22 a.m.

32. P-30 is a group of e-mails that were sent to and from Howarth's school e-mail account on April 4, 2005. Howarth sent e-mails from his school e-mail account at 10:39 a.m. 10:50 a.m., 10:53 a.m., 10:56 a.m., 11:27 a.m., 11:54 a.m., 12:00 p.m., 12:40 p.m., 1:00 p.m., 1:11 p.m., and 1:29 p.m. E-mails were received on Howarth's school e-mail account at 10:56 a.m., 10:59 a.m., 11:02 a.m., 11:09 a.m., 11:47 a.m., 12:06 p.m., 12:09 p.m., 1:03 p.m., 1:13 p.m. and 1:24 p.m.

33. P-31 is a group of e-mails that were sent to and from Howarth's school e-mail account on April 4, 2005. Howarth sent e-mails from his school e-mail account at 9:12 a.m. and 9:18 a.m. E-mails were received on Howarth's school e-mail account at 9:17 a.m. and 9:23 a.m.

34. P-32 is an e-mail, containing sixteen photographs, that was received on Howarth's school e-mail account on April 5, 2005; Howarth forwarded the e-mail on April 6, 2005 at 8:33 a.m.

35. P-33 is a group of e-mails that were sent to and from Howarth's school e-mail account on April 5, 2005. Howarth sent e-mails from his school e-mail account at 8:55 a.m., 9:31 a.m., and 9:40 a.m. E-mails were received on Howarth's school e-mail account at 8:47 a.m., 9:09 a.m. and 9:40 a.m.

36.P-34 is an e-mail that Howarth sent from his school e-mail account on April 5, 2005 at 1:19 p.m.

37.P-35 is an e-mail that Howarth forwarded from his home e-mail account to his school e-mail account on April 5, 2005.

38.P-36 is a group of e-mails that were sent to and from Howarth's school e-mail account on April 5, 2005. Howarth sent e-mails from his school e-mail account at 11:27 a.m. and 1:19 p.m. E-mails were received on Howarth's school e-mail account at 11:07 a.m. and 11:56 a.m.

39.P-37 is an e-mail that Howarth sent from his school e-mail account on Wednesday April 6, 2005 at 7:52 a.m.

40.P-38 is an e-mail that Howarth sent from his school e-mail account on April 6, 2005 at 8:44 a.m.

41.P-39 is an e-mail that Howarth sent from his school e-mail account on April 6, 2005 at 8:33 a.m.; Howarth forwarded this e-mail on April 6, 2005 at 8:46 a.m.

42.P-40 is an e-mail that Howarth sent from his school e-mail account on April 6, 2005 at 8:11 a.m.

43.P-41 is an e-mail that was received on Howarth's school e-mail account on April 5, 2005; Howarth forwarded the e-mail on April 6, 2005 at 8:47 a.m.

44.P-42 is a group of e-mails that were sent to and from Howarth's school e-mail account on April 6, 2005. Howarth sent e-mails from his school e-mail account at 8:56 a.m. and 9:39 a.m. E-mails were received on Howarth's school e-mail account at 9:06 a.m. and 10:09 a.m.

45.P-43 is an e-mail that Howarth received on his school e-mail account on April 6, 2005 at 9:37 a.m., and to which Howarth sent a response at 9:44 a.m.

46.P-44 is an e-mail that was received on Howarth's school e-mail account on April 6, 2005.

47.P-45 is an e-mail that was received on Howarth's school e-mail account on April 6, 2005.

48.P-46 is an e-mail that was received on Howarth's school e-mail account on April 6, 2005.

49.P-47 is an e-mail that was received on Howarth's school e-mail account on April 6, 2005.

50.P-48 is an e-mail that was received on Howarth's school e-mail account on April 6, 2005.

51.P-49 is an e-mail that was received on Howarth's school e-mail account on April 6, 2005.

52.P-50 is an e-mail, containing a photograph, which was received on Howarth's school e-mail account on April 7, 2005.

53.P-51 is an e-mail that was received on Howarth's school e-mail account on January 12, 2000.

54.P-52 is an e-mail that was received on Howarth's school e-mail account on January 25, 1994, and was found on Howarth's school computer.

55.P-53 is an e-mail, dated February 19, 2004, which was found on Howarth's school computer.

56.P-54 is an e-mail that was received on Howarth's school e-mail account on November 3, 2000.

57.P-55 is an e-mail, containing multiple photographs that include nudity, which was received on Howarth's school e-mail account on December 20, 2000, and was found on his school computer.

58.P-56 is an e-mail, containing a cartoon, which was received on Howarth's school e-mail account on December 20, 2000, and was found on his school computer.

59.P-57 is an e-mail, containing a cartoon, which was received on Howarth's school e-mail account on June 4, 2001, and was found on his school computer.

60.P-58 is an e-mail, containing a cartoon, which Howarth sent from his school e-mail account on June 7, 2001 at 8:48 a.m.

61.P-59 is an e-mail that Howarth sent from his school e-mail account on June 7, 2001 at 10:56 a.m.

62.P-60 is an e-mail that Howarth sent from his school e-mail account on June 13, 2001 at 8:34 a.m.

63.P-61 is an e-mail, containing a photograph of a woman's bare breasts, which was received on Howarth's school e-mail account on October 21, 2002.

64.P-62 is an e-mail received was received on Howarth's school e-mail account on November 4, 2002.

65.P-63 is a group of e-mails that Howarth sent from his school e-mail account on January 8, 2003 at 12:34 p.m. and January 21, 2003 at 8:30 a.m.

66.P-64 is an e-mail, containing multiple photographs, which was received on Howarth's school e-mail account on January 17, 2003.

67.P-65 is an e-mail that was received on Howarth's school e-mail account on January 21, 2003.

68.P-66 is an e-mail that was received on Howarth's school e-mail account on November 11, 2003.

69.P-67 is an e-mail that Howarth forwarded from his personal e-mail account to his school e-mail account on January 21, 2004.

70.P-68 is an e-mail that Howarth forwarded from his personal e-mail account to his school e-mail account on January 21, 2004.

71.P-70 is an e-mail that Howarth sent from his school e-mail account on March 18, 2004 at 8:18 a.m.

72.P-72 is an e-mail that Howarth sent from his school e-mail account on March 23, 2004 at 10:07 a.m.

73.P-73 is an e-mail that Howarth sent from his school e-mail account on March 25, 2004 at 1:41 p.m.

74.P-75 is an e-mail containing a photograph, which Howarth sent from his school e-mail account on April 6, 2006 at 2:24 p.m.

75.P-76 is an e-mail that was received on Howarth's school e-mail account on April 27, 2004.

76.P-77 is a group of e-mails that were sent to and from Howarth's school e-mail

account on March 24, 2005; Howarth sent e-mails from his school e-mail account at 8:33 a.m., 8:43 a.m., 8:51 a.m., 9:47 a.m., 9:54 a.m., and 10:16 a.m. E-mails were received on Howarth's school e-mail account at 8:03 a.m., 8:43 a.m., 8:53 a.m., 9:19 a.m., 9:56 a.m. and 10:10 a.m.

77. P-78 is an e-mail that was received on Howarth's school e-mail account on August 2, 2005.

78. P-79 is a group of e-mails, containing multiple photographs, which were received on Howarth's school e-mail account on February 11, 2005 and, thereafter saved into the e-mail folder "jokes".

79. P-80 is a group of e-mails and documents, which were found on Howarth's school computer.

80. P-81 is list of websites that were listed as "favorites" on Howarth's school computer.

81. P-82 is a group of e-mails, containing video attachments, which were received on Howarth's school e-mail account.

82. For teachers, the MSHS "school day" begins at 7:30 a.m. and ends at 2:35 p.m.

Testimony of Cheryl Smith

Cheryl Smith, the Maple Shade Superintendent of Schools, testified that among her duties is to address complaints of teacher misconduct. The first complaint she received regarding Howarth was in 2003 when Raymond Marini, principal of the high school, advised her that Howarth and several other teachers had gone to lunch at a strip club in Philadelphia during a school day. On the date in question, the school was in the process of administering exams. The school day begins at 7:30 a.m. and ends at

2:45 p.m. and teachers were required to return to school after lunch. Those teachers not required to proctor an exam in the afternoon were given the time to correct examinations.

Ms. Smith testified that she and Mr. Marini met with each of the teachers individually. In Howarth's case, Mr. Andy Severin, the Education Association representative and Robin Sandusky, Howarth's supervisor met and during the meeting, Mr. Marini went over the facts, expressed disappointment at Mr. Howarth's conduct and read a letter of reprimand that was issued to Mr. Howarth. This letter of reprimand was placed in his file and stated that Howarth had demonstrated unprofessional behavior by visiting an establishment that compromised his reputation as a Maple Shade employee during the work day (P-1). It also indicated that this showed poor judgment, reflected poorly on the school district and compromised his professionalism. It indicated that this conduct was unbecoming a professional educator. Ms. Smith indicated that Howarth did not challenge anything that was said and gave the appearance that he understood.

In April 2005, Ms. Smith was contacted by Dr. Joseph Massari, the Superintendent of Schools for Pennsgrove School District. Mr. Massari indicated that there had been discovered some very disturbing e-mails that had been exchanged between Howarth and a Pennsgrove teacher, Richard Vozza. These e-mails were forwarded to Ms. Smith by fax. She took notes of this conversation with Dr. Massari (P-4).

Ms. Smith indicated that the school district has an acceptable use policy governing the use of school district computers and that the policy is that the computers are to be used for educational purposes (P-2). The policy is distributed to teachers as part of the staff handbook and is discussed at opening faculty meetings at the beginning of each school year.

Ms. Smith contacted the school district attorney who instructed her to have the director of technology confiscate Howarth's computer and bring it to her office.

Following this Howarth was suspended with pay for violation of the staff acceptable use policy (P-86).

In June 2005, Ms. Smith again met with Mr. Howarth and his union representative concerning the incident at which time Howarth was given an opportunity to explain why he believed his increment should not be withheld. Howarth defended his value to the district but did not express regret the incident had occurred. He was continued on suspension with pay until tenure charges were filed in September 2005. The tenure charges were resolved in June 2006 when the parties entered into a settlement agreement resulting in Howarth's resignation from Maple Shade.

Ms. Smith testified that in her opinion a number of the e-mails violates Maple Shade's staff acceptable use policy including P-9, P-10, P-30, P-49, P-35 of which contains an invoice for the purchase of DVD's, including a guide to foreplay and a guide to oral sex.

Testimony of Arunas Avizius

Arunas Avizius testified that he has been employed by the Maple Shade School District for thirty-one years and has been the technology administrator for the school district for fifteen years. His duties include the maintenance and protection of the district's technology and assisting teachers in incorporating technology into their instruction. He drafted the staff acceptable use policy and under that policy district computers are to be used for educational purposes, for research that supports education.

Avizius testified that at the request of Superintendent Smith he took possession of Mr. Howarth's computer by going to Howarth's classroom with the principal, Mr. Marini, and removing the computer from Howarth's desk. The computer was then secured in the Superintendent's office where it remained during his investigation. Avizius then investigated by reviewing e-mails for inappropriate content. While he was

reviewing the e-mails he found pictures of nude women, inappropriate jokes and e-mails, and movie files.

Mr. Avizius explained that the "P Drive" is a private drive assigned to a specific user for file storage. The P Drive is part of the network and staff members are encouraged to store things on the P Drive rather than the local computer. Information on the P Drive must be placed there by the user. He then indicated that an e-mail client is a program that is used to access e-mail and that e-mail clients have folders which are locations where e-mails can be placed by the system or stored by the user. There are several standard folders to e-mail clients which include the in-box, out-box, sent items, deleted items and junk mail. He indicated that e-mail users can create additional "custom folders" and that e-mails do not appear in a custom folder unless they have been deliberately moved to that folder by the user. He also explained that an e-mail "header" contains information about the e-mail including the sender, the recipient, the date and time the e-mail was sent. He also explained that a sender must take affirmative action to attach a file to an e-mail as an attachment.

Mr. Avizius testified that with respect to Mr. Howarth's e-mail account, there were multiple custom folders created including those entitled "jokes", "saved", "important", and "dean", each of which had to have been affirmatively created. The custom folder "dean" contained P-11, P-51, P-55 and P-56, and the "important" folder contained P-61, P-62, P-64 and P-82. The custom folder "saved" contained P-76 and the custom folder "jokes" contained P-19. These exhibits contained vulgar language, a derogatory cartoon about homosexuals, multiple photographs of nude women and men, and a video clip entitled "This Old Whore House." He explained that each of these exhibits had to be affirmatively saved into their respective custom folders. He also testified that Mr. Howarth's local computer or "C Drive" contained inappropriate content. He found images reflected in P-83 on the C Drive and explained that an affirmative action is required for files to appear on the C Drive. Such an affirmative action was taken with respect to the image file that was attached to P-7 which is a photograph of a woman performing oral sex upon a man in a restaurant. He admitted that it is not possible to tell what time an e-mail was read but that if the recipient replied to or forwarded the e-

mail then the recipient would have viewed it some time between the time it was sent and the time that the user replied or forwarded it. While a person has no control over what comes into their e-mail box, if one repeatedly receives unwanted e-mails there are ways to block subsequent e-mails from that e-mail address.

Testimony of Raymond Marini

Raymond Marini, the former principal at Maple Shade High School testified that while he was principal he received complaints concerning Mr. Howarth. In February 2003, he learned that Howarth was with a group of teachers that went to a Go-Go Bar in Philadelphia during their lunch hour on a mid-term examination day. Teachers are required to return to school after lunch on exam days. He met with Howarth as well as the other teachers to discuss the incident and during that meeting Howarth admitted to visiting the Go-Go Bar during school hours and acknowledged that it was a poor choice.

Mr. Marini also testified of complaints regarding Howarth's use of his computer during class time on two separate occasions. On the first occasion, a parent raised the issue of Howarth's computer usage in a child study team meeting indicating that the child felt that Howarth was at the computer and not teaching. When Marini asked Howarth about this incident, his response was that he used the computer to answer e-mails from parents and to do educational research. Mr. Marini advised Howarth not to use class time for those purposes.

Mr. Marini testified that in April 2005 Superintendent Cheryl Smith advised Marini that she had received information that Howarth was using his computer in violation of the acceptable use policy. Marini explained that the acceptable use policy is provided to teachers in the faculty handbook and is also discussed at the opening day faculty meeting which all teachers are required to attend.

Mr. Marini testified that he maintained schedules for each individual teacher and identified Howarth's teaching schedules for the 2001-02 through 2004-05 school years

(P-85). By cross-referencing Howarth's teaching schedules with the various e-mail exhibits, Howarth's practice of sending inappropriate e-mails at times that he was scheduled to be instructing the students of Maple Shade are as follows:

P-13 Forwarded on 10/13/04 @ 1:06 P.M., while Howarth was scheduled to instruct a Math Class

P-16 Forwarded 12/3/04 @ 1:12 P.M., while Howarth was scheduled to instruct a Math Class

P-19 Forwarded on 1/18/05 @1:09 P.M., while Howarth was scheduled to instruct a Math Class

P-22 Forwarded 3/9/05 @ 11:27 A.M., while Howarth was scheduled to instruct an English Class

P-74 Forwarded 3/31/04 @ 9:54 A.M., while Howarth was scheduled to instruct a Science Class

P-10 Sent 3/18/04 @ 12:57 P.M., while Howarth was scheduled to instruct a Social Studies Class

P-32 Forwarded 4/6/05 @ 8:33 A.M., while Howarth was scheduled to instruct a Math Class

P-14 Forwarded 11/29/04 @ 1:08 P.M., while Howarth was scheduled to instruct a Math Class

P-28 Sent 4/1/05 @ 11:41 A.M., while Howarth was scheduled to instruct an English Class

Sent 4/1/05 @ 10:34 A.M., while Howarth was scheduled to instruct an English Class

P-29 Sent 4/4/05 @ 9:07 A.M. while Howarth was scheduled to instruct a Social Studies Class

P-30 Sent 4/4/05 @ 10:39 A.M., while Howarth was scheduled to instruct an English Class

Sent 4/4/05 @ 10:50 A.M., while Howarth was scheduled to instruct an English Class

Sent 4/4/05 @ 10:53 A.M., while Howarth was scheduled to instruct an English Class

Sent 4/4/05 @ 11:27 A.M., while Howarth was scheduled to instruct an

English Class

Sent 4/4/05 @ 1:00 P.M., while Howarth was scheduled to instruct a Math Class

Sent 4/4/05 @ 1:11 P.M., while Howarth was scheduled to instruct a Math Class

P-31 Sent 4/4/05 @ 9:18 A.M., while Howarth was scheduled to instruct a Social Studies Class

Sent 4/4/05 @ 9:12 A.M., while Howarth was scheduled to instruct a Social Studies Class

P-33 Sent 4/5/05 @ 9:31 A.M., while Howarth was scheduled to instruct a Social Studies Class

P-34 Sent 4/5/05 @ 1:19 P.M., while Howarth was scheduled to instruct a Math Class

P-36 Sent 4/5/05 @ 11:27 A.M., while Howarth was scheduled to instruct an English Class

Sent4/5/05 @ 1:19 P.M., while Howarth was scheduled to instruct a Math Class

P-37 Sent 4/6/05 @ 7:52 A.M., while Howarth was scheduled to instruct a Math Class

P-39 Sent 4/6/05 8:33:58 A.M., while Howarth was scheduled to instruct a Math Class

P-40 Sent 4/6/05 @ 8:11 A.M., while Howarth was scheduled to instruct a Math Class

P-42 Sent 4/6/05 @ 8:56:48 A.M., while Howarth was scheduled to instruct a Social Studies Class

Sent 4/6/05 @ 9:39 A.M., while Howarth was scheduled to instruct a Social Studies Class

P-43 Replied 4/6/05 @ 9:44 A.M., while Howarth was scheduled to instruct a Reading Class

P-63 Sent 1/8/03 @ 12:34 P.M., while Howarth was scheduled to instruct a Social Studies Class

Sent 1/21/03 @ 8:30 A.M., while Howarth was scheduled to instruct a Math Class

P-70 Sent 3/18/04 @ 8:18 A.M., while Howarth was scheduled to instruct an English Class

P-72 Sent 3/23/04 @ 10:07 A.M., while Howarth was scheduled to instruct a Science Class

P-77 Sent 3/24/05 @ 10:16 A.M., while Howarth was scheduled to instruct a Reading Class

Sent 3/24/05 @ 9:54 A.M., while Howarth was scheduled to instruct a Reading Class

Sent 3/24/05 @ 9:47 A.M., while Howarth was scheduled to instruct a Reading Class

Sent 3/24/05 @ 8:33 A.M., while Howarth was scheduled to instruct a Math Class

P-79 Forwarded 1/18/05 @ 1:10 P.M., while Howarth was scheduled to instruct a Math Class

Replied 1/18/05 @ 1:09 P.M., while Howarth was scheduled to instruct a Math Class

Testimony of Robin Sandusky

Robin Sandusky testified that he is Director of Special Education and Mr. Howarth's supervisor. He indicated that in May 2004, a parent complained to him about Howarth's computer usage and that her child attributed poor performance to Howarth's excessive computer usage. When he met with Howarth to discuss it he indicated he was using the computer for educational reasons. Mr. Sandusky advised him not to do so. Mr. Sandusky received a second complaint about Howarth's excessive computer usage in December 2004. A child stated that all he ever does is sit at the computer and he never works with the students. Mr. Sandusky again spoke with Howarth and stated that it was inappropriate to use the computer during instructional time.

Testimony of Dean Howarth

Dean Howarth testified to his educational background and prior employment and work experience. He holds a Social Studies Comprehensive Certificate and a Teacher of the Handicapped Certificate. Prior to being employed in Maple Shade he taught three years at Gloucester High School and as a permanent substitute in Gateway Regional. He worked at Archway while he was going for his special education degree. He then began his employment at Maple Shade in 1994 until his termination in 2006. After Maple Shade he taught at Emily Fisher Charter School in Trenton from fall 2006 until February 2007. He then taught at Robbinsville High School until June 2008.

At Maple Shade, Howarth was co-advisor for the Junior High School Student Honor Society and Student Council. He was class advisor for the class of 1998. He coached wrestling for five years until 1999 because his own children were getting more demanding, injuries requiring surgery and philosophical disagreement as far as discipline. Other than the incidents recounted in this case he was never disciplined at Maple Shade.

Howarth testified first concerning the incident in which he and two other male teachers and four female teachers visited Penns Port Pub, a bar and restaurant located in Philadelphia, during their lunch hour. He believed that teachers were allowed to leave for the day after they completed their duties, and he did not return to school that day. In addition to being a bar and restaurant, there is a center stage visible from the restaurant on which a young woman wearing a bikini would dance. Howarth had been at this establishment approximately ten occasions previous to this over a ten-year period. A former student of Howarth's danced there but was not performing at the time of their visit. He did not contest the punishment imposed for having left work too early and patronizing an establishment that did not shed good light on the school.

Howarth testified concerning his use of the school computer. He recalled that there were two occasions when Mr. Marini brought to his attention complaints by

parents or students that he was spending too much time on the computer. He vaguely recalled the first complaint involving a student who was failing his class because he refused to do his work and was absent eighty percent of the time. He believed this student was looking for excuses and trying to take the focus off of himself for his failing. The second complaint involved a failing student with behavior issues who was disruptive. That student was removed from his class and placed in a self-contained class in the high school. Nothing came of this second complaint.

Howarth admitted sending many personal e-mails during the time he was scheduled to be instructing classes. He also admitted that students were present in his classroom at the time that he would send the e-mails. He admitted that nearly every exhibit introduced in this matter was on his Maple Shade computer and e-mail account. He specifically denied having previously seen only one of the exhibits and admitted that he basically saw pretty much everything.

Howarth acknowledged receiving a copy of the acceptable use policy from the school district at the beginning of the school year and admitted that he is familiar with the policy. However, he indicated that at the time of these occurrences he did not understand that it was wrong to send, receive or store the materials contained in the exhibits on his school computer. He acknowledged that some of the material on the computer can be offensive when he was brought to the superintendent's office and it was explained to him. He admitted that it was probably a poor choice to look at the material and that he should have used better judgment. He admitted that he should have requested that the sender stop sending inappropriate e-mails to his Maple Shade e-mail account, but he did not do so.

Howarth admitted that he sent and/or received a series of e-mails on his school computer on March 31, 2004 (P-74), on April 1, 2005 (P-28), April 4, 2005 (P-29 and P-30), April 5, 2005 (P-32, P-33, P-34 and P-36) and April 6, 2005 (P-32, P-37, P-39, P-40, P-42 and P-43). The time he spent doing so amounted to about two minutes here and there. He testified that these dates were right before the end of the marking period when he implemented a "make-up week." During the first week of April 2005, he did

not lecture, but allowed his students to work independently at their desks. If a student had a question or needed assistance the student would ask him and he would help the student at the student's desk. He never left the room but would be at his desk grading papers, preparing exams and helping students when asked. He acknowledged that this make-up week was neither sanctioned nor approved by the school district or the special education department. However, the school's administrators and teachers were happy with it.

Howarth testified that, as to additional dates referred to by Mr. Marini, March 18, 2004 (P-10), October 13, 2004 (P-13), November 29, 2004 (P-14), December 3, 2004 (P-16), January 18, 2005 (P-19), and March 9, 2005 (P-22), and some others not referred to by Mr. Marini, January 8, 2003 (P-63), January 21, 2003 (P-70), March 18, 2004 (P-70), March 23, 2004 (P-72), March 24, 2004 (P-72) and March 24, 2005 (P-77). With respect to these exhibits Howarth explained that in a special education classroom a teacher usually cannot lecture for the entire forty-two minutes or even thirty-five minutes because their attention spans are very, very short. Lessons are done in short segments so you might do an exercise, go over it on the board and then have a break and then a short segment. He never stopped teaching to use the computer but only used it during the breaks between segments. In addition, he would only spend a minute here and a minute there or at the end of class while students were starting their homework.

Howarth was referred to the book of exhibits and testified that he did not see all of these exhibits before they were placed in the book. There was a movie in there about an old house that he did not see. He testified that he saw about eighty-five percent of the items in the book that were on his computer. He does not know which he saw. Some of the e-mails came up blank and others were sent to him that he did not request. At the time he did not believe it was wrong to have this material on the computer. He now believes it was wrong. He acknowledges that some things could offend people and he then realized it was wrong. When he met Mrs. Smith a second time and proposed discipline was to be discussed, he apologized and he then realized that some of the material was offensive. He apologized and was sorry for the negative

impact on the school, his family and the students. The students suffered by him not being in the classroom as a result of these charges. It also caused stress at home and stress to other teachers.

Howarth testified he had excellent rapport with parents and students. He never engaged in any improper actions with the students. He acknowledged sending and receiving the material. He testified that he received pictures of naked people from Mr. Ranchoff, who was still employed and he received mostly jokes including nudity from Mr. Brad Bauer. No one other than he was to be terminated. The tenure charges against him were settled and he has lost salary and pay because of the tenure charges and because of his employment at lesser salary at both the Charter School and Robbinsville. His employment at Robbinsville was ended when an anonymous e-mail containing a newspaper article about the Maple Shade situation was sent to Robbinsville principal and others. Robbinsville had a few instances of teacher indiscretion and they did not want to take a chance on bad publicity so he was placed on administrative leave and not rehired. All of his evaluations after his leaving Maple Shade have been excellent.

Howarth acknowledged that he did not request that the e-mails not be sent to him and did not do so. He acknowledged receiving a copy of the Acceptable Use Policy (P-2). He testified that he expressed remorse at his second meeting with Mrs. Smith. The tenure charges had not been filed by then.

Testimony of S.C.

S.C. testified that she formerly resided in Maple Shade from 1998 to 2003. Her son B.C., who was classified as Attention Deficit Disorder (ADD), had Howarth as his teacher from seventh to tenth grade. His only teacher in tenth grade was Howarth. B.C. left the school district at the beginning of the tenth grade because he was acting out and was a troublemaker. He was placed in an alternative school in Cherry Hill. She was not satisfied with his placement and felt that B.C. did not belong there. Howarth fought to have him come back and was able to get him returned to the school district.

Howarth was excellent teaching B.C. his tenth grade work while others in the class were at the seventh and eighth grade level. She was absolutely happy with Howarth's teaching ability and his dedication to her son. Howarth would talk to B.C. and encourage him to do his schoolwork. On occasion he would come to the house when B.C. did not want to go to school in order to convince him to attend. When B.C. got involved with drugs Howarth visited him at the Detention Center and Rehab Center for six months. B.C. loves Howarth. She feels that Howarth went above and beyond his duties as a teacher. She has no relationship with Howarth; he was only her son's teacher.

Testimony of Marion Haggerty

Marion Haggerty testified to her educational background and teaching certificates, which include health and physical education, and special education K through twelve. She remains employed by Maple Shade. She knows Mr. Howarth and has worked with him for twelve years as a colleague. She socialized with him only when in school. Her class was in the same area as Howarth and they shared a large room in which portable walls were installed to separate their classes. They shared the room for one or two years. She taught grades seven and eight with one ninth grade social studies class. Sometimes she taught jointly with Mr. Howarth. She identified the classroom layout (P-87).

She could look over the portable partitions dividing the classrooms when she stood on her toes. The desks in Howarth's room faced away from the computer. She never saw any students at or looking at Howarth's computer. No student or anyone else ever complained about his computer and she never saw anything on his computer other than schoolwork. She observed Howarth teaching and found him to be very organized, and he had a good rapport with his students. He was light-hearted, well structured and knew his content. On occasions, he helped pay for needy students' lunches on class trips.

Before exams students were given an opportunity and extra time to make up incomplete work, and this was more prevalent in special education. Students were allowed to work at their desks during that time to avoid failure. She indicated that students only worked on make-up work or exam review packets before the exams.

Exams took place twice a year and during exams there was a half-day schedule. Her understanding is when a teacher was finished with the exams they were allowed to leave school and there was no policy which required a teacher to remain. She has left school as well as stayed in school after exams. Teachers were permitted to leave during lunch period on regular school days, but that was almost impossible because there is only a twenty-two minute lunch period. She understood there was no formal policy at all on exam days. She felt that teachers could go home because they were no longer assigned with student contact. She never saw Howarth leave the class unattended. She said there was no policy on where teachers could go after exams.

Testimony of Frances M. Schuld

Frances M. Schuld testified to her educational background and teaching certificates which included social studies K through twelve. He taught social studies at Maple Shade and was the head wrestling coach from 1985 through 2002 for a total of eighteen years. He knew Howarth before he came to Maple Shade. Howarth is a friend but they do not see each other since Howarth left. He recommended Howarth to Maple Shade and regarded him highly as a wrestling coach. He coached with Howarth for approximately four to five years when Howarth was an assistant coach and he felt Howarth was outstanding and had an outstanding relationship with students. Howarth helped him deal with problem children such as R.R. He was extremely professional, very knowledgeable and handled all students very well. Other teachers were positive toward Howarth. He never saw any inappropriate conduct by Howarth and there were never any complaints from students.

With regard to exams, there was no written rule that said a teacher could not leave. He was not aware of any other incidents where teachers were disciplined for

going to lunch. Howarth stopped coaching wrestling because he had a disagreement concerning discipline of a student. This has not affected their relationship.

Testimony of Molly Cristine Avery

Molly Cristine Avery testified to her educational background and teaching certificates. She knows Dean Howarth. He was a special education teacher at Robbinsville while she was principal. They last worked together in March 2008. His contract was not renewed but she was not involved in that decision. His evaluations were all satisfactory and there were never any complaints by any students or parents. He was held in high regard and never engaged in any inappropriate conduct. In March 2008, there was an anonymous e-mail sent with a copy of a newspaper article concerning allegations of misconduct in Maple Shade. She forwarded this to her boss and Howarth stopped working at Robbinsville. At the end of the school year Howarth was not renewed. Based on Howarth's performance everything was positive and she had no concerns about his conduct or activities. She was not asked for her recommendation but could not recommend him because she never observed him teach.

LEGAL DISCUSSION AND ANALYSIS

The Board of Examiners is authorized by N.J.A.C. 6A:9-I7.5 to revoke or suspend the certificate or certificates of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. However, the Board of Examiners may not revoke or suspend a certificate without providing the holder an opportunity to be heard pursuant to N.J.A.C. 6A:9-17.6.

While "conduct unbecoming a teacher" is not specifically defined in either the statutes or regulations, judicial interpretation has proscribed a broad range of behavior as "conduct unbecoming a teacher." State Bd. of Exam'rs. v. Schumacher, EDE 7396-03, Initial Decision (July 19, 2005), Final Decision, Bd. of Exam'rs. (Sept. 22, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. The broad scope of unbecoming

conduct is necessitated by the high standard to which teachers are held because of the amount of influence they exercise over students. State Bd. of Exam'rs v. Charlton, 96 N.J.A.R. 2d (EDE) 18, citing In re the Certificates of Bradley, 92 N.J.A.R. 2d (EDE) 5, 13.

In In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), cert. den'd., 65 N.J. 292 (1974), the court noted that the "touchstone of the determination lies in the certificate holder's fitness to discharge the duties and functions of one's office or position." Unfitness for a position may be shown by a series of incidents or one incident, if sufficiently flagrant. Redcay v. State Ed. of Educ. 130 N.J.L. 369, 371 (1943)

In administrative proceedings such as this, the prosecuting party bears the burden of proving essential elements of fact by a preponderance of competent and credible evidence, i.e., sufficient to assure reliability and to avoid the appearance of arbitrariness. N.J.S.A. 52:14B-10(a), (c); N.J.A.C. 1:1-15.5; In re Polk, 90 N.J. 550, 566-69 (1982); In re Kerlin, 151 N.J. Super. 179, 184, n.2 (App. Div. 1977); see also Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re the Certificates of Papadaniil, EDE 8821-00 Initial Decision (March 13, 2002), adopted Exam'rs. (May 9, 2002) (citations omitted). "Evidence is found to 'preponderate' if it establishes the reasonable probability of the fact alleged and generates a reasonable belief that the tendered hypothesis . . . is true." State Bd. of Exam'rs v. Ferreira, OAL Dkt. No. EDE 3390-04 (July 5, 2005) adopted, Exam'rs (Sept. 22, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. The certificate holder must then demonstrate facts that counter the charges set forth in the Order to Show Cause. State Ed. of Exam'rs v. Brown, 91 N.J.A.R. 2d. (EDE) 5.

1. Whether the evidence establishes that Dean Howarth engaged in the alleged conduct?

In the Joint Stipulation of Facts, the parties stipulated to the existence of P-5 through P-82 (excluding Exhibit P-74) on Howarth's school computer. The undisputed

testimony of Mr. Avizius, the school district technology administrator was that these exhibits were all contained within files and folders on Howarth's computer. While respondent's attorney seems to argue that there is no evidence of Howarth's viewing these exhibits, Howarth's own testimony admitted sending many personal e-mails concerning these exhibits and seeing all but one of the exhibits. In fact, Howarth admitted that he basically saw pretty much everything on his computer. He also admitted not advising the senders of this material to stop sending him this material. It is also clear, based upon the computer records and the testimony of Mr. Avizius that Howarth affirmatively saved and forwarded many of these exhibits.

Based upon the foregoing, I **FIND** that the testimony and evidence in this matter overwhelmingly establishes that Howarth engaged in the conduct as alleged by the petitioner by sending, receiving, forwarding, saving and otherwise viewing and reviewing the exhibits stipulated to have been found on his computer. In addition, I **FIND** that Howarth acknowledged and admitted to attending a Go-Go bar during work hours in 2003.

2. Whether Dean Howarth's alleged conduct is unbecoming conduct?

I have carefully reviewed the cases relied upon by the petitioner in support of its request to revoke the teaching certificates of the respondent. In Board of Education of the Borough of Madison v. Grundfest, OAL Dkt. No. EDU 5326-98, Initial Decision (March 29, 2000), Final Decision, (June 20, 2000) http://www.lawlibrary.rutgers.edu/oal/search.html, the Commissioner reversed the decision of the ALJ finding the teacher guilty of the charges based on questionable evidence. However, the Commissioner specifically noted that "the charge of accessing pornographic materials on a school computer is reprehensible and, if proven true, violates a sacred trust between the teacher and his students."

In In the Matter of the Certificate of Gomes, Agency Dkt. No. 0304-172, Final Decision, Examiners (April 20, 2004) http://www.lawlibrary.rutgers.edu/oal/search.html, a teacher employed as a teacher of social studies was charged with unbecoming

conduct for accessing pornographic websites on the school district's computers located in the school library. It was later discovered that the teacher had obtained access to pornographic websites from computers in other school district classrooms. The Board of Examiners found that the teacher's behavior was highly inappropriate in that he accessed twenty different pornographic sites on forty-four different occasions. It held that this flagrant misuse of district resources showed a lack of judgment and a failure to comply with the heavy duty of self-restraint and controlled behavior which is imposed on a teacher.

In Matter of Certificates of Donahue, Agency Dkt. No. 0708-208, Final Decision, Examiners (March 31, 2009), a middle school librarian was found guilty of unbecoming conduct based on her accessing pornographic websites over a three-day period using the circulation desk computer during school hours. She was also charged with sending e-mail messages concerning inappropriate, obscene, lude or vulgar language to another district employee. The Board of Examiners indicated that even though no students were exposed to the offending material, this was only a matter of happenstance and does not lessen the severity of these actions or the potential for harm. The Board determined that her abuse of the public trust and misuse of the district's computer was central to her job function as a school librarian and thus was sufficiently flagrant that only one incident would have been sufficient.

I have carefully reviewed all of the exhibits submitted in evidence by stipulation of the parties upon which the allegation of unbecoming conduct is based. I **FIND** that virtually all of these exhibits violate the Maple Shade Board of Education Policy on Acceptable Use of the information network. I **FIND** that a number of the exhibits include nude photographs, generally of women, that are clearly inappropriate and objectionable in the public school environment. These include Exhibits P-5, P-7, P-8, P-11, P-13, P-16, P-19, P-20, P-22, P-55, P-61, P-69, P-74, and P-79 (duplicate of an earlier exhibit). P-21 possibly contains nudity but it is unclear from the exhibit. In addition, of these exhibits containing nudity I **FIND** at least three of them are pornographic in nature because they are photographs that depict either sexual activity or erotic poses designed to arouse sexual excitement. These exhibits are P-7 depicting

oral sex, P-8 which is a series of photographs purporting to show an exercise class but progressing to erotic poses by females which are designed to arouse sexual excitement, and P-22 consisting of a series of erotic poses by females which are designed to arouse sexual excitement.

Based upon the guidance given by the Commissioner of Education in Grundfest, supra, and by the Board of Examiners in Gomes, supra, and Donahue, supra, and after taking into account the surrounding circumstances, I **FIND** the actions and conduct of Howarth in this case clearly amount to unbecoming conduct. His conduct and actions were a flagrant misuse of district resources and showed a lack of judgment and a failure to comply with the heavy duty of self-restraint and controlled behavior imposed on a teacher. In particular, Howarth's conduct in accessing, saving and forwarding those exhibits on his school computer which I found to be pornographic in nature is reprehensible and violates a sacred trust with his students.

3. What is the appropriate penalty under the circumstances?

In Gomes, supra, the Board of Examiners revoked the teacher's certificate for highly inappropriate behavior in accessing pornographic sites on school computers. The Board concluded that this revocation should occur because his flagrant misuse of district resources showed a lack of judgment and a failure to comply with the heavy duty of self-restraint and controlled behavior imposed on a teacher. In Donahue, supra, the Board determined that a school librarian's abuse of the public trust and misuse of the district's computer was central to her job function thus was sufficiently flagrant that only one incident would have been sufficient. Mitigating factors such as her unblemished record and the character testimony presented that she was well-liked by students and staff and had performed charitable works for her community, while laudable, did not outweigh the aggravating circumstances surrounding this offense. The Board of Examiners concluded that the only proper response to this breach is revocation.

In this case, respondent asserts a number of mitigating factors. However, I have given little, if any, weight to the settlement agreement between the Maple Shade Board

of Education and Howarth. That settlement agreement is not a decision on the merits, and the Board of Examiners is not bound by the determinations made therein, but may make its own separate and independent determinations based on the merits in this case.

Likewise, I have given little, if any, weight to the possible misuse of school district computers by other staff and administrators at Maple Shade. The fact that other educators in the school district may have violated their trust to the students cannot be used to justify or mitigate the conduct and actions of the respondent in this case.

The testimony and evidence clearly indicates that Howarth's performance as a teacher is good to excellent. His colleagues and other educators as well as parents found him to be a dedicated and effective teacher. However, Howarth's prior excellent record and his subsequent realization of the error of his ways does not mitigate the extraordinary lack of judgment he has shown in this case.

I **FIND** that Howarth's actions and conduct are such that he is unfit to discharge the duties and functions as a teacher. In re Tenure Hearing of Grossman, supra, 127 N.J. Super. at 29. I **FIND** that the only proper response to the flagrant breach of trust on the part of Howarth is the revocation of his teaching certificates. Redcay v. State Ed. of Educ., supra, 130 N.J.L. at 371. I make this finding with some feelings of regret because of Howarth's prior record as a dedicated and effective teacher, but believe it to be necessary for the protection of the students of the State of New Jersey.

DECISION AND ORDER

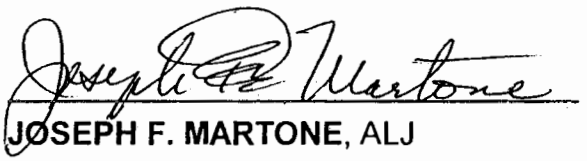
I **ORDER** that Certificates of Dean Howarth as a Teacher of Social Studies and a Teacher of the Handicapped are **REVOKED** and his appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this matter. If the State Board of Examiners does not adopt, modify 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 **SECRETARY OF THE STATE BOARD OF EXAMINERS, 1000 Riverview Plaza, 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 20, 2009
DATE



JOSEPH F. MARTONE, ALJ

Date Received at Agency: 7/20/09

Date Mailed to Parties: 7/20/09

mph/jk

APPENDIX

LIST OF WITNESSES:

For petitioner:

Cheryl Smith
Arunas Avizius
Raymond Marini
Robin Sandowski

For respondent:

Mary Ann Ferren
Andrew Severin
S.C.
Marion Hagerty
Francis M. Schuld
Molly Avery
Dean Howarth

LIST OF EXHIBITS:

Joint exhibits:

J-1 Joint Stipulation of Facts dated May 7, 2008

Court exhibits:

C-1 Statement of Charges of Unbecoming Conduct (for identification only)

For petitioner:

P-1 Letter of reprimand, dated February 13, 2003

P-2 Maple Shade Board of Education Staff Acceptable Use Policy

P-3 Maple Shade Jr./Sr. High School Teacher Handbook

P-4 Superintendent Cheryl Smith's handwritten notes regarding her telephone conversation with Dr. Joseph Massare, dated April 6

P-5 E-mail, which contains a photograph of a nude woman, and was forwarded by Howarth from his personal e-mail account to his school e-mail account on January 15, 2005, and thereafter saved into the e-mail folder "Jokes".

P-6 E-mail, which contains photographs of partially nude women on bicycles, and was received on Howarth's school e-mail account on November 6, 2003.

P-7 E-mail, which contains a photograph of a woman performing oral sex upon a man, and was forwarded by Howarth from his personal e-mail account to his school e-mail account on January 21, 2004.

P-8 E-mail, which contains ten photographs of nude or partially nude women exercising, and was forwarded by Howarth from his personal e-mail account to his school e-mail account on January 21, 2004.

P-9 E-mail that was sent by Howarth from his school e-mail account on March 16, 2004 at 1:45 p.m.

P-10 E-mail that was sent by Howarth from his school e-mail account on March 18, 2004 at 12:57 p.m.

P-11 E-mail, containing photographs of a partially nude woman, which was received on Howarth's school e-mail account on March 31, 2004.

P-12 E-mail that was received on Howarth's school e-mail account April 12, 2004.

P-13 E-mail, containing a photograph of a partially nude woman, and was forwarded by Howarth from his personal e-mail account to his school e-mail account; Howarth forwarded this e-mail from his school e-mail account on October 13, 2004 at 1:06 PM.

P-14 E-mail, containing multiple attachments that was received on Howarth's school e-mail account on October 26, 2004; Howarth forwarded this e-mail from his school e-mail account on November 29, 2004 at 1:08 p.m.

P-15 E-mail, containing a photograph of a woman with her breast partially exposed; which was received on Howarth's school e-mail account on November 29, 2004 and, thereafter saved into the e-mail folder "jokes".

P-16 E-mail, containing a photograph of a nude woman, which was received on Howarth's school e-mail account on December 3, 2004; Howarth forwarded the e-mail from his school e-mail account on December 3, 2004

at 1:12 pm; Howarth saved the e-mail into the e-mail folder "jokes".

P-17 E-mail that was received on Howarth's school e-mail account on December 9, 2004.

P-18 E-mail that Howarth forwarded from his home e-mail account to his school e-mail account on January 15, 2005 and, thereafter saved into the e-mail folder "jokes".

P-19 E-mail, containing a photograph of a nude woman and a partially nude woman, which Howarth forwarded from his school e-mail account on January 18, 2005 at 1:09 pm.

P-20 E-mail, containing multiple photographs, which Howarth forwarded from his home e-mail account to his school e-mail account on January 15, 2005 and, thereafter saved to the e-mail folder "jokes".

P-21 E-mail that was received on Howarth's school e-mail account on March 7, 2005.

P-22 E-mail, which contains 16 photographs of a nude or partially nude woman, and was received on Howarth's school e-mail account on March 8, 2005; Howarth forwarded the e-mail from his school e-mail account on March 9, 2005 at 11:27 am.

P-23 E-mail that Howarth sent from his school e-mail account on March 22, 2005.

P-24 E-mail that Howarth sent from his school e-mail account on March 24, 2005.

P-25 E-mail that was received on Howarth's school e-mail account on March 29, 2005.

P-26 E-mail that was received on Howarth's school e-mail account on March 29, 2005.

P-27 E-mail that was received on Howarth's school e-mail account on March 30, 2005.

P-28 Group of e-mails that were sent to and from Howarth's personal e-mail account on April 1, 2005; e-mails were received on Howarth's personal e-mail account at 8:22 a.m., 11:01 a.m., 11:49 a.m., 12:05 p.m., 12:09 p.m. Howarth sent e-mails at 10:34 a.m., 11:41 a.m., 11:51 a.m., 12:04 p.m. and 2:21 p.m.

P-29 Group of e-mails that were sent to and from Howarth's school e-mail account on April 4, 2005. Howarth sent e-mails at 8:37 a.m., 8:43 a.m., 9:07 a.m., and 9:21 a.m. E-mails were received on Howarth's school e-

mail account at 8:48 a.m., 9:03 a.m., and 9:22 a.m.

P-30 Group of e-mails that were sent to and from Howarth's school e-mail account on April 4, 2005. Howarth sent e-mails from his school e-mail account at 10:39 a.m. 10:50 a.m., 10:53 a.m., 10:56 a.m., 11:27 a.m., 11:54 a.m., 12:00 p.m., 12:40 p.m., 1:00 p.m., 1:11 p.m., and 1:29 p.m. E-mails were received on Howarth's school e-mail account at 10:56 a.m., 10:59 a.m., 11:02 a.m., 11:09 a.m., 11:47 a.m., 12:06 p.m., 12:09 p.m., 1:03 p.m., 1:13 p.m. and 1:24 p.m.

P-31 Group of e-mails that were sent to and from Howarth's school e-mail account on April 4, 2005. Howarth sent e-mails from his school e-mail account at 9:12 a.m. and 9:18 a.m. E-mails were received on Howarth's school e-mail account at 9:17 a.m. and 9:23 a.m.

P-32 E-mail, containing sixteen photographs, that was received on Howarth's school e-mail account on April 5, 2005; Howarth forwarded the e-mail on April 6, 2005 at 8:33 a.m.

P-33 Group of e-mails that were sent to and from Howarth's school e-mail account on April 5, 2005. Howarth sent e-mails from his school e-mail account at 8:55 a.m., 9:31 a.m., and 9:40 a.m. E-mails were received on Howarth's school e-mail account at 8:47 a.m., 9:09 a.m. and 9:40 a.m.

P-34 E-mail that Howarth sent from his school e-mail account on April 5, 2005 at 1:19 p.m.

P-35 E-mail that Howarth forwarded from his home e-mail account to his school e-mail account on April 5, 2005.

P-36 Group of e-mails that were sent to and from Howarth's school e-mail account on April 5, 2005. Howarth sent e-mails from his school e-mail account at 11:27 a.m. and 1:19 p.m. E-mails were received on Howarth's school e-mail account at 11:07 a.m. and 11:56 a.m.

P-37 E-mail that Howarth sent from his school e-mail account on Wednesday April 6, 2005 at 7:52 a.m.

P-38 E-mail that Howarth sent from his school e-mail account on April 6, 2005 at 8:44 a.m.

P-39 E-mail that Howarth sent from his school e-mail account on April 6, 2005 at 8:33 a.m.; Howarth forwarded this e-mail on April 6, 2005 at 8:46 a.m.

P-40 E-mail that Howarth sent from his school e-mail account on April 6, 2005 at 8:11 a.m.

P-41 E-mail that was received on Howarth's school e-mail account on April 5, 2005; Howarth forwarded the e-mail on April 6, 2005 at 8:47 a.m.

P-42 Group of e-mails that were sent to and from Howarth's school e-mail account on April 6, 2005. Howarth sent e-mails from his school e-mail account at 8:56 a.m. and 9:39 a.m. E-mails were received on Howarth's school e-mail account at 9:06 a.m. and 10:09 a.m.

P-43 E-mail that Howarth received on his school e-mail account on April 6, 2005 at 9:37 a.m.

P-44 E-mail that was received on Howarth's school e-mail account on April 6, 2005.

P-45 E-mail that was received on Howarth's school e-mail account on April 6, 2005.

P-46 E-mail that was received on Howarth's school e-mail account on April 6, 2005.

P-47 E-mail that was received on Howarth's school e-mail account on April 6, 2005.

P-48 E-mail that was received on Howarth's school e-mail account on April 6, 2005.

P-49 E-mail that was received on Howarth's school e-mail account on April 6, 2005.

P-50 E-mail containing a photograph, which was received on Howarth's school e-mail account on April 7, 2005.

P-51 E-mail that was received on Howarth's school e-mail account on January 12, 2000.

P-52 E-mail that was received on Howarth's school e-mail account on January 25, 1994, and was found on Howarth's school computer.

P-53 E-mail, dated February 19, 2004, which was found on Howarth's school computer.

P-54 E-mail that was received on Howarth's school e-mail account on November 3, 2000.

P-55 E-mail, containing multiple photographs that include nudity, which was received on Howarth's school e-mail account on December 20, 2000, and was found on his school computer.

P-56 E-mail, containing a cartoon, which was received on Howarth's school e-mail account on December 20, 2000, and was found on his school computer.

P-57 E-mail, containing a cartoon, which was received on Howarth's school e-mail account on June 4, 2001, and was found on his school computer.

P-58 E-mail, containing a cartoon, which Howarth sent from his school e-mail account on June 7, 2001 at 8:48 a.m.

P-59 E-mail that Howarth sent from his school e-mail account on June 7, 2001 at 10:56 a.m.

P-60 E-mail that Howarth sent from his school e-mail account on June 13, 2001 at 8:34 a.m.

P-61 E-mail, containing a photograph of a woman's bare breasts, which was received on Howarth's school e-mail account on October 21, 2002.

P-62 E-mail received on Howarth's school e-mail account on November 4, 2002.

P-63 Group of e-mails that Howarth sent from his school e-mail account on January 8, 2003 at 12:34 p.m. and January 21, 2003 at 8:30 a.m.

P-64 E-mail, containing multiple photographs, which was received on Howarth's school e-mail account on January 17, 2003.

P-65 E-mail that was received on Howarth's school e-mail account on January 21, 2003.

P-66 E-mail that was received on Howarth's school e-mail account on November 11, 2003.

P-67 E-mail that Howarth forwarded from his personal e-mail account to his school e-mail account on January 21, 2004.

P-68 E-mail that Howarth forwarded from his personal e-mail account to his school e-mail account on January 21, 2004.

P-70 E-mail that Howarth sent from his school e-mail account on March 18, 2004 at 8:18 a.m.

P-72 E-mail that Howarth sent from his school e-mail account on March 23, 2004 at 10:07 a.m.

P-73 E-mail that Howarth sent from his school e-mail account on March 25, 2004 at 1:41 p.m.

P-74 E-mail received on Howarth's school e-mail account on March 31, 2004, forwarded on March 31, 2004 at 9:54 a.m. (for identification only)

P-75 E-mail containing a photograph, which Howarth sent from his school e-mail account on April 6, 2006 at 2:24 p.m.

P-76 E-mail that was received on Howarth's school e-mail account on April 27, 2004.

P-77 Group of e-mails that were sent to and from Howarth's school e-mail account on March 24, 2005; Howarth sent e-mails from his school e-mail account at 8:33 a.m., 8:43 a.m., 8:51 a.m., 9:47 a.m., 9:54 a.m., and 10:16 a.m. E-mails were received on Howarth's school e-mail account at 8:03 a.m., 8:43 a.m., 8:53 a.m., 9:19 a.m., 9:56 a.m. and 10:10 a.m.

P-78 E-mail that was received on Howarth's school e-mail account on August 2, 2005.

P-79 Group of e-mails, containing multiple photographs, which were received on Howarth's school e-mail account on February 11, 2005 and, thereafter saved into the e-mail folder "jokes".

P-80 Group of e-mails and documents, which were found on Howarth's school computer.

P-81 List of websites that were listed as "favorites" on Howarth's school computer.

P-82 Group of e-mails, containing video attachments, which were received on Howarth's school e-mail account.

P-83 Examples of materials stored on Howarth's "p" drive

P-84 Directory of documents on school computer from 2000 to 2005

P-85 Howarth's Class Schedules (2001 through 2005)

P-86 Letter to Howarth from Superintendent Smith regarding suspension for violation of the Acceptable Use Policy, dated April 6, 2005

P-87 Diagram of Howarth's classroom

P-88 Faculty Meeting Agenda, September 2, 2003

P-89 Chart of Howarth's e-mail activity from April 4, 2005, through April 6, 2005

P-90 List of e-mail exhibits

For respondent:

R-1 August 26, 2005, E-mail to Andy Severin from Cheryl Smith, Redacted

R-1 August 26, 2005, E-mail to Andy Severin from Cheryl Smith, New Teacher Speech

R-2 March 23, 2006, Letter from Joan Josephson regarding tenure hearing of Dean Howarth (Maple Shade)

R-3 June 29, 2005, Letter of Agreement between Craig Ranshaw and Maple Shade Township Board of Education sent by Craig Ranshaw

R-4 April 8, 2005, Letter of Suspension of Bradley Bauer sent from Cheryl Smith to Mr. Bauer

R-5 May 12, 2005, Letter involving the reemployment of Bradley Bauer sent from Cheryl Smith to Mr. Bauer

R-6 September 13, 2005, Letter to Jennifer Krause serving as a reprimand for her violation of the staff sent by Cheryl Smith

R-7 July 5, 2005, Annual Agreement Letter for reappointment to Dean Howarth from Cheryl Smith

R-8 May 26, 2005, Child Study Team Observation Report of Dean Howarth

R-9 June30, 2004, Annual Tenure Teacher Evaluation Report for the 2003-2004 school year of Dean Howarth

R-10 January 10, 2002, Child Study Team Observation Report of Dean Howarth

R-11 November 11, 2002, Child Study Team Observation Report of Dean Howarth

R-12 February 14, 2001, Observation Report of Dean Howarth

R-13 March 9, 2000, Observation Report of Dean Howarth

R-14 February 11, 1999, Observation Report of Dean Howarth

R-15 February 19, 1998, Observation Report of Dean Howarth

R-16 October 17, 1997, Observation Report of Dean Howarth

R-17 January 11, 1997, Letter regarding annual observation sent from Rich Keegan to Dean Howarth

R-18 January 16, 1997, Observation Report of Dean Howarth

R-19 March 20, 1997, Letter regarding Dean Howarth's 3rd Annual Observation sent from Richard Keegan

R-20 March 26, 1997, Observation Report of Dean Howarth

R-21 December 17, 1997, Observation Report of Dean Howarth

R-22 January 23, 1996, Observation Report of Dean Howarth

R-23 February 29, 1996, Observation Report of Dean Howarth

R-24 November 7, 1996, Observation Report of Dean Howarth

R-25 May 15, 1996, Annual Tenure Teacher Evaluation Report of Dean Howarth in the 1995-1996 school year period

R-26 October 25, 1995, Observation Report of Dean Howarth

R-27 December 6, 1995, Observation Report of Dean Howarth

R-28 February 13, 2001, Sexual joke labeled "good one" sent by Lions2331@aol.com Reserve

R-29 March 27, 2001, Sexual joke labeled "This is not polite, but..." sent by Joe Murphy to Dean Howarth

R-30 May 16, 2001, E-mail, "In Praise of Older Women" sent by Alan Siniscalchi to "Undisclosed Recipients@www.mapleshade.org"

R-31 June 4, 2000, E-mail, "Good enough to eat?" sent by Richard Keegan to Dean Howarth

R-32 February 8, 2001, E-mail, "2 Cannibals in search" sent by Wolverines74@cs.com to Dean Howarth

R-33 February 6, 2001, E-mail, "A little Jewish Humor" sent by Wolverines74@cs.com to Dean Howarth

R-34 January 13, 2000, E-mail, "The Mice" sent by Joe Meloche to Dean Howarth

R-35 March 9, 2000, E-mail, "Foul Language sent by Human Resources (joke)" sent by Craig Ranshaw to Dean Howarth

R-36 March 19, 2001, E-mail, "St. Patty's is over, Whoa just not yet!" sent by Wolverines74@cs.com to Dean Howarth

R-38 Initial Decision approving Settlement Agreement, dated June 15, 2006; Settlement Agreement between Dean Howarth and Maple Shade Board of Education; and Commissioner of Education Decision approving Settlement, dated July 10, 2006

R-39 Revised diagram of Howarth's classroom

R-40 October 13, 2006 Evaluation Form from Emily Fischer Charter School (Trenton, NJ)

R-41 April 20, 2007 Observation Report from Washington Township Public Schools

R-42 May 2, 2007 Evaluation Form from Washington Township Public Schools

R-43 November 13, 2007 Observation Report from Washington Township Public Schools

R-44 January 17, 2008 Observation Report from Washington Township Public Schools

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
DEAN HOWARTH	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 0607-156

At its meeting of January 18, 2007, the State Board of Examiners reviewed a decision forwarded by the Commissioner of Education that had settled a tenure case brought against Dean Howarth by the Maple Shade Board of Education (Maple Shade) for charges of unbecoming conduct. *In the Matter of the Tenure Hearing of Dean Howarth,* Docket No. EDU 08830-05 (Commissioner's Decision, July 10, 2006). Howarth currently holds a Teacher of Social Studies certificate, issued in March 1987, and a Teacher of the Handicapped certificate, issued in December 1994.

This case originated in September 2005, when the Maple Shade Board of Education certified tenure charges against Howarth. The district charged him with conduct unbecoming a teaching staff member for using a school computer visible to students to send and receive sexually explicit and racist e-mails during his instructional time, sending negative e-mails concerning the district and its students and visiting a strip club during lunchtime of an in-service day and returning to school late with the smell of alcohol on his breath.

The Acting Commissioner of Education transmitted the case to the Office of Administrative Law (OAL). After the hearing had begun, the parties settled the matter. Howarth resigned from his tenured position and the district paid him back salary and benefits. The Acting Commissioner approved the settlement and transmitted the matter to the Board of Examiners for appropriate action. Commissioner's Decision, slip op. at 1.

Thereafter, on February 22, 2007, the State Board of Examiners issued Howarth an Order to Show Cause as to why his certificates should not be suspended or revoked. The Order was predicated on the charges of unbecoming conduct that had been alleged in the tenure hearing.

The Board sent Howarth the Order to Show Cause by regular and certified mail on March 5, 2007. The Order provided that Howarth's Answer was due within 30 days. Howarth filed an Answer on April 3, 2007. In his Answer, Howarth admitted that the district had brought tenure charges against him but denied that the allegations warranted the suspension or revocation of his certificates. (Answer, ¶¶ 4, 6.)

Thereafter, on June 8, 2007, the Board transmitted the matter to the Office of Administrative Law (OAL) as a contested case. A hearing was conducted before Administrative Law Judge (ALJ) Joseph Martone on several dates in May, July and December 2008, and in January 2009. After the record closed, ALJ Martone issued his Initial Decision on July 20, 2009. *In the Matter of the Certificates of Howarth*, Dkt. No. EDE 4479-07 (Initial Decision, July 20, 2009). In that decision, ALJ Martone concluded that Howarth had engaged in the conduct alleged in the Order to Show Cause "by sending, receiving, forwarding saving and otherwise viewing and reviewing the exhibits stipulated to be found on his computer." *Id.* at 27. The ALJ found that "virtually all of the exhibits" submitted into evidence by stipulation of the parties violated Maple Shade's policy on "Acceptable Use of the Information network." *Id.* at 28. Moreover, the ALJ noted that many of the exhibits contained nudity and at least three were pornographic in nature. *Id.* at 28. The ALJ also found that "Howarth acknowledged and admitted to attending a Go-Go bar during work hours in 2003." *Id.* at 27. ALJ Martone determined that Howarth's actions and conduct in the case clearly amounted to unbecoming conduct: "His conduct and actions were a flagrant misuse of district resources and showed a lack

of judgment and a failure to comply with the heavy duty of self-restraint and controlled behavior imposed on a teacher." *Id.* at 29. Howarth's conduct in "saving, accessing and forwarding" the pornographic exhibits was particularly "reprehensible" according to the ALJ and "violate[d] a sacred trust with his students." *Ibid.*

In considering the appropriate penalty in the case, ALJ Martone noted that Howarth "assert[ed] a number of mitigating factors." *Id.* at 29. The ALJ gave little weight, however, to Howarth's settlement agreement in his tenure case as it was not binding on the Board of Examiners. *Id.* at 29-20. Similarly, Howarth's argument that other staff members in Maple Shade were also misusing district computers was given short shrift by the ALJ as that excuse could not justify or mitigate Howarth's conduct. *Id.* at 30. ALJ Martone did note Howarth's record as a dedicated and effective teacher, but added that his "prior excellent record and his subsequent realization of the error of his ways does not mitigate the extraordinary lack of judgment he has shown in this case." *Ibid.* Accordingly, the ALJ concluded that the only appropriate penalty was the revocation of Howarth's teaching certificates. *Ibid.*

Howarth submitted Exceptions and the Deputy Attorney General (DAG) representing the Board of Examiners submitted Reply Exceptions. In his Exceptions, Howarth admitted that he had inappropriate e-mails on his school computer but argued that no evidence was produced to show when he opened and reviewed the e-mails that he received. (Exceptions, pp. 9-11.) Howarth also argued that the District's policy on acceptable personal use of district computers was unclear and that Maple Shade allowed teachers to use their school computers for personal use during the same time period he had received, stored or sent e-mails from his district computer. (Exceptions, pp. 11-16.) Howarth contended that he never accessed pornographic sites using the internet, but rather, was accused only of sending and receiving explicit e-mails.

(Exceptions, pp. 21-22.) He maintained that most of the e-mails sent to him were by persons over whom he had no control. (Exceptions, p. 22.) He also argued that there was no proof that his job performance was diminished in any way or that any student saw or was harmed by the e-mails. (Exceptions, pp. 22-23.) Howarth also claimed that the ALJ erred when he gave little weight to Howarth's mitigation evidence, especially the settlement agreement from his tenure case wherein the District "was essentially agreeing that Mr. Howarth was still qualified to teach in the public schools of New Jersey." (Exceptions, p. 26.). Howarth reiterated his claims that other District staff members had sent and received inappropriate e-mails and that he was an outstanding teacher whose computer use "neither affected his instruction of his students nor contributed to any deficiency in his teaching performance." (Exceptions, pp. 28-30; 30.)

In her reply, the DAG argued that the "Initial Decision, and the factual findings and legal conclusions contained therein, are amply supported by the evidence presented at hearing." (Reply Exceptions, p. 1.) She noted that ALJ Martone had found that Howarth had sent, received, forwarded and saved the inappropriate exhibits found on his school computer, that he had attended a Go-Go bar during school hours, and that at least several of the exhibits were pornographic in nature. (Reply Exceptions, pp. 1-2.) The DAG further claimed that ALJ Martone's legal conclusion that Howarth engaged in conduct unbecoming a teaching staff member was correct. (Reply Exceptions, pp. 3-6.) She noted that Howarth's behavior was particularly egregious, because his e-mails were sent regularly over several years and during periods when Howarth was supposed to be engaged in classroom instruction, and because some of his e-mails contained highly inappropriate commentary regarding female students at Maple Shade. (Reply Exceptions, pp. 6-7.) She further argued that a settlement agreement in a tenure proceeding is not controlling in a revocation case and that ALJ Martone was therefore correct in

according it "little, if any, weight." (Reply Exceptions, pp. 8-9.) Finally, the DAG argued that Howarth's claims that it was impossible to tell when and for how long he viewed the offensive e-mails, and that no students viewed any of the e-mails, were distractions from the real issue of his unbecoming conduct. (Exceptions, pp. 9-12.) Accordingly, the DAG noted that "Howarth's exceptions do nothing to undermine the integrity of the Initial Decision," and urged the Board of Examiners to adopt it as the "Final Decision in this matter." (Reply Exceptions, p. 13.)

The Board must now determine whether to adopt, modify or dismiss the Initial Decision in this matter. At its meeting of October 22, 2009, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision, Exceptions and Reply Exceptions and the issues raised therein, the Board voted to adopt the Initial Decision.

As a preliminary matter, the Board must address Howarth's claim that the settlement agreement in his tenure case should carry more weight in this proceeding than that accorded to it by ALJ Martone. That argument is unfounded. As the DAG correctly noted in her Reply Exceptions, neither the presiding ALJ's nor the Commissioner's approval of a settlement in a tenure case necessarily signifies agreement with the substance of the provisions, but rather an acknowledgment that the agreement comports with the legal requirements for settlement. (Reply Exceptions, pp. 7-8.) Moreover, only the Board of Examiners is imbued with the statutory authority to determine who is qualified to possess a teaching certificate in New Jersey. *N.J.S.A.* 18A:6-38. That purview extends far beyond the limited scope of determining whether a teaching staff member has engaged in conduct which renders him unsuitable for a particular district. Instead, the Board of Examiners must be mindful of its responsibility to all New Jersey public school children by removing from its classrooms all teachers who are detrimental to their

welfare. In view of that heavy burden, settlement of a tenure matter, which may be prompted by vastly different concerns, has no bearing whatsoever on a revocation proceeding.

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. As noted above, ALJ Martone found that Howarth was a dedicated teacher who nevertheless engaged in inappropriate and, at times, reprehensible conduct with regard to sending and receiving inappropriate and pornographic e-mails at work. (Initial Decision, slip op. at 29, 30.) The record is replete with exhibits which no reasonable individual could argue were in any way appropriate for workplace viewing, let alone further dissemination. Howarth's claim that "everyone else was doing it" rings hollow and runs counter to the purpose of allowing mitigation. Although ALJ Martone expressed some regret at revoking Howarth's certificates, the Board of Examiners shares no such misgivings. Howarth has clearly engaged in conduct that negates any claim he can have as a role model for children. In fact, his behavior was harmful to students in that they lost valuable instructional time because he was otherwise occupied. Moreover, the fact that no student viewed this material on his computer is mere happenstance and not a cause for acclamation. As we have noted previously, "failing to get 'caught in the act' by students does not lessen the severity of [Howarth's] actions or the potential for harm." *In the Matter of the Certificates of Darlene Donahue,* Dkt. No. 0708-208 (Bd. of Examiners, March 31, 2009.) The potential for seeing the material existed and therefore does not lessen the severity of the offense. The Examiners therefore agree with the ALJ's conclusion that the only appropriate response to Howarth's breach is the revocation of his teaching certificates. (Initial Decision, slip op. at 30.)

Accordingly, on October 22, 2009, the Board of Examiners voted to adopt the Initial Decision and revoke Howarth's teaching certificates. On this 2nd day of December 2009, the

Board of Examiners formally adopted its written decision to adopt the Initial Decision in this matter, and it is therefore ORDERED that Dean Howarth's Teacher of Social Studies and Teacher of the Handicapped certificates be hereby revoked effective immediately. It is further ORDERED that Howarth 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: 12/4/09

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

215-10

OAL DKT. NO. EDU 11818-08
AGENCY DKT. NO. 280-9/08

CHARLES COLEMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|15|10

Date of Mailing: 7|15|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11818-08
AGENCY DKT. NO. 280-9/08

CHARLES COLEMAN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY
Respondent.

Eugene G. Liss, Esq., for petitioner

Bernard Mercado, Associate Counsel, for respondent (Lisa Pollak, General Counsel)

Record Closed: May 10, 2010 Decided: May 14, 2010

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Charles Coleman (petitioner) filed a Petition of Appeal with the Commissioner of Education in which he contends that he acquired tenure as a teacher in the employ of the State-Operated School District of the City of Newark (Board). Petitioner further

asserts that the Board violated his tenure rights when it determined not to continue his employment as a teacher into the 2008–09 academic year. The Board filed its Answer and denies petitioner's claim of tenure. The Board says its action regarding petitioner's non-reemployment is in all respects proper.

After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case, the matter was assigned to administrative law judge Joseph Paone, who subsequently was appointed to the New Jersey Superior Court. Judge Paone's appointment resulted in the case being assigned to this administrative law judge on or about January 30, 2010. A hearing was scheduled to be conducted on May 7, 2010. At the opening of the record, counsel to the parties were granted time to discuss the possibility of settling the matter, rather than proceed to hearing. After approximately one hour, the record was continued, at which time counsel announced that a settlement had been reached. For the following reasons, the conclusion is reached that the Commissioner of Education should adopt the settlement as a full, fair, and final disposition of the matter.

BACKGROUND OF DISPUTE

Petitioner alleges in his petition that at the conclusion of the 2007–08 school year he had served as a fully certified teacher in the Board's employ for four years and eight months. Three years of such employment was under written contract, while the remaining time of employment was on a per-diem basis.

It is noted that at the hearing, the parties stipulated that petitioner possesses an instructional certificate with an elementary endorsement, and that during all times of his employment he was assigned within the scope of the endorsement to an elementary position. On or about May 9, 2008, petitioner was advised by the former superintendent of schools that his employment was not to be continued into the 2008–09 school year. Petitioner requested and was granted an opportunity to be heard by the Board. Though petitioner claimed a tenure status during the opportunity to be heard, the Board determined to affirm the determination not to continue his employment.

In addition to his claim of tenure, petitioner also alleges that the Board erred in its determination not to continue his employment because it failed to cause an appropriate number of observations and evaluations of his performance to be made, that he was the target of unlawful discrimination because of race, and that he was the target of religious bias because of his Muslim faith.

SETTLEMENT

The Board, relying on a risk-reward analysis, agrees that petitioner may be likely to show that at least one of the days he taught on a per-diem basis could reasonably be considered time served as a teacher for purposes of his acquiring tenure under N.J.S.A. 18A:28-5. The Board acknowledges that petitioner is a satisfactory teacher and that under the new superintendent of schools, whose title is now executive director, petitioner will more likely than not be an effective teacher for the students of Newark. The Board says it is prudent for it to use its financial resources for Newark students, as opposed to litigating an issue on which it may not prevail.

Under the offer made by the Board, petitioner would be considered to have acquired a tenure status in its employ, and returned to a teaching position within the scope of the endorsement on his certificate at the commencement of the 2010–11 school year. He would receive no back pay, nor any other remuneration from the Board, and he would be placed on step 12 of the appropriate salary scale. The Board explains that the time between now and the commencement of the 2010–11 school year will provide the Commissioner of Education time to review the Initial Decision and the record compiled on May 7, 2010.

If the settlement is approved by the Commissioner, the Board would consider petitioner to have been on an approved unpaid administrative leave since June 30, 2008. Board counsel represents that the executive director of the State-Operated School District of the City of Newark agrees with the pre-offered terms.

Petitioner testified under oath that he understands the terms of the settlement; that he discussed the terms with his attorney; that he understands that he is entitled to a

hearing on his petition, but that he waives such entitlement upon his acceptance of the settlement; that he embraces the terms of the settlement in a voluntary manner; and that he accepts the pre-offered terms as a full and final settlement of the matter.

CONCLUSION

As is required under N.J.A.C. 1:1-19-1, I **CONCLUDE** that the testimony given under oath by petitioner establishes that his acceptance of the settlement terms is voluntary, is consistent with the law, and is fully dispositive of all issues in controversy. Therefore, I approve the settlement as disposing of all issues presented in the petition of appeal. The parties are ordered to comply with the terms of the settlement as set out 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.

Daniel B McKeown

May 14, 2010
DATE

DANIEL B. MC KEOWN ALJ (t/a)

Date Received at Agency: 5-14-10

Date Mailed to Parties: MAY 17 2010

Laura Dudley
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8708
Attorney for the State-Operated School District
of the City of Newark

		OFFICE OF ADMINISTRATIVE LAW
CHARLES COLEMAN	:	
Petitioner,	:	OAL DKT. NO. EDUOR 11818-2008N
vs.	:	AGENCY REF. NO. 280-9/08
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,	:	SETTLEMENT AGREEMENT
Respondent.	:	

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Charles Coleman ("Coleman" or "Petitioner") and the State-Operated School District of the City of Newark (the "District"):

1. Petitioner agrees to withdraw, with prejudice, his appeal and request for a hearing filed under OAL Docket No. EDUOR 11818-2008N.

2. The District agrees to reinstate Petitioner in September 2010 for the 2010-11 school year. Petitioner will be assigned to a location other than Barringer 9th Grade Success Academy.

3. Coleman will receive no back pay as part of this Agreement but will be placed on the salary guide at Step 12 upon his reinstatement. Coleman will also be credited with the sick days he otherwise would have received and will be deemed to have attained a tenure status with the State-Operated Newark Public Schools.

4. This agreement shall not constitute a precedent in any matters involving other employees.

5. Except as noted above, Petitioner waives all claims of any nature against Respondent with regard to this matter, including fees, or other monetary relief, with the exception of workers' compensation.

6. Except as noted above, Coleman waives all claims against the District with regard to this matter in any forum, including back pay, counsel fees, or other monetary relief. 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 Petitioner's employment with the District. It specifically includes, without limitation, all claims which Petitioner may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation

provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above) and/or any other alleged violation of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or tort law or public policy or whistleblower claim, or collective bargaining/ contractual claim relating to employment, having any bearing whatsoever on his employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs, and/or future wage loss.

7. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

8. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

9. If any provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid,

void, or unenforceable, the remaining provisions will continue in full force and effect.

10. This Agreement is subject to the State District Superintendant of the State-operated School District of the City of Newark and will only become effective upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: June 21, 2010

CHARLES COLEMAN
Petitioner

Dated: Jun 27 2010

EUGENE LISS
Attorney for Petitioner

Dated: 7/1/10

DR. CLIFFORD B. JANEY
State District Superintendent

Dated: 7/1/10

ARSEN ZARTARIAN
Deputy General Counsel

CERTIFICATION

I, CHARLES COLEMAN, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my counsel questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: June 21, 2010

CHARLES COLEMAN

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; DEPARTMENT OF EDUCATION; AND DEPARTMENT OF TREASURY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board of Education (Lakewood) sought Medicaid reimbursement for special education students who have been parentally placed in private schools. The petition originally sought relief exclusively through the Department of Education, which raised jurisdictional questions. The petition was then withdrawn and filed in the Appellate Division of Superior Court, naming the three respondents herein. The court remanded the matters for hearing at the OAL, where they were consolidated and predominant interest was established in the Department of Human Services. The record before the Commissioner includes the Initial Decision of the OAL and the Final Agency Decision of the Department of Human Services.

The ALJ identified the core question of law in this matter as the interplay of the Individuals with Disabilities Education Improvement Act (IDEIA) and a provision of the Medicare Catastrophic Coverage Act of 1988 (42 U.S.C.A. § 1396b(c)), and found that: prior to 1988, Medicaid did not reimburse special education services because they were covered under the IDEIA; the Medicaid amendment of 1988 allowed reimbursement for certain medically necessary services pursuant to 42 U.S.C.A. § 1396b(c), but this statute does not separately address Medicaid-eligible privately placed students; and there is little reason to believe that Congress equalized treatment of privately placed students with publically placed students for Medicaid purposes without any special mention of this issue. Accordingly, the ALJ granted the respondents' motion for summary judgment, denied petitioner's motion for partial summary decision, and dismissed the petition.

The Director of the Department of Human Services, Division of Medical Assistance and Health Services, reviewed the record of this matter including the Initial Decision of the OAL, petitioner's exceptions and respondents' reply thereto, and determined to adopt the findings, conclusions and recommended decision of the ALJ in their entirety as the Final Agency Decision.

Upon careful review and consideration, the Commissioner determined that there are no remaining issues under the jurisdictional purview of the Commissioner of Education. Accordingly, the petition of appeal was dismissed.

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

Mailed 7/16/10

OAL DKT. NOS. HMA 888-08, EDU 889-08 and TPP 2462-08 (consolidated)
AGENCY DKT. NO. 80-3/07

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, PETITIONER, V. DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; DEPARTMENT OF EDUCATION; AND DEPARTMENT OF TREASURY, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

This matter involves a consolidated action that stemmed from a petition originally filed with the Department of Education in which Petitioner sought Medicaid reimbursement for special education students who have been parentally placed in private schools. The original petition was withdrawn because of potential jurisdictional questions. Petitioner then filed an appeal in the Superior Court of New Jersey, Appellate Division, against the Department of Human Services, Division of Medical Assistance and Health Services; the Department of Education; and the Department of Treasury seeking similar relief. The Appellate Division remanded the matters to the respective agencies for a hearing at the Office of Administrative Law (OAL). On remand, the petitions were consolidated, and the parties agreed that the Department of Human Services, Division of Medical Assistance and Health Services, has predominant interest.

The record of this matter, which includes the Initial Decision of the OAL, the Petitioner's exceptions to the Initial Decision, the Respondents' joint reply to the Petitioner's exceptions, and the final decision of the Division of Medical Assistance and Health Services, has

been reviewed. There were no separate exceptions filed with the Commissioner of Education. Upon such review, the Commissioner has determined that there are no remaining issues under the jurisdictional purview of the Commissioner of Education.

Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/10

Date of Mailing: 7/16/10

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
PO BOX 712
TRENTON, NJ 08625-0712

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

JENNIFER VELEZ
Commissioner

JOHN R. GUHL
Director

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

LAKEWOOD BOARD OF EDUCATION	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE & HEALTH SERVICES, DEPARTMENT OF EDUCATION, AND DEPARTMENT OF THE TREASURY	:	**OAL DKT NOS. HMA 888-08 EDU 889-08 and TPP 2462-08 (CONSOLIDATED)**
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this matter including the Initial Decision, the OAL case file, Petitioner's Exceptions to the Initial Decision and Respondents' reply thereto. Although Petitioner submitted an additional response to Respondents' submission, I am unable to consider the submission because the OAL rules make no provision for responses to reply exceptions. See N.J.A.C. 1:1-18.4. Moreover, it appears that Exhibit D of Petitioner's response was not

submitted at the hearing and thus cannot be included in exceptions in accordance with N.J.A.C. 1:1-18.4(c).

Procedurally, the time period for DMAHS to render a Final Agency Decision is June 10, 2010 pursuant to an Order of Extension. The Initial Decision issued by ALJ Metzger concluded DMAHS had the predominant interest in this consolidated matter and instructed DMAHS upon rendering its Final Agency Decision to obtain a 45-day Order of Extension and forward the Initial Decision and the Final Agency Decision to the Commissioner of the Department of Education and the Director of the Division of Purchase and Property to render a Final Agency Decision on any remaining issues and consider any specific remedies which may be within their authority.

I hereby ADOPT the findings, conclusions and recommended decision of the Administrative Law Judge in their entirety and incorporate the same herein by reference. As noted in the Initial Decision, summary disposition may be entered where there is no genuine issue as to any material fact and where the moving party is entitled to prevail as a matter of law. See N.J.A.C. 1:1-12.5 and Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Once the moving party has shown competent evidence of the absence of any genuine issue of fact, the non-moving party must do more than simply create some doubts as to the material facts; it must raise a factual issue substantial enough to sustain a reasonable conclusion in the non-moving party's favor. I agree with the Administrative Law Judge that Lakewood has failed to raise any genuine issue of material fact that would require a hearing in this matter. At issue is whether reimbursement through Medicaid is available for services provided to parentally-placed special education private school students. For the reasons which follow, I agree that Medicaid

reimbursement is limited to services provided to public school students pursuant to an Individualized Education Program (IEP).

By way of background, the Individuals with Disabilities Education Improvement Act (IDEIA), was enacted to ensure that children with disabilities have available to them a free and appropriate public education. The IEP sets forth the specific services needed by the child. Before 1988, Medicaid, the payor of last resort, did not cover any items in a child's IEP because federal IDEIA funds were available to pay for those items. However, with the enactment of the Medicare Catastrophic Coverage Act of 1988, Medicaid was no longer prohibited from paying for services prescribed in a student's IEP. The statutory amendment does not require coverage of services in an IEP, it permits it.

Pursuant to this amendment, the Department of Education, the Department of Human Services and the Department of Treasury created the Special Education Medicaid Initiative (SEMI), a program designed to maximize the recovery of costs eligible for matching federal Medicaid reimbursement. The recovered funds are divided between the State and the local school district. Lakewood contends that the SEMI program should be permitted to submit claims for Medicaid reimbursement for services provided to its parentally-placed private school students. I disagree. As discussed below, the statutory requirement for an IEP provides ample support for Respondents' position that special education services provided to parentally placed private school students were not meant to be treated in the same way as those provided to public school students as far as Medicaid reimbursement is concerned.

Federal Medicaid law clearly requires that there be an IEP containing the medical services provided through the SEMI program.[1] The federal statute provides in pertinent part:

> Treatment of educationally-related services. Nothing in this title [42 USCS §1396 et seq.] shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for covered services furnished to a child with a disability **because such services are included in the child's individualized education program [IEP] established pursuant to part B of the Individuals with Disabilities Act** [20 USCS § 1411 et seq.]
>
> [42 U.S.C.A. §1396b(c) (emphasis added)]

Further, the congressional history from the enactment of this law states:

> The conference agreement clarifies that federal Medicaid matching funds are available for the cost of health services, covered under a State's Medicaid plan, that are furnished to a handicapped child or a handicapped infant or toddler, even though such services are included in the child's individualized education program [IEP] or individualized family service plan [IFSP]. Under the Education for All Handicapped Children Act of 1975, P.L. 94-142, **children with handicaps are entitled to a free and appropriate public education in conformity with an individualized education program (IEP) which describes the educational and "related services" necessary to meet the child's unique needs.** While the State education agencies are financially responsible for educational services, in the case of a Medicaid-eligible handicapped child, State Medicaid agencies remain responsible for the "related services" identified in the child's IEP if they are covered under the State's Medicaid plan . . .
>
> [134 Cong. Rec. H 3765, 3840 (emphasis added)]

The legislative history suggests that Congress clearly sought to distinguish between public versus private school students by virtue of its direct reference to a free and appropriate public education (FAPE). It is only pursuant to providing a FAPE that Congress permits related services contained in an IEP to be covered by Medicaid. Comments to the U.S. Department of Education's regulations addressing the IDEIA amendments of 1997 clearly state that private school children "have no individual right to receive some or all of the special education

[1] Parentally-placed private school students may however continue to participate in the Medicaid program by receiving services from participating Medicaid providers.

and related services that they would be entitled to if enrolled in a public school." 64 F.R. 12406. The comments go on to state that because private school students with disabilities are not entitled to a FAPE, it is "misleading" to use the term IEP. Indeed, while IEPs must include all special education and related available services, regardless of cost, to children under IDEIA, a private school student with a disability has no right to have a plan developed in the same way because the local education agency determines the amount and type of services it will provide to that child. As aptly noted by the ALJ, "[t]here is little reason to believe that the Congress, without any special mention, equalized the treatment of privately placed students with publicly placed students, for Medicaid purposes, when that is not the approach of the IDEIA, the very mechanism by which the benefit is delivered". See Initial Decision at page 4. It follows that Congress allows only those school-based services included in an IEP to be covered by Medicaid as part of a FAPE. For these reasons, I FIND that Respondents are correct in not providing SEMI claiming for school-based services not supported by an IEP.

THEREFORE, it is on this 20th day of May 2010,

ORDERED:

That the recommended decision granting Respondent's motion for summary decision is hereby ADOPTED.

Valerie Harr, acting Director
John R. Guhl, Director
Division of Medical Assistance
and Health Services

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. HMA 888-08
EDU 889-08 AND TPP 2462-08
(CONSOLIDATED)

LAKEWOOD BOARD OF EDUCATION,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; DEPARTMENT OF EDUCATION; AND DEPARTMENT OF THE TREASURY,

Respondents.

Michael Inzelbuch, Esq., for petitioner

Dianna Rosenheim, Deputy Attorney General, for respondent Department of Human Services (Paula T. Dow, Attorney General of New Jersey, attorney)

Christopher Huber, Deputy Attorney General, for respondent Department of Education (Paula T. Dow, Attorney General of New Jersey, attorney)

Kimberly Sked, Deputy Attorney General, for respondent Department of the Treasury (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: March 1, 2010 Decided: March 11, 2010

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

These matters arise out of a petition filed by the Lakewood Board of Education seeking reimbursement through Medicaid for special education students that have been parentally placed in private schools. Collectively, respondents are the Department of Human Services, which administers the Medicaid program, the Department of Education, and the Department of the Treasury.

Initially the petition sought relief exclusively through the Department of Education, which raised jurisdictional questions. The petition was withdrawn and filed in the Superior Court, Appellate Division, naming the three agencies. The court in turn remanded for hearing in the Office of Administrative Law (OAL) on the substantive questions presented. The matters were consolidated and predominant interest was established in the Department of Human Services by agreement of the parties before my predecessor in the case, Hon. John Futey, ALJ. Lakewood then filed a motion for partial summary decision on liability, and respondents have countered with a cross-motion for summary decision, Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). For this purpose, the students for whom reimbursement is sought should be seen as eligible, but for the fact that they have been privately placed. Separate factual and legal arguments over claim specifics and appropriate use of funding lines are not necessary to a resolution.

The core question of law involves the interplay of the Individuals with Disabilities Education Improvement Act (IDEIA),[1] 20 U.S.C.A. §§ 1400-1482, and a provision of the Medicare Catastrophic Coverage Act of 1988, at 42 U.S.C.A. § 1396b(c). Under the IDEIA children with disabilities are entitled to a free appropriate public education (FAPE). The Act intends that parents and district child study teams will work cooperatively to produce an individualized education program (IEP), which then serves

[1] The Act has undergone a number of name changes and this is the current usage.

as an annual guide by which to measure progress. Each child evaluated in this way has a statutory right to needed services irrespective of cost, and a process is established by which to redress grievances. Though the IDEIA also makes provision for privately placed students, this is limited, allowing for group coverage to the extent local budgets permit, 34 C.F.R. § 76.654(a) (1998); for a historical discussion, see, e.g., K.R. by M.R. v. Anderson Cmty. Sch. Corp., 81 F.3d 673 (7th Cir. 1996), vacated and remanded for reconsideration in light of 1997 amendments to IDEA, 521 U.S. 1114, 117 S. Ct. 2502, 138 L. Ed. 2d 1007 (1997), adhered to on remand, 125 F.3d 1017 (7th Cir. 1997), cert. denied, 523 U.S. 1046, 118 S. Ct. 1360, 140 L. Ed. 2d 510 (1998). In its brief Lakewood seeks to narrow these distinctions by focusing on the IEP and service plan documents and the process by which they are developed. This is not, however, where the deep difference rests. Rather, one is an entitlement based on need without limit, while the other is discretionary and subject to the vagaries of funding.

Prior to 1988, Medicaid, as payer of last resort, did not reimburse special education services, precisely because they were covered under the IDEIA. The Medicaid amendment that year allowed reimbursement for certain medically necessary services, 42 U.S.C.A. § 1396b(c). Owing to the new intersection of these statutes and a desire to maximize federal funding, New Jersey created the Special Education Medicaid Initiative, through which the three agencies here coordinate segments of the regulatory task. Federal reimbursement is available to the State for a proportion of costs for evaluation, physical therapy, occupational therapy, speech therapy, counseling, nursing services, and specialized transport. The State in turn shares this money with districts. The question here is whether Medicaid reimbursement extends as well to these parentally placed private-school students. The issue is particularly impactful in Lakewood because a large majority of students attend private religious schools.

The distinctions in treatment for parentally placed and publically placed students under the IDEIA are crucial as we attempt to understand the interplay with Medicaid. 42 U.S.C.A. § 1396b(c) does not separately address Medicaid-eligible privately placed

students. Rather, it keys reimbursement to the IEP, where services would be described. Privately placed students receive service plans so as to distinguish them from publically placed students, 34 C.F.R. § 300.452 (1999). Lakewood points out that when the Medicaid amendment was adopted in 1988 the document developed for private-school students was also referred to as an IEP. The term "service plan" did not come into use until some years later via regulation, see 64 F.R. 12406, 12659. This is accurate, and in the end the matter ought not to turn solely on jargon. It happens that the current nomenclature reinforces philosophical differences originating in the IDEIA, and it is these, in the main, that defeat petitioner.

There is little reason to believe that the Congress, without any special mention, equalized the treatment of privately placed students with publically placed students for Medicaid purposes, when that is not the approach of the IDEIA, the very mechanism by which the benefit is delivered. A focus on public education is also suggested by the direct reference to FAPE in legislative history pertaining to the Medicaid amendment, 134 Cong.Rec.H. 3765, 3840. By definition, privately placed students are not entitled to FAPE. Recognizing that legislative intent is sometimes in the eye of the beholder, it nonetheless appears that 42 U.S.C.A. § 1396b(c) addresses the broad public programming of the IDEIA, see generally New Capitol Bar & Grill Corp. v. Div. of Unemployment Sec., Dep't of Labor and Indus., 25 N.J. 155, 160 (1957).[2]

The motion papers pose additional questions concerning the claims themselves and the legal parameters of certain funding lines. These arguments are supported by conflicting certifications that may create fact questions. I prefer here to address the baseline issue. If my understanding is sustained the matter is ended. If Lakewood ultimately prevails on the point, the entire landscape of the litigation is likely to shift.

[2] The motion record includes two reports to Congress that assess the progress and problems associated with the IDEIA/Medicaid linkage. The first is a 2003 document entitled Individuals with Disabilities Education Act (IDEA) and Medicaid, by Apling & Herz. The second is a 2006 follow-up entitled, The Link Between Medicaid and the Individuals with Disabilities Education Act (IDEA): Recent History and Current Issues, by Herz. Both relate that Congress adopted 42 U.S.C.A. § 1396b(c) to ease the financial burden on states and school districts from IDEIA mandates. Despite federal subsidy, the latter bear the major cost of this program. If this history is accurate it tends to support respondents' position. The unique demographics of Lakewood aside, for much of the country the heavy cost under the IDEIA derives from FAPE obligations, and logically this is the sphere of congressional attention.

Based on the foregoing, the motion of the respondent agencies is **GRANTED**, the Lakewood motion is **DENIED**, and the claims are **DISMISSED**.

I hereby **FILE** this Initial Decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES.**

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** shall forward the record, including this recommended decision and its final decision, to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION and the DIRECTOR OF THE DIVISION OF PURCHASE AND PROPERTY**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within their statutory grant of authority.

Upon transmitting the record, the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** 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 and the DIRECTOR OF THE DIVISION OF PURCHASE AND PROPERTY** within forty-five days of the predominant agency decision. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION and the DIRECTOR OF THE DIVISION OF PURCHASE AND PROPERTY** do not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 11, 2010
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

3/11/10

Date Mailed to Parties:

3/11/10

mph

OAL DKT. NO. EDU 6007-10
AGENCY DKT. NO. 114-6/10

PETER A. BOND,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW, PAULA T. DOW, NEW JERSEY ATTORNEY GENERAL AND CLIFFORD B. JANEY, SUPERINTENDENT OF NEWARK PUBLIC SCHOOLS,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order, that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7|23|10
Date of Mailing: 7|23|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 6007-10

AGENCY DKT. NO. 114-6/10

PETER A. BOND,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW, PAULA T. DOW, NEW JERSEY ATTORNEY GENERAL, AND CLIFFORD B. JANEY, SUPERINTENDENT OF NEWARK PUBLIC SCHOOLS,

Respondents.

Craig R. Levine, Esq., for petitioner Peter Bond (New Jersey Institute for Social Justice)

Joyce Williams, Deputy Attorney General, for respondent New Jersey State Department of Education, Office of Criminal History Review and Paula T. Dow (Paula T. Dow, Attorney General of New Jersey)

Bernard Mercado, Associate Counsel, for respondent Clifford B. Janey, Superintendent of Newark Public Schools (Lisa J. Pollak, General Counsel)

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the determination by the Department of Education, Criminal History Review Unit (the Department) that, pursuant to N.J.S.A. 18A:6-7.1, he is disqualified from employment in any position with a school or other educational institution under the supervision of the Department or with a contracted service provider under contract with such a school or educational facility based upon the results of his criminal background check. On June 7, 2010, petitioner filed a Petition of Appeal with the Commissioner of Education (the Commissioner). Petitioner also filed a motion for emergent relief seeking a stay of the disqualification determination, which was scheduled to be heard on June 17, 2010. In support of the motion, petitioner submitted a memorandum of law and an affidavit of petitioner (Bond Aff.). Respondents submitted briefs in opposition to the motion, which the undersigned received on June 17, 2010. Oral argument on the motion was held on June 17, 2010, at which time I also permitted limited testimony by petitioner.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented follows.

In 2007, petitioner secured employment in New Jersey with Chartwells School Dining Services (Chartwells) as a District Manager. Bond Aff. at ¶ 4. Petitioner was required to undergo a criminal background check in connection with his employment. By letter dated March 8, 2010, the Department informed petitioner that he was "permanently disqualified from employment in any position with a school or other educational institution under the supervision of the Department . . . or with a contracted service provider under contract with said school or educational facility" based upon the results of his criminal background check which, according to the attachment, included a

1971 drug offense adjudicated in municipal court carrying a sentence of one year probation.[1]

As a District Manager of Chartwells in New Jersey, petitioner oversaw and managed the food services operations in six New Jersey school districts, including Newark, and supervised nearly 100 schools. Bond Aff. at ¶¶¶ 1, 4, and 5. Due to the size of the Newark School District, petitioner "would ordinarily operate out of the Chartwells' district office for Newark, housed within the Camden Middle School Building . . . ." Id. at 5. As part of his job duties, petitioner would "travel to the various New Jersey schools" under his supervision "to tour the food services facilities . . . ." Ibid. According to petitioner's Affidavit, these activities did not involve "regular contact with school children" and "[a]t most" he "passed children in the halls." Ibid. Petitioner also participated in Youth Action Council meetings for each district, which provided "the opportunity to meet with students, parents and teachers" to ensure the quality of the company's services. Ibid. Prior to his current position, petitioner held positions that entailed working with the Philadelphia and Washington D.C. school systems for three years. Id. at 4.

Petitioner is fifty-nine years of age and has resided in New Jersey for nearly his entire life. He is the father of three adult children, one of whom lives in New Jersey, and has five grandchildren. Bond Aff. at ¶ 10. One of petitioner's two sisters also resides in New Jersey. Ibid. Petitioner testified that he is engaged to be married in 2011 and has a foster child who resides with his fiancé.

Petitioner is currently employed by Chartwells. After receiving notice that petitioner was disqualified from employment in any New Jersey school, Chartwells modified petitioner's job duties. Bond Aff. at ¶ 5. According to petitioner's Affidavit and testimony, Chartwells "temporarily" modified his duties so that he could work out of his

[1] Although the Department attached to its brief an earlier letter dated September 6, 2007, advising petitioner that he was permanently disqualified from such employment based upon the results of his criminal background check, petitioner disputes that he received the letter and the record does not establish the circumstances surrounding what occurred after that letter and prior to the Department's letter dated March 8, 2010.

home. Petitioner travels to supervise districts out of state, including in Maryland and Pennsylvania, and petitioner has work assignments in New York.

Petitioner states in his Affidavit that, if he is ruled disqualified from working with the New Jersey public schools, he will not be able to continue in his position at Chartwells, which requires the capacity to visit school locations; he would incur economic losses; and he would lose many of the retirement and insurance benefits that he secured through his job. Bond Aff. at ¶ 8. Petitioner further avers that it would be extremely difficult to start a new career or move to a new state, and that leaving New Jersey would be especially difficult on his family. Ibid. Petitioner testified as to his need for medical benefits for required medication, coupled with the probability that he would fall into debt, lose his home and have to postpone his wedding, as well as relocate to a different state, if he lost his job. Petitioner described that his current employment arrangement is not an "indefinite" arrangement, and relayed that his employer has informed him since March that it would create a problem for his employment if the disqualification matter were not resolved by July. Petitioner further relayed that his employer recently told him that he could not apply for a position with the company in Washington or a promotional position in South Jersey as a result of the disqualification. Petitioner stated his belief that he was "running out of time" with the company, and he is uncertain as to how long Chartwells will continue his employment.

It is against this backdrop that petitioner's application for emergent relief is considered.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

Petitioner argues that the Department's determination harms his "liberty to practice his trade in New Jersey, his ability to maintain and advance his career, and the stability of his family." Petitioner relies on Community Hosp. Group, Inc. v. Blume Goldfaden Berkowitz Donnelly Fried & Forte, P.C., 384 N.J. Super. 251, 255 (App. Div. 2006) for the proposition that "acts destroying a complainant's business, custom and profits do an irreparable injury."

Simply put, I embrace respondents' position that petitioner has failed to demonstrate irreparable harm. Petitioner's Affidavit and testimony do not support a finding that the Department's determination has destroyed his business, custom or profits. Rather, petitioner has continued his employment with Chartwells and currently holds a supervisory position servicing clients in different states. Although it may be an inconvenience to petitioner to supervise the food service programs in other states due to the travel involved, this does not rise to the level of an irreparable harm. While petitioner expressed sincere concern that he may soon lose his job, the evidence as a whole falls short of demonstrating an imminent termination of petitioner's employment. According to petitioner's Affidavit, he presently has "a very good working relationship" with the company. Bond Aff. at ¶ 8. The Department's disqualification determination does not restrict petitioner's ability to work for the company in a capacity that does not involve New Jersey schools or educational facilities. Petitioner has failed to offer evidence that Chartwells has issued a notice terminating his employment as of a specific date or specific evidence of immediate financial distress. In short, whether petitioner will or will not be terminated and/or lose his health benefits is speculative in nature. And, even if petitioner's employment with Chartwells was terminated as a result of his disqualification, an employee's loss of income alone is generally insufficient to constitute irreparable harm. See Morton v. Beyer, 822 F. 2d, 364, 372-73 (3d Cir. 1987). See also Sampson v. Murray, 415 U.S. 61, 92 n.68, 39 L. Ed. 2d 166, 94 S.Ct. 937 (1974) ("an insufficiency of savings or difficulties in immediately obtaining other employment--external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself--will not support a finding of irreparable injury, however severely they may affect a particular individual."). Further lacking is sufficient evidence to support a finding that the stability of petitioner's

family will be irreparably harmed if the relief requested is not granted. In sum, I **CONCLUDE** that petitioner has failed to meet his burden of establishing a clear showing that he will suffer immediate irreparable injury unless the requested relief is granted.

Apart from this, in order to prevail on an application for an emergent relief, petitioner must demonstrate that the legal right underlying his claim is settled and must make a preliminary showing of a reasonable probability of ultimate success on the merits. Crowe, supra, 90 N.J. at 133.

N.J.S.A. 18A:6-7.1, governing "criminal record check in public school employment," states 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 . . . 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.
>
> . . . .

Petitioner claims that he should not be disqualified because his position did not involve "regular contact with pupils." His Petition of Appeal also alleges that N.J.S.A. 18A:6-7.1 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the equal protection guarantee of the New Jersey Constitution, and the substantive due process guarantees of the United States and New Jersey Constitutions. Petitioner further avers that the Department and the Newark Public Schools violated Title VII of the Civil Rights Act by denying his employment on the basis of his criminal record, and that the statute is preempted by Title VII.

I **CONCLUDE** that petitioner has failed to shoulder his burden of proving that the legal right underlying his various claims is settled and that he has a likelihood of prevailing on the merits of his claims. In this regard, petitioner does not dispute that he was convicted of a disqualifying offense under the statute. It is further undisputed that, in his position of District Manager in New Jersey, petitioner supervised the food services operations at nearly 100 schools and was required to visit schools when students could and would be present in the hallways. The Commissioner has 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 State Department of Education, Office of Criminal History Review. EDU 8547-07, Initial Decision (April 21, 2008), rejected, Comm'r (May 30, 2008) <http://lawlibrary.rutgers.edu/oal/search.html.> Indeed, unlike the petitioner in Chavis whose office was situated in a separate administration building, petitioner's office for Newark was located in the very same building where school children were present all day. Petitioner has also failed to demonstrate a settled legal right underlying his constitutional and Title VII claims and a reasonable probability of prevailing on the merits of those claims. Beyond the heavy burden that must be met vis-à-vis petitioner's claims asserting that the statute is unconstitutional, which casts doubt on petitioner's likelihood of success, petitioner has failed to clearly establish this forum's jurisdiction to entertain claims that appear to amount to a facial challenge to the constitutionality of the statute.

Finally, in balancing the equities and interests of the parties, the scales tip in favor of respondents. The Department has the duty to safeguard students by

disqualifying individuals convicted of the offenses enumerated by the Legislature. The Legislature's "unequivocal intent" was to "preclude judgment of individual applicants in the interest of ensuring the maximum degree of protection for children." Chavis, supra. Suffice it to say, the public interest in protecting the welfare of school children and providing a safe instructional environment outweighs petitioner's right to work for a contractor within a New Jersey school.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

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

June 22, 2010
DATE

MARGARET M. MONACO, ALJ

jb

OAL DKT. NO. EDU 5498-09
AGENCY DKT. NO. 76-4/09

K.C., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter which encompassed both EDU/EDS issues, the parties' proposed Consent Order, 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' Consent Order – with respect to those issues over which he has jurisdiction – 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 Consent Order.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|23|10

Date of Mailing: 7|23|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05498-09
AGENCY DKT. NO. 76-4/09

K.C. ON BEHALF OF MINOR CHILD R.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Respondent.

David Giles, Esq., for petitioner

Philip E. Stern, Esq., for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: June 9, 2010 Decided: June 11, 2010

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

This matter was transmitted to the Office of Administrative Law (OAL) on May 15, 2009, 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 August 12, 2009. The attached Consent Order and Certified Board Resolution were submitted on June 9, 2010, 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.

6/11/10
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 6-15-10

Date Mailed to Parties: JUN 15 2010

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DOCKET NO: ~~EDS~~ EDU 05498-2009N
AGENCY REF. NO.: 76-4/09 5401-09
OAL DOCKET NO.: EDS-~~501~~-2009
AGENCY REF. NO.: 2009-14637

K.C. o/b/o R.A.

v.

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION

MIDDLESEX COUNTY

Before the Honorable Barry E. Moscowitz, A.L.J.

CONSENT ORDER

The parties to the above-captioned matter having amicably resolved their differences;

This matter is hereby deemed settled for the following consideration:

1. R.A.'s school discipline records shall be modified so as to reflect that he was suspended for no more than 10 school days for each disciplinary incident, which occurred in September 2008 and during the winter break of this school year. With respect to the second incident, the records should reflect nothing more than R.A. was suspended for selling during the winter break away from school to another student for five dollars imitation marijuana. R.A.'s other student records, including any 504/ADA and child study team records, should not reflect anything more regarding his disciplinary record.

2. R.A.'s child study team records will reflect that his placement at Center School was made by the IEP team without objection from K.C. and that his program and placement prospectively shall be determined by the IEP team pursuant to regular IEP standards and procedures. However, the District agrees that should K.C. continue to find Center School an appropriate placement and want R.A. to remain there, the School District will fully support such placement. Conversely, should K.C. determine that Center School is not appropriate for R.A., the IEP team will consider alternative placements, including Old Bridge High School. R.A.'s previous suspension will play no role in any decisions regarding R.A.'s program and placement.

3. The Board will support the provision of counseling to R.A. at Center School as may be requested by K.C. and consistent with Center School recommendations.

4. The Board will make available to R.A. an extended school year program consisting 2.5 hours of daily reading and writing instruction designed to address his individual needs in these areas.

5. The Board, through its Child Study Team, will make every effort to secure a placement at Middlesex County's ½-day Vocational Technical High School for the 2009-2010 school year.

6. The Board will refer R.A. to Children's Specialized Hospital for a follow-up evaluation by a multi-disciplinary team to clarify R.A.'s diagnosis, educational needs, and discrepancies in past learning assessments, and to develop an integrated, comprehensive plan, as recommended by Dr. Iofin, to support and enhance R.A.'s functioning in school. This evaluation shall include learning, central auditory processing, neuropsychological and medical (psychiatric, pediatric neurodevelopmental or other medical, as determined appropriate by Children's Specialized) assessments. It will also include a functional behavioral assessment focusing on R.A.'s actions that have resulted in his previous discipline.

7. The Board also agrees to pay K.C. five thousand dollars ($5,000.00) to reimburse her for private therapy and educational services provided in the past or that will be provided in the future.

FOR PETITIONERS

_____

FOR THE OLD BRIDGE TOWNSHIP BOARD OF EDUCATION

_____

HONORABLE BARRY E. MOSCOWITZ, A.L.J.

_____

DATED: June 8, 2009

4. The Board will make available to R.A. an extended school year program consisting 2.5 hours of daily reading and writing instruction designed to address his individual needs in these areas.

5. The Board, through its Child Study Team, will make every effort to secure a placement at Middlesex County's ½-day Vocational Technical High School for the 2009-2010 school year.

6. The Board will refer R.A. to Children's Specialized Hospital for a follow-up evaluation by a multi-disciplinary team to clarify R.A.'s diagnosis, educational needs, and discrepancies in past learning assessments, and to develop an integrated, comprehensive plan, as recommended by Dr. Iofin, to support and enhance R.A.'s functioning in school. This evaluation shall include learning, central auditory processing, neuropsychological and medical (psychiatric, pediatric neurodevelopmental or other medical, as determined appropriate by Children's Specialized) assessments. It will also include a functional behavioral assessment focusing on R.A.'s actions that have resulted in his previous discipline.

7. The Board also agrees to pay K.C. five thousand dollars ($5,000.00) to reimburse her for private therapy and educational services provided in the past or that will be provided in the future.

FOR PETITIONERS

Kimberly Carson

FOR THE OLD BRIDGE TOWNSHIP BOARD OF EDUCATION

HONORABLE BARRY E. MOSCOWITZ, A.L.J.

DATED: June 8, 2009

OLD BRIDGE TOWNSHIP BOARD OF EDUCATION
CERTIFIED BOARD RESOLUTION

FINANCE

McDermott moved, seconded by Hopman the following:

the Board approve to pay the settlement fee in the amount of $5,000.00 in the matter concerning student # 26851.

VOTE: Sulikowski, Andriani, Desai, Donofrio, Henry, Hopman, McDermott and Weber – YES.
MOTION CARRIED.

I HEREBY CERTIFY that the foregoing is a true copy of the motion adopted by the Old Bridge Township Board of Education at its Regular Meeting held on February 23, 2010.

Nancy M. Mongon
School Business Administrator/Board Secretary

OAL DKT. NO. EDU 8421-09
(EDU 2892-03 on remand)
AGENCY DKT. NO. 153-5/03

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

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, with the following comment.

The Commissioner notes that paragraphs 1 and 2 prescribe actions that predate the Commissioner's consideration of the settlement terms. The parties are reminded that a settlement of litigation is not binding until the Commissioner approves same.

The foregoing notwithstanding, 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.

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/10

Date of Mailing: 7/23/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8421-09

AGENCY DKT. NO. 153-5/03

REMAND OF EDU 2892-03

CHARLOTTE KLUMB,

Petitioner,

v.

MANALAPAN-ENGLISHTOWN BOARD OF EDUCATION,

Respondent.

Richard C. Swarbrick, Esq., for petitioner

Patricia D. Connelly, Esq., for respondent (Brown & Connelly, attorneys)

Record Closed: June 10, 2010 Decided: June 14, 2010

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

This matter concerns the determination of the back salary and emoluments due to the petitioner, Charlotte Klumb, pursuant to the final decision of the Commissioner of Education (Commissioner) dated June 16, 2005, and the decision of the State Supreme Court dated May 11, 2009.

The matter was referred to the Office of Administrative Law (OAL) on July 27, 2009 for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

PROCEDURAL HISTORY

On December 22, 2004, I rendered an initial decision based on a motion for summary decision, in which I concluded that there were no factual disputes and that the respondent, the Manalapan-Englishtown Board of Education (Board) had the right to deny the petitioner's request that she be rehired to her former teaching position after the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF Board) had determined that her disability had disappeared or substantially diminished. On June 16, 2005, the Commissioner rejected my initial decision and held that the pension statute mandated the rehiring of a formerly disqualified employee and ordered her reinstated as of March 1, 1999, with all appropriate emoluments and back pay. It was noted that March 1, 1999, was the day that the Board interviewed the petitioner for an existing elementary teacher vacancy but that the Board did not rehire her until September 1, 2005.

The State Board of Education (State Board) affirmed the Commissioner's decision on January 4, 2006, and the Appellate Division of the Superior Court (Appellate Division) affirmed the State Board's decision on July 25, 2005. The State Supreme Court on May 11, 2009 affirmed the Appellate Division's decision as to the rehiring of the petitioner but remanded to the Commissioner issues relating to the back salary payment. The period of time in issue as to the back salary issues is between March 1, 1999 and September 1, 2005.

The Commissioner then remanded the back salary issues to the OAL. It is OAL's policy to give a remanded matter to the administrative law judge (ALJ) who had initially handled the case. Consistent with this policy, the matter was reassigned to me.

Richard C. Swarbrick, Esq., on behalf of the petitioner, filed a motion to disqualify me from hearing the remanded matter since I had issued the initial decision in the

original case, had ruled against the petitioner, and other ALJs were available to handle the matter.

As to the motion, I concluded that the petitioner had not shown any legal reason why I should recuse myself and that there was no reason to believe that I could not provide a fair, unbiased and impartial hearing and determination in this matter. On October 29, 2009, I ordered that the petitioner's motion for recusal be denied. Swarbrick filed an appeal with the Director and Chief Administrative Law Judge. On November 24, 2009, Director Laura Sanders issued a final order in which she affirmed my decision.

Both parties filed a number of motions regarding the issue in this matter as well as discovery, and I handled the matters in a number of orders. After there was substantial compliance by the petitioner as to the discovery requests, I had a settlement conference with the parties on April 26, 2010. During the conference, we were able to agree to the outline of a settlement of the matter. The parties had to work out the details of the settlement and have a discussion with a representative of the TPAF Board. I received a written and signed stipulation of settlement on June 10, 2010.

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.

June 14, 2010
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

JUN 15 2010

Date Received at Agency:

JUN 15 2010

Date Mailed to Parties:

/cad

BROWN & CONNELLY, L.L.C.
1127 Highway 35
Ocean, NJ 07712
Phone (732)517-0720
Fax (732)517-0722
Attorneys for Respondent, Board of Education of the
Manalapan-Englishtown Regional School District

CHARLOTTE KLUMB	:	**BEFORE THE COMMISSIONER OF EDUCATION**
Petitioner,	:	**OAL DOCKET NO. EDU-08421-2009S**
v.	:	
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

This matter having come before the Office of Administrative Law upon a remand to the Department of Education by order of the Supreme Court of New Jersey for proceedings consistent with the order of the Supreme Court, and the parties having amicably resolved the matter, it is hereby stipulated and agreed as follows:

WHEREAS, on or about April 29, 2002, petitioner filed a lawsuit against the Board of Education of the Manalapan-Englishtown Regional School District and agents, servants and employees of said Board of Education, seeking re-employment after retirement, back-pay and other monetary damages; and

WHEREAS, said matter was transmitted to the New Jersey Department of Education and heard by the Office of Administrative Law and decided by the Commissioner of Education on or about June 16, 2005; and

WHEREAS, in accordance with the decision of the Commissioner of Education, petitioner was re-employed by the respondent Board of Education in or about September 2005, and remains an employee in the Manalapan-Englishtown Regional School District; and

WHEREAS, after review by the State Department of Education, the Appellate Division of the Superior Court and the Supreme Court of the State of New Jersey, the matter was returned to the Department of Education for a hearing to resolve the issues relating to back-pay as set forth in the decision of the Supreme Court of New Jersey dated May 11, 2009, and its supplemental order entered July 2, 2009; and

WHEREAS, the remanded matter was transmitted by the Department of Education to the Office of Administrative Law for a hearing; and

WHEREAS, as set forth above, the litigation in this matter

has been lengthy and protracted and further litigation will result in continued extensive time and expense, which is not in the best interest of the parties;

WHEREAS, the matter is ripe for settlement at this time because it will allow petitioner to make plans for retirement at the end of this school year (2009-10), and for the respondent Board of Education to conduct educational planning for the next school year (2010-2011) in a prudent, timely and fiscally responsible manner; and

WHEREAS, the parties desire to resolve any and all claims of petitioner that may have arisen during her employment with the Board of Education in order to finally resolve all claims and put a conclusive end to any and all disputes between the parties; and

WHEREAS, the New Jersey Teacher's Pension and Annuity Fund (hereinafter "TPAF") has certain claims to the proceeds of any back-pay award that may have been made in this proceeding, and resolution of the claims in this matter will enable TPAF to recover funds out of the proceeds of this settlement;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. Within 30 days of the date hereof, the Respondent Board of Education shall issue payment in the amount of TWO HUNDRED FORTY THOUSAND DOLLARS ($240,000.00) minus all federal, state and local withholding taxes on the entire amount, said payment

representing full and final settlement of all claims of the petitioner in this matter. Payment of the aforesaid net amount shall be made payable to the trust account of Brown & Connelly, L.L.C., to be held in trust pending resolution of claims by TPAF and pending final approval by the Commissioner of Education, as set forth below.

2. Petitioner agrees that she shall finally and conclusively end her employment with the Respondent Board of Education on or before July 1, 2010, and hereby waives any and all claims of whatsoever kind or nature to re-employment at any time after July 1, 2010. Said agreement to leave the employ of the respondent Board of Education is final and absolute, and is not contingent upon approval of petitioner's retirement application by the Division of Pensions or resolution of any claims that the Teacher's Pension and Annuity Fund may have against petitioner or against the settlement proceeds, or any other contingencies for release of the funds from the trust account of Brown & Connelly, L.L.C.

3. This settlement agreement is contingent upon approval by the Administrative Law Judge assigned to this matter and upon final approval by the Commissioner of Education. The proceeds of the settlement amount set forth in paragraph 1 shall not be released by the law firm of Brown & Connelly, L.L.C. until such time as there is final approval by the Commissioner of Education.

4. The parties understand and recognize that the TPAF has certain claims against the proceeds of the settlement amount set forth in paragraph 1, for payments that were made to petitioner by TPAF or for payments that petitioner may be required to make as contribution to her retirement from the settlement proceeds. In light of these claims, the parties understand and agree that the proceeds of the settlement shall not be released from the trust account of the law firm of Brown & Connelly, L.L.C. until such time as there is a full and final release by the TPAF of any and all claims it may have with respect to the proceeds of this settlement. The parties understand and recognize that the respondent Board of Education does not take any position with respect to the amount of the settlement proceeds to be paid to TPAF, and that said amount shall be negotiated between petitioner herein and TPAF, or resolved through the ordinary administrative and legal procedures for the resolution of said claims.

5. Upon resolution of the claims of TPAF and upon approval of this settlement agreement by the Commissioner of Education, a portion of the proceeds of this settlement shall be paid to TPAF in the amount determined by agreement of petitioner and TPAF or by other legal proceedings; and the remainder shall be paid to petitioner herein by payment to the trust account of Richard Swarbrick, Esquire, attorney for the petitioner. No amount of the settlement proceeds shall be released to TPAF without the

approval of petitioner herein or order of a court of competent jurisdiction.

6. The parties understand and agree that this settlement represents a compromise of the claims and positions of the parties, and that neither party makes any admission with respect to the claims or defenses of the other party to these proceedings.

7. In consideration of this agreement, petitioner hereby expressly releases and forever discharges the Board of Education of the Manalapan-Englishtown Regional School District and its agents, servants, employees, and Board of Education members, past and present, from and against any and all claims, demands, actions, causes of action, of whatsoever kind or nature, including but not limited to any claim for interest, attorneys' fees, costs or expenses by reason of any act or omission of the Board of Education of the Manalapan-Englishtown Regional School District or any of its agents, servants, employees or Board of Education members, past or present. This release includes, but is not limited to, any claims which have been made, or could have been made, under the education laws of State of New Jersey, Sections 1981 through 1988 of Title 42 of the United States Code, the civil rights acts of the United States of America and the State of New Jersey, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, the Family and Medical Leave

Act and the Family Leave Act, the Workers' Compensation Law of the State of New Jersey, the New Jersey Conscientious Employee Protection Act, the Age Discrimination in Employment Act, and all other laws and statutes relating to civil rights, employment, retirement, pensions and wages, and any action for tort, defamation, infliction of emotional stress, tortious interference with employment or contract, personal injury, breach of contract or other common law action. Petitioner specifically releases all parties named in the complaint filed under Docket No. MON-2190-02, and all claims raised or which could have been raised in that proceeding or the proceedings before the New Jersey Commissioner of Education.

9. Petitioner agrees to hold harmless the law firm of Brown & Connelly, L.L.C. from and against any and all claims by petitioner or any other party to the settlement proceeds to be held in trust by said law firm pending resolution of the claims set forth above.

10. This agreement represents the full agreement between the parties, and no other promises or agreements have been made by or to either party. All parties represent that they have consulted with counsel prior to the execution of this agreement and that they are satisfied with the representation of counsel, and all parties agree that they are responsible for payment of their own attorneys' fees. This agreement is being made

voluntarily and with full understanding of the terms and conditions herein.

11. This agreement is expressly subject to approval of the Board of Education of the Manalapan-Englishtown Regional School District. In the event the aforesaid approval is not obtained, then this agreement shall be null and void.

Dated: 5-20-10

Charlotte Klumb
CHARLOTTE KLUMB

BOARD OF EDUCATION OF THE
MANALAPAN-ENGLISHTOWN REGIONAL
SCHOOL DISTRICT

Dated: 6-8-10

By: John J. Marciante Jr. Ph.D.
JOHN J. MARCIANTE, JR., Ph.D.,
Superintendent

BROWN & CONNELLY, L.L.C.
Attorneys for Respondent,
Board of Education of the
Manalapan-Englishtown Regional
School District

Dated: June 9, 2010

By: Patricia D. Connelly
PATRICIA D. CONNELLY

Dated: 5/26/10

Richard Swarbrick
RICHARD SWARBRICK, ESQUIRE
Attorney for petitioner,
Charlotte Klumb

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June 9, 2010

The Honorable Beatrice S. Tylutki, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-0049

RE: KLUMB v. MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT
DOCKET NO. EDUOR 08421-2009S

Dear Judge Tylutki:

I am enclosing an original and one copy of Stipulation of Settlement in the above matter for your review and approval. Please return a copy marked "filed" in the self-addressed stamped envelope provided herein.

The settlement was approved by the Board of Education of the Manalapan-Englishtown Regional School District at its meeting on June 8, 2010.

Respectfully yours,

Patricia D. Connelly

PATRICIA D. CONNELLY

PDC/mek
Enclosures

cc: Board of Education of the Manalapan-Englishtown
Regional School District
Stephen Hunter, Esquire, with enclosures
Cynthia A. Satter, Esquire
Richard C. Swarbrick, Esquire

224-10E

OAL DKT. NO. EDU 5044-10
AGENCY DKT. NO. 73-4/10

PRITCHARD INDUSTRIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, AND GCA SERVICES GROUP, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

A challenge to respondent Ridgewood Board of Education's awarding of a custodial/maintenance services contract to respondent GCA Services Group was instituted by the second lowest bidder, Pritchard Industries, by way of a petition and application for emergent relief. The Commissioner's task at this juncture is to determine whether petitioner has established entitlement to emergent relief pending the ultimate decision on the merits. After review of the papers, the audio recording of the emergent hearing in the Office of Administrative Law (OAL) and the Administrative Law Judge's (ALJ) recommended order denying interim relief, the Commissioner is constrained to adopt the ALJ's order and return the case to the OAL for a hearing on the merits.[1]

The gravamen of petitioner's challenge relates to the requirement in respondent Ridgewood Board of Education's bid specifications that 20% of each bidder's quote for wages and benefits (WBT) be composed of prevailing wages (in Bergen County) for the following

[1] The Commissioner notes that in the Initial Decision, the ALJ misstated the date of this case's transmittal from the Department of Education to the OAL. That transmittal was effectuated on April 16, 2010, not on May 11, 2010.

Mailed 7/23/10

trades: plumbing, electric work, carpentry, painting and HVAC (heating, ventilation and air conditioning). It is undisputed that the 20% amount translates into 3328 hours. Listings of the prevailing wages for the trades was included in the bid invitation. By way of example, the listings showed that the prevailing wages for journeymen – the lowest level of tradesman – ranged from $44.09 per hour for painters to $74.95 per hour for electricians. (Certification of Thomas Martin, Exhibit B)

Although the bid invitation provided information which purportedly reflected the historic mix of trade work relevant to the district, it also expressly stated that: "The trades' mix of these hours is up to the experience and expertise of the contractor." (Certification of Thomas Martin, Exhibit A [Invitation for Bids], page 6) It further stated: "Prevailing wage is the Contractor's responsibility to manage and control. The District will not be responsible for any additional charges to the bid/contract price due to prevailing wage issues." *(Ibid.)* And, as the ALJ found, the contractor had to sign a certification that it would provide the requisite staffing, wages, overtime, and benefits for the duration of the contract.

GCA's quote for the prevailing wage component of its bid averaged $49.78 per hour (as opposed to Pritchard's quote that averaged $74.11). Petitioner reasoned that GCA's low average prevailing wage signified that GCA had not conformed to the requirement that bidders use the Bergen County prevailing wage figures for the five trades. (*See, e.g.* Petitioner's brief at 6-7) Thus, petitioner argued, GCA had deviated from the bid specifications, submitted an unresponsive bid, and should not have been awarded the contract. (Petitioner's brief at 8)

Respondent GCA countered first that GCA's low prevailing wage rate did not, in and of itself, prove that GCA failed to follow the specification which required that 20% of the contract work be paid at Bergen County's prevailing wages for the relevant trades. Second,

GCA explained that – as the incumbent provider of custodial and maintenance services to the respondent board of education – it had historic knowledge about the nature of the services most commonly required by the district and about the kinds of benefit packages chosen by the custodial and maintenance employees. This knowledge was purportedly helpful in selecting the number of hours in each trade that was likely needed for the term of the contract.

The standards for adjudicating applications for emergent relief, contained in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and codified in *N.J.A.C.* 6A:3-1.6(b), are well known.[2] The ALJ correctly concluded that in this case the third standard is the determinative question, *i.e.* "Is petitioner likely to prevail on the merits?" (Initial Decision at 7) To so prevail, in this case, petitioner's task is to show that GCA deviated from the specifications concerning the requirement that 3328 hour of contract work be paid at Bergen County's prevailing wages for the relevant trades. The ALJ found, based upon the exhibits, certifications and argument that had been put before him, that GCA was not likely to accomplish that task:

> Having reviewed the specifications and the arguments of counsel, I see no reason why a bid based on the prevailing-wage rate for HVAC or painting would be non-compliant with the specifications. The specifications only required a contractor to bid at least 20% of the total maintenance hours at prevailing-wage-rate hours. The specifications specifically stated that the mix of these hours was up to the experience and expertise of the contractor.
>
> Moreover, the specifications noted that the mix of these hours was subject to change based on the scope of the work and the needs of the Ridgewood Public School District; that the prevailing wage is the responsibility of the contractor manage and control [sic]; and

---

[2] They require a determination 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 interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

> that Ridgewood would not be responsible for any additional charges due to prevailing wage issues.
>
> Finally, I note that GCA signed a certification guaranteeing that it would comply with the prevailing-wage rates for the prevailing-wage-rate work.
>
> (Initial Decision at 9)

The Commissioner agrees with the ALJ. Given the large number of hours that were to be set aside for prevailing wage work, it is mathematically possible that respondent GCA included a small allotment for plumbers and electricians, but allocated the lion's share of hours to painters and HVAC journeymen. It may have done this after examination of the respondent board of education's maintenance records and after identification of the benefit packages chosen by the various employees who had been working in the district or whom it planned to utilize. Moreover, it had to plan its trade mix with the knowledge that it would be obligated to absorb any financial fallout, were it to quote a 'lowball' wage rate.

While it is possible that petitioner could eventually proffer hard evidence disclosing GCA deviations from the bid specifications, it has not done so to date. Consequently, the Commissioner adopts the ALJ's order denying petitioner's application for emergent relief and returns the case to the OAL for disposition on the merits.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/10

Date of Mailing: 7/23/10

[3] 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

ORDER

EMERGENCY RELIEF

OAL DKT. NO. EDU 05044-10

AGENCY DKT. NO. 73-4/10

PRITCHARD INDUSTRIES, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY AND GCA SERVICES GROUP, INC.,

Respondents.

Patrick T. Collins, Esq., for petitioner Pritchard Industries, Inc. (Franzblau and Dratch, attorneys)

Jeffrey R. Merlino, Esq., for respondent Board of Education of the Village of Ridgewood (Lindabury, McCormick, Estabrook, Cooper, attorneys)

Christina A. Stoneburner, Esq., and **Christine A. Cannella**, Esq., for respondent GCA Services Group, Inc. (Fox Rothschild, attorneys)

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

STATEMENT OF THE CASE

On March 8, 2010, the Ridgewood Board of Education (Ridgewood) awarded GCA Services Group, Inc. (GCA) a services contract. Pritchard Industries, Inc. (Pritchard) contends that it should have been awarded the services contract because the prevailing-wage rate it submitted was realistic (based on 67% of the historic mix of prevailing-wage-rate work) while the prevailing-wage rate GCA submitted was unrealistic (based on only 33% of the historic mix). The specifications, however, did not require that the prevailing-wage rate be based on any particular mix of prevailing-wage-rate work. Should the contract be invalidated? No. Only a material departure from a specification can invalidate a bid and the contract based on it.

PROCEDURAL HISTORY

On February 10, 2010, Ridgewood gave notice that it was accepting sealed bids for a custodial, maintenance, grounds, and management services contract until 10:00 a.m. on February 23, 2010. Both Pritchard and GCA submitted timely bids but the bid GCA submitted was the lowest. As a result, Ridgewood awarded the contract to GCA.

On March 8, 2010, Ridgewood passed a resolution awarding the contract to GCA.

On April 16, 2010, Pritchard filed an application for emergency relief with the Department of Education. According to its verified complaint, Pritchard seeks a temporary restraining order enjoining GCA and Ridgewood from entering into the contract. In the alternative, GCA seeks and order rendering the contract null and void. Finally, Pritchard seeks an order awarding the contract to it instead of GCA.

On May 11, 2010, the Department of Education transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of

procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to 1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9.

On May 28, 2010, the parties appeared for a conference during which time they agreed to a briefing schedule and a return date for oral argument. On June 14, 2010, the parties returned for oral argument, having already submitted their papers in support of an in opposition to the motion.

DISCUSSION AND FINDINGS OF FACT

Other than the contentions set forth below, I **FIND** the following as **FACT**, based on the certifications the parties submitted:

Background

Both Pritchard and GCA provide custodial, maintenance, grounds, and management services to private companies and public entities including school districts. GCA has been the service provider to the Ridgewood Public School District for the past four years. Its current contract is due to expire on June 30, 2010.

On February 10, 2010, Ridgewood gave notice that it was accepting sealed bids for a custodial, maintenance, grounds, and management services contracts until 10:00 a.m. on February 23, 2010.

For a bid to be considered responsive and responsible under the specifications, it had to follow the minimum staffing, wages, overtime, and fringe benefits requirements set forth in the specifications. The contractor also had to sign a certification that it would provide the requisite staffing, wages, overtime, and benefits for the duration of this contract. Indeed, non-compliance with these requirements would be considered a material breach of the contract and would subject it to cancellation. (§ 1, ¶N, p. 5.)

GCA signed such a certification.

In addition, contractors were to bid at least 20% of the total maintenance hours at prevailing-wage-rate hours. The mix of those hours, however, was up to the experience and expertise of the contractor. Historically, the mix of the prevailing-wage-rate work has been 16% carpentry, 33% electrical, 1% HVAC, 32% painting, and 18% plumbing. Regardless, the mix of these hours was subject to change based on the scope of the work and the needs of the Ridgewood Public School District. Moreover, the prevailing-wage rate was to be the responsibility of the contractor to manage and control. As such, Ridgewood would not be responsible for any additional charges due to any prevailing-wage-rate issues. (§ 1, ¶ N, p. 6.)

The contract is for two years, from July 1, 2010, to June 30, 2012, and both Pritchard and GCA submitted bids. Pritchard submitted a bid in the amount of $7,148,478.03, and GCA submitted a bid in the amount of $7,087,052.84. As Pritchard notes, the difference between the two bids was only $60,256, which is less than 1% of their respective bids.

Still, Pritchard's bid was only the second lowest bid. GCA's was the lowest. Therefore, Ridgewood awarded the contract to GCA.

On March 8, 2010, Ridgewood passed a resolution awarding the contract to GCA.

The Bids

Twenty percent of the total maintenance hours were fixed at 3,328 hours. Therefore, Pritchard and GCA had to bid at least 3,328 hours at prevailing-wage rates. The rate was up to them.

In Bergen County, the prevailing-wage rate for carpentry is $65.16 to $73.39; the prevailing-wage rate for electrical is $74.95 to $91.43; the prevailing-wage rate for

HVAC is $51.97; the prevailing-wage rate for painting is $44.09 to $49.22; and the prevailing-wage rate for plumbing is $72.30 to $79.31.

If either party had used the historical mix of prevailing-wage-rate work, the amalgamated rate for that work would have been $68.02. Neither Pritchard nor GCA used that rate. Pritchard used a prevailing-wage rate of $74.11, while GCA used a prevailing-wage rate of $49.78.

Technically, the parties listed their respective prevailing-wage rates as incremental rates. Since the overall-average-wage rate for maintenance positions was fixed at $25.28, Pritchard listed an average-prevailing-wage rate increment of $48.83, while GCA listed an average-prevailing-wage rate increment of $24.50. As such, both Pritchard and GCA listed their prevailing-wage rates as the incremental cost for the prevailing-wage-rate work.

Pritchard and GCA also listed their prevailing-wage rates as total prevailing-wage rates without delineating the wages and benefits. Although the form in the specifications lists hourly wages, medical benefits, and fringe benefits as separate line items, both parties acknowledge that it is impossible to separate them from the total prevailing-wage rate. Therefore, both Pritchard and GCA listed their prevailing-wage rate increment as a total prevailing-wage rate only.

Contentions

Pritchard contends that GCA's prevailing wage rate of $49.78 is based on only 33% of the historic prevailing-wage-rate work (HVAC and painting) while its prevailing-wage rate of $74.11 is based on 67% of the historic prevailing-wage-rate work (carpentry, electrical, and plumbing). According to Pritchard, this means that GCA will not pay the prevailing-wage-rate work for carpentry, electrical, or plumbing (or has assumed that none of the prevailing-wage-rate work performed will be in those trades).

GCA counters that its prevailing-wage rate is based on the actual prevailing-wage-rate work performed in the Ridgewood Public Schools since July 2006; the actual wage rates it pays its current individual trade employees; and its current employee health benefit participation rates. GCA also asserts that the New Jersey Department of Labor had approved this method for calculating prevailing-wage rates in 1995 and that GCA has used it in Ridgewood and in at least two other school districts before:

> 11. Based upon my industry knowledge and past experience, GCA reviewed the Specifications and determined how many hours of those required to be bid at prevailing wage rates would be spent by a carpenter, painter, electrician, plumber, or any of the other listed crafts and trades. In order to do so, GCA took into account the number of hours and type of prevailing wage rate work performed in the Ridgewood Public Schools since July 2006.
>
> 12. For those hours required to be bid at prevailing wage rates, GCA then determined the difference or delta between the Base Rate (as specified on page 6 of the Specifications) and the applicable prevailing wage rates for Bergen County, New Jersey to determine what additional amount would be needed to be paid for those hours bid at the prevailing wage rate.
>
> 13. GCA then took into account the actual wage rate paid to the current individual trade employees, as this rate will effect [sic] the delta. Thus, an employee making more than the Base Rate, was credited the amount over the Base Rate against the delta.
>
> 14. In calculating the prevailing wage range, GCA also took into account the benefit participation rates of its current staff. Employees participating in family or single health care coverage would have less of a difference between the Prevailing Wage Rate and Base Rate when compared to an individual who declined health care coverage. This is because the Prevailing Wage Act requires the total prevailing wage (base wage rate x benefit wage rate) to be paid to the employee. An employer who does not provide fringe benefits must pay the total amount of the Benefit Wage Rate to the employee. An employer who provides benefits that are worth less than the Benefit Wage Rate must pay the balance directly to the employee.
>
> 15. The above procedures or methods for calculating prevailing wages was established and approved by the New

> Jersey Department of Labor at least since 1995. It was placed into effect on at least (3) school districts that have contracted maintenance:
>
> a. Ridgewood Public Schools, Ridgewood NJ
> b. Lakewood Township Public Schools, Lakewood NJ
> c. Monroe Township Public Schools Williamstown NJ
>
> [(Certif. of James Calamia dated June 7, 2010.)]

Similarly, Ridgewood states that GCA complied with its specifications. In short, Ridgewood states that the prevailing-wage-rate increment GCA submitted for prevailing-wage-rate work simply includes no health care or other fringe benefits beyond the benefits already included in the overall-average-wage rate for maintenance positions.

DISCUSSION AND CONCLUSIONS OF LAW

Where irreparable harm will result without an expedited decision prohibiting some action in a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon application of a party. N.J.A.C. 1:1-12.6

The standards to be met for granting such relief are contained in Crowe v. DeGioia, 90 N.J. 126 (1982). They have since been codified in 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 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 not suffer greater harm than the respondent will suffer if the requested relief is not granted.

In this case, the salient issue is whether Pritchard has a likelihood of prevailing on the merits of the underlying claim.

Under New Jersey Public School Contract Law, every contract for the performance of any service shall be awarded only by resolution of the board of education to the "lowest responsible bidder" after public advertising for bids. N.J.S.A. 18A:18A-4(a).

Under the statute, "responsible" means able to complete the contract in accordance with its requirements, N.J.S.A. 18A:18A-2(x), while "responsive" means conforming in all material respects to the specifications of the bid, N.J.S.A. 18A:18A-2(y).

According to the New Jersey Supreme Court, this means that the contract must be awarded to the lowest bidder who complies with the substantive and procedural requirements set forth in the specifications; and that any material departure invalidates the non-conforming bid as well as any contract based on it. Meadowbrook Carting Co. v. Borough of Island Heights and Consol. Waste Serv., 138 N.J. 307, 313-14 (1994).

Minor discrepancies and technical omissions; however, can be waived. Id. at 314. The test is one of materiality: (1) whether waiver would deprive the municipality of its assurance that the contract will be entered into, performed, and guaranteed according to its specifications; and (2) whether waiver would adversely affect competitive bidding by giving an advantage to one bidder over the other or by undermining the common standards of competition. Id. at 315.

In this case, Pritchard argues that GCA is not the lowest-responsible bidder because GCA did not comply with the requirements set forth in the specifications. In particular, Pritchard argues that GCA's prevailing-wage rate is a material departure from the specifications because it is unrealistic. More pointedly, Pritchard argues that acceptance of GCA's prevailing-wage rate would deprive Ridgewood of its assurance that the contract would be performed according to its specifications and give GCA an advantage over Pritchard, thereby undermining the standards of competition.

Therefore, Pritchard concludes that the bid GCA submitted is invalid and Ridgewood should have awarded the contract to it instead.

GCA, on the other hand, argues that it did conform in all material respects to the specifications for the prevailing-wage rate. According to GCA, it arrived at its prevailing-wage rate through a computation of its employees' current base rate, the base rate set forth in the specifications, and its employees' current health insurance participation rates. In addition, GCA factored in its own estimate of the prevailing-wage rate work to be performed based upon its own experience in the Ridgewood Public Schools during the past four years.

Having reviewed the specifications and the arguments of counsel, I see no reason why a bid based on the prevailing-wage rate for HVAC or painting would be non-compliant with the specifications. The specifications only required a contractor to bid at least 20% of the total maintenance hours at prevailing-wage-rate hours. The specifications specifically stated that the mix of these hours was up to the experience and expertise of the contractor.

Moreover, the specifications noted that the mix of these hours was subject to change based on the scope of the work and the needs of the Ridgewood Public School District; that the prevailing wage is the responsibility of the contractor manage and control; and that Ridgewood would not be responsible for any additional charges due to prevailing wage issues.

Finally, I note that GCA signed a certification guaranteeing that it would comply with the prevailing-wage rates for the prevailing-wage-rate work.

Therefore, I **CONCLUDE** that the prevailing-wage rate GCA submitted was responsive to the specifications; that Pritchard has not demonstrated a likelihood of prevailing on the merits of its underlying claim; and that its application for emergency relief should be denied.

ORDER

Based on my findings of fact and conclusions of law, I **ORDER** that the application for emergency relief be **DENIED**.

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

June 14, 2010
DATE

BARRY E. MOSCOWITZ, ALJ

dr

#227-10

DANIEL J. FARRAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the State Board of Examiners (Board) to deny him a social studies endorsement to his instructional certificate. Petitioner contends that he is entitled to the endorsement because: he has taught middle school social studies for twelve years; he received a passing score on the PRAXIS exam for Social Studies Content Knowledge; and his college major – psychology – is considered a social science. Respondent denied the endorsement on the basis that petitioner did not satisfy the academic requirements for the social studies endorsement, and filed a motion for summary decision.

The ALJ found that: petitioner's response to the motion for summary decision failed to set forth specific facts showing that there is a genuine issue of material fact which would require an evidentiary proceeding; petitioner failed to show that the actions of the Board in denying him the social studies endorsement were arbitrary, capricious and unreasonable; and summary disposition in favor of respondent was appropriate.

The Commissioner found that: petitioner has no academic training or practical experience in six of the ten subject areas about which high school social studies teachers are expected to be knowledgeable, pursuant to *N.J.A.C.* 6A:9-9.2(a)(6)(ii): world history, economics, government, political science, geography, and anthropology; the PRAXIS score alone cannot form the basis for the social studies endorsement; and petitioner's experience teaching middle school does not signify that he possesses the expertise and depth of knowledge that is required to teach upper level courses in high school. The Commissioner concluded that petitioner has not met his burden to prove that he is qualified to receive a social studies endorsement, and adopted the ALJ's recommendation that the petition be dismissed.

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

July 26, 2010

OAL DKT. NO. EDU 13763-08
AGENCY DKT. NO. 292-10/08

DANIEL J. FARRAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

In this case, the petitioning teacher asks the Commissioner of Education to reverse the denial, by respondent State Board of Examiners, of his application for a Social Studies (K-12) endorsement to his instructional certificate. Petitioner's undergraduate degree is a Bachelor of Science with a major in Psychology. He attained his instructional certificate and elementary education endorsement via the alternate route, and has been teaching social studies at the elementary level in the Carteret School District, Middlesex County.

Petitioner argues, in his petition and subsequent papers, that he is entitled to a social studies endorsement because 1) he has taught middle school social studies for twelve years, 2) he received the score of 172 on the PRAXIS Social Studies Content Knowledge exam, and 3) because his college major, psychology, is considered a social science. Respondent urges the Commissioner to uphold its denial of the endorsement, which denial was based on its determinations that 1) petitioner's experience teaching at the elementary level cannot substitute for the training required to teach at the high school level, 2) a PRAXIS test score, alone, cannot be grounds for the issuance of a subject matter endorsement, and 3) petitioner's college studies

did not include sufficient credit hours in the disciplines which comprise the 'subject' of social studies. Since none of the material facts in this case are disputed, summary disposition is appropriate.

The petitioner bears the burden of establishing – by a preponderance of the competent and credible evidence – that he is entitled to issuance of the social studies endorsement. *In re Masiello*, 25 *N.J.* 590 (1958). The Board of Examiners – which is the body statutorily mandated to determine whether applicants for endorsements to instructional certificates have met the relevant requirements, *see, N.J.S.A.* 18A:6-38 – found that petitioner did not meet that burden. The Initial Decision of the Office of Administrative Law recommends that the Board of Examiners' determination be upheld.[1]

In most decisions wherein the Commissioner has reviewed determinations by the Board of Examiners, the articulated standard of review has been an assessment of whether the Board's ruling was reasonable, or whether it was arbitrary and capricious. *See, e.g. Fisher v. State Bd. of Examiners*, 96 *N.J.A.R.*2d (EDU) 561 (Comm'r April 8, 1996); *Williams v. State Bd. of Examiners*, 95 *N.J.A.R.*2d (EDU) 58 (Comm'r Oct. 12, 1994). There have, however, been cases in which the utilized standard of review appeared to contemplate that the Commissioner's function was to make an independent determination concerning whether the petitioner had met his or her burden under the rules and whether certification was proper. *See, e.g. Linda J. Avellino v. New Jersey State Board of Examiners,* Commissioner's Decision No. 332-00, decided October 2, 2000, at 34-35. The Commissioner finds that in the instant case, under either standard of review, the Board of Examiner's decision must be affirmed.

[1] No exceptions to that decision were filed by petitioner.

At the time that petitioner applied for the social studies endorsement, general requirements for subject matter endorsements were set forth in *N.J.A.C.* 6A:9-8.1(a)(3), which states in pertinent part:

> Except as indicated in *N.J.A.C.* 6A:9-11..., to be eligible for a CE in instructional areas, the candidate shall...
>
> Until October 30, 2009, for subject area endorsements, complete a major in the subject area or at least 30 credits in a coherent sequence of courses appropriate to the instructional area. At least 12 semester-hour credits must be at the advanced level of study, including the junior, senior or graduate level study...

In addition, *N.J.A.C.* 6A:9-9.2(a)(6) instructed that two social studies endorsements were available: Psychology and Social Studies – the latter of which "includes American history, European history, world history, government, political science, sociology, geography, anthropology and economics." *Ibid.* Effective January 7, 2008, the regulations concerning subject matter endorsements were supplemented. *N.J.A.C.* 6A:9-11.16 now expressly requires that, in addition to complying with *N.J.A.C.* 6A:9-8.1(a)(3), social studies teachers must have completed fifteen credits in history – to include courses in American history and World history – to obtain a social studies endorsement.

Apart from the thirty or more credit hours that petitioner completed in psychology, his college transcript shows that he completed two history and three sociology courses, for a total of fifteen credit hours. (Respondent's Brief in support of motion for summary decision, Exhibit C) Only one of those courses – "Social Problems in the United States" – was above the beginning level of study. *(Ibid.)* Respondent found that those fifteen credits were insufficient to serve as the basis for K-12 social studies instruction. In objecting to that finding, petitioner appears to contend that since psychology is considered a social science, his psychology

credits should be added to the fifteen history and sociology credits he earned in college, to satisfy the above referenced thirty credit requirement.

Neither *N.J.A.C.* 6A:9-8.1 nor *N.J.A.C.* 6A:9-9.2(a)(6) provides an itemized list of courses required for a social studies endorsement. However, construing the two regulations *in pari materia* leads to two logical conclusions. First, interpreting the regulations in the way that petitioner urges, *i.e.,* allowing a candidate to use psychology courses to satisfy the requirements for a social studies endorsement, would render superfluous the psychology endorsement memorialized in *N.J.A.C.* 6A:9-9.2(a)(6)(i). Statutory construction and common sense preclude such an interpretation. *See, e.g., State v. Reynolds*, 124 *N.J.* 559, 564 (1991).

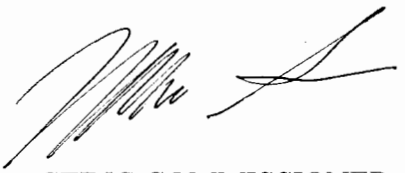
Second, to grant petitioner's wish and issue him a social studies endorsement based upon his psychology classes, simply because psychology is regarded as one of the social sciences, would appear to be ignoring the purpose of both *N.J.A.C.* 6A:9-8.1 and *N.J.A.C.* 6A:9-9.2(a)(6)(ii). The latter regulation identifies the disciplines that an instructor of social studies is expected to teach, over half of which are nowhere in petitioner's academic or experiential background. The former regulation, *N.J.A.C.* 6A:9-8.1, instructs that a candidate for a K-12 endorsement for a specific subject area – in this case social studies – must have taken a minimum of 30 credits in the disciplines that the candidate plans to teach, with twelve at an advanced level. There can be no other purpose behind these requirements than to ensure that the State's students receive quality instruction in the core curriculum. That purpose would be undermined by issuing a social studies endorsement to a teacher who has taken two beginning level history courses, three sociology courses (two of which were at the beginning level), and no courses whatsoever in the remaining seven disciplines set forth in *N.J.A.C.* 6A:9-9.2(a)(6)(ii).

In summary, the Commissioner cannot conclude that petitioner has met his burden to prove that he is qualified to receive a social studies endorsement when the record shows that he has had no academic training or practical experience in six of the ten subject areas in which a high school social studies teacher is expected to be knowledgeable. More specifically, the only college transcript provided by petitioner reveals that of the ten subjects subsumed under the social studies endorsement, petitioner took no courses in world history, economics, government, political science, geography or anthropology. (Respondent's Brief in support of motion for summary decision, Exhibit C) All but one of the history and sociology courses that he did take were at the beginning level of study. *(Ibid.)*

Similarly, the Commissioner is not persuaded that a social studies endorsement can be properly issued based solely upon a PRAXIS score, in the absence of proof of academic and practical training in the disciplines required for the teaching of social studies. Finally, in the Commissioner's view, the fact that petitioner taught social studies on an elementary level does not signify that he possesses the expertise and depth of knowledge that is required to teach upper level social studies courses in high school – including honors and AP courses.

Accordingly, the Commissioner adopts the recommendation in the Initial Decision that the petition be dismissed.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/26/10

Date of Mailing: 7/27/10

[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
GRANTING SUMMARY JUDGMENT
OAL DKT. NO. EDU 13763-08
AGENCY DKT. NO. 292-10/08

DANIEL FARRAR,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF STATE BOARD OF EXAMINERS,

Respondent.

Daniel J. Farrar, pro se

Bryant Lawrence Horsley, Deputy Attorney General, for respondent (Paula Dow, Attorney General of New Jersey, attorney)

Record Closed: September 9, 2009 Decided: April 27, 2010

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Daniel Farrar, appeals the determination of the Department of Education, State Board of Examiners that denied him a social studies endorsement to his instructional certificate. Respondent denied the endorsement on the basis that petitioner did not satisfy the requirements for the endorsement.

On December 2, 2008, the respondent transmitted the matter to the Office of Administrative Law for hearing as a contested case. A hearing was scheduled for June 9, 2009. On April 23, 2009, respondent filed a Motion for Summary Judgment. On or about September 3, 2009, petitioner filed a letter in opposition to the Summary Judgment Motion. A reply was filed by the respondent on September 9, 2009.

FACTS

Petitioner Daniel Farrar (petitioner or Farrar) has been employed as an elementary school teacher in Carteret since 1996. He teaches middle school social studies. He holds a Bachelor of Science degree in Psychology. In 2006, Farrar passed the Praxis examination measuring content knowledge in social studies. His goal was to receive a social studies endorsement, enabling him to teach social studies at the high school level.

Farrar requested a credentials review before the State Board of Examiners, in 2006. His request was submitted through the Middlesex County Office of Education. Farrar did this with the understanding that the Credentials Review Committee would review his experience and alternative education, but would not waive requirements. The function of the Committee is to determine if the experience is comparable to the particular certification requirements.

In March 2007, Farrar received a letter from the Office of Licensure and Credentials, detailing that the evaluation revealed that a minimum of thirty credit hours in social studies in a "coherent sequence" in the subject field was required. Farrar was required to complete an additional fifteen semester-hour credits with twelve of those credits at an advanced level of study (junior, senior and graduate level). He was advised to consult an accredited four-year college or university to register for those courses. It was further provided that psychology courses could not be substituted for the core content of social studies. All other requirements for the endorsement were met.

In April 2007, Farrar contacted Robert R. Huggins, Ph.D., acting director, Office of Licensure and Credentials, voicing concerns regarding the teacher certification requirements, and the processing of his case. Dr. Huggins responded, reiterating the requirements, citing to N.J.A.C. 6A:9-9.2, and distinguishing social studies and psychology as two separate teaching endorsements. Further, Dr. Huggins advised Farrar that he could appeal this decision to the State Board of Examiners. Farrar filed an appeal on May 7, 2007, and the Credentials Review Committee coordinator advised that the procedure might take several months and reiterated that the Board would not waive requirements, but "determines if the experience presented by the petitioner demonstrates a one to one relationship with the particular certification requirements."[1]

In January, 2008, Dr. Huggins advised Farrar that he had received his appeal and further advised that upon the submission of the required supporting documentation, The State Board of Examiners would review his appeal.

In April, 2008, Farrar received another letter from Dr. Huggins, advising that the information packet submitted had some deficiencies. Dr. Huggins instructed Farrar to focus on each area of deficiency and prepare a narrative which correlates his experience and coursework as the equivalent of the required college study.

In May, 2008, Dr. Huggins advised Farrar to inform him that his appeal was placed on the agenda for the June 5th meeting of The State Board of Examiners. He was invited to attend the meeting so he could address any of the questions or issues the Board might have.

In July 2008, Dr. Huggins advised Farrar that his appeal was denied. The Board concluded in its decision that after reviewing all the documentary evidence and his oral presentation, he failed to establish the required one-on-one correspondence of his experience and academic background. The Board concluded that he did not show "the breadth of knowledge" necessary to teach higher-level courses at the high school level, even though he has a successful and lengthy teaching history at the middle school

[1] See (Cifone letter, ¶ 3, p. 1, May 7, 2007.)

level. Thus, the Board denied his request for an endorsement to teach social studies for grades kindergarten through 12. In October, 2008, Farrar appealed this decision to the Commissioner.

STANDARDS FOR SUMMARY DECISION

Both the New Jersey Administrative Code and the New Jersey Court Rules set forth the standards to be applied in the disposition of a case presenting no genuine issue of material fact, and not requiring a plenary hearing. N.J.A.C. 1:1-12.5(b) states that: "Summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits if any, show that there is no genuine issue as to material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule echoes the New Jersey Court Rule, R. 4:46-2(c) which states, in part: "The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The rule goes on to explain what constitutes a genuine issue of fact.

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [Ibid.]

For more than forty years the case that served as a beacon for the determination of summary judgment motions was Judson v. People's Bank and Trust of Westfield, 17 N.J. 67 (1954). However, in 1995 the Judson standard was augmented by the decision in Brill v. Guardian Life Insurance of America, 142 N.J. 520 (1995). Now, instead of just determining whether a material issue of fact exists, Brill requires that the evidence be viewed in the light most favorable to the non-movant, who must demonstrate that a dispute exists, and, if resolved in the non-movant's favor, will entitle him to a favorable judgment.

> The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial" . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46- 2 . . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law" . . . the trial court should not hesitate to grant summary judgment.
>
> [Brill, supra, 142 N.J. at 540 (internal citations omitted).]

In order for the non-movant to prevail, the party "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). "If the adverse party does not respond, an absence of a material factual dispute may be presumed and the movant will prevail if the law supports the movant's position." 37 New Jersey Practice, Administrative Law and Practice, §5.18 (Steven L. Lefelt, Anthony Miragliotta and Patricia Prunty) (2d ed. 2000).

Here, Farrar did not answer interrogatories, even when the DAG amended them, and made them slightly less onerous. In fact, the only response to the motion for summary decision is the following:

> The basis of my rebuttal of Mr. Brian Horseley's motion to dismiss my claim is simple. Documentation. The N.J. State Department of Education has a staggering amount of documents on everything. Anything, I've passed my Praxis exam (score 177). The state claims that my psychology credits do not count towards the 30 credits of Social Studies required for the secondary endorsement. The state has documentation (New Jersey licensing code) that at the time I applied for the Social Studies endorsement; Social Studies, along with World History, European History, U.S. History, Economics, Civics, Sociology, and Anthropology was listed as a Social Science. There is documentation that shows psychology is ten percent of the practice exam for the Social Studies endorsement. It is ten percent of the actual Praxis exam for the Social Studies endorsement. After an exhaustive search I have found NO [emphasis in the original] documentation that states that, at the time I applied for the

> Social Studies endorsement Psychology was not considered a Social Science. Thank you for your attention.
>
> [(Farrar Letter, (undated, received OAL, June 19, 2009).)]

I FIND that petitioner has failed to specify the facts, and has made only the most general allegations. Insofar as his understanding that, at the time he applied, psychology credits were considered under the ambit of social sciences, that well may be the case, yet he has failed to consider one very important matter, that upon the evaluation of his credentials, in 2007, the State Licensing Board made it clear that psychology could not be substituted for the core curriculum in social studies.[2] It is true that when Farrar made his first application for a credentials review, in 2006, there were no promulgated rules establishing the requirements necessary to obtain a Social Studies endorsement. Such a rule was not proposed until August 20, 2007, see 39 N.J.R. 3441(a), and not adopted until January 7, 2008, see 40 N.J.R. 113(b). The response to comments upon adoption, does allow for a grandfather clause for students who were enrolled in applicable degree programs during the pendency of the proposal of the rule and the date of adoption. See 40 N.J.R. 114, subchapter 11, response to comment 3. The exception is not applicable herein. Farrar was actively teaching social studies at the middle school level, not enrolled in a college program, at the time of his request for an endorsement. His undergraduate field of concentration was psychology. When his credentials were first reviewed, Dr. Huggins explained that under N.J.A.C. 6A:9-9.2, social studies and psychology were designated as two distinct subject areas, each with its own endorsement. That rule's effective date was January 20, 2004. Psychology was not subsumed into the subject area of social studies, it was distinct from it, and therefore the social studies core curriculum area of study was reasonably interpreted by the Board to exclude some of the credits earned by the petitioner in psychology.

Therefore, the fact that the requirements for obtaining a Social Studies endorsement were not codified until after petitioner first requested a credentials review, is not dispositive of the instant dispute. Rather, the issue is whether or not, in making

[2] (Resp't's br., Ex. A, April 23, 2009.)

the decision to deny Farrar an endorsement for social studies, the Board acted arbitrarily, capriciously or unreasonably.

The burden is on the petitioner who must prove the actions of the Board were unlawful. It is not enough to allege that they reached the wrong conclusion; he must first overcome the "presumption of correctness." He must prove that the action of the board was "arbitrary, capricious and unreasonable." S. Mountain Civic Ass'n. v. Bd. of Educ. of Millburn Twp., EDU 0589-83 (July 13, 1983), adopted, Comm'r (Aug. 29, 1983).

In Bayshore Sewerage Company v. Department of Environmental Protection, 122 N.J. Super. 184, aff'd, 131 N.J. Super. 37 (App. Div. 1973), the Court held: "Arbitrary and capricious action of administrative bodies means willful and unreasoning action without consideration and in disregard of circumstances, but where there is room for two opinions the action is not arbitrary or capricious when exercised honestly and upon due consideration even though court may believe that an erroneous conclusion has been reached."

Here, I **FIND** that the record does not support that the Board's determination was without ample consideration or in disregard of the circumstances. Nor is there any support that the Board's determination was unreasonable and contrary to law.

CONCLUSION AND ORDER

I **CONCLUDE** that the Board of Examiner's recommendation that petitioner successfully complete an additional fifteen credits to rectify the only deficiency toward obtaining a social studies endorsement is immin ently reasonable. Thus , I hereby **AFFIRM** the denial of a social studies endorsement. Thus, for the foregoing reasons, respondent Motion for Summary Judgment is hereby **GRANTED** and this matter is hereby **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 27, 2010

DATE

IRENE JONES, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

sej

229-10E

OAL DKT. NO. EDU 7347-10
AGENCY DKT. NO. 142-7/10

JEREMY RASMUSSEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order, that petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6, with respect to petitioner's claim that he was wrongfully denied a *Donaldson* hearing. Therefore, the Board is directed to provide the petitioner with a *Donaldson* hearing as soon as possible, but not later than August 30, 2010. To that end, if there are currently no Board meetings scheduled prior to August 30, 2010, the Board is directed to schedule a special meeting to afford the petitioner with the opportunity to have his *Donaldson* hearing. The Board is further directed to refrain from filling any additional vacancies for which petitioner holds an appropriate endorsement until petitioner is provided with a *Donaldson* hearing.

Accordingly, the recommended Order of the OAL granting petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/29/10

Date of Mailing: 7/29/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 7347-10
AGENCY DKT. NO. 142-10

JEREMY RASMUSSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent.

Jeremy Rasmussen, petitioner, pro se

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

Petitioner, Jeremy Rasmussen, filed an application for emergency relief with the Commissioner of Education, alleging the non-renewal of his employment as a teacher of secondary English with respondent was for improper purposes. For the reasons discussed below, petitioner's request for emergent relief, seeking a Donaldson hearing, is **GRANTED**.

DISCUSSION

Petitioner is an experienced and well-educated individual. See, Resume P-2. In 2008-2009 and 2009-2010, petitioner was employed by the Vineland Board of Education (Board) as a teacher of secondary English. Petitioner holds a teaching certificate for said title. Petitioner has accumulated 1.75 years of teaching credit towards his tenure rights.

For the 2008-2009 school year, petitioner taught two periods of college English for ninth grade and two periods of college English for tenth grade. For the 2009-2010 school year, petitioner taught two periods of college English for ninth grade and one period of English 11 for students having difficulty passing the HSPA test.

Petitioner received performance evaluations during his approximate two years of service with the Board. Performance evaluations are broken down into four categories: unsatisfactory, basic, proficient and distinguished. For the years in question, petitioner received primarily distinguished or proficient scores in the relevant categories on the evaluations. Petitioner stated his performance evaluations for the years in question were excellent.

The Vineland school district has been designated as in need of improvement by the New Jersey Department of Education. Petitioner explained that all of his students received a 100% pass rate for the HSPA test for both the 2008-2009 and 2009-2010 academic years. Petitioner highlighted that for the 2009-2010 school year, he was assigned one class of students who had failed the HSPA test for English 11. 100% of students who completed his English 11 course passed the HSPA test.

The State of New Jersey faces difficult economic times. As part and parcel of these economic times, school boards must make serious budget decisions. See, Affidavit of Kevin Franchetta, ¶2. Budget decisions were required to be made in May and June 2010.

On May 12, 2010, the Board determined not to renew petitioner for the 2010-2011 school year. The official minutes state the:

> ...action was based upon the projected return of tenured teachers from leave of absence, the reduction in number of pupils, reasons of economy, budgetary considerations, change in the administrative or supervisory organization of the district, restructuring of program components, current limited contract, and/or other good cause. Seven Board members voted in favor of the action.
>
> See, Affidavit of Kevin Franchetta, Exhibit A.

On May 13, 2010, petitioner was notified that, in accordance with N.J.S.A. 18:27-10 (Notice of Continued Employment to Non-Tenured Teaching Staff) he would not be offered employment for the 2010-2011 school year. The reasons provided in the notice were identical to those contained in the Board minutes mentioned above. The letter also specifically states that, "This action is not based upon your performance." Finally, the notice emphasized that:

> In the event any or all of these factors change, including but not limited to budgetary considerations, the Board of Education may then, but is not obligated to offer you employment for the 2010-2011 school year.
>
> Affidavit of Kevin Franchetta, Exhibit B.

The Board contends that the notice sent to petitioner was identical to those sent to numerous other non-tenured teaching staff members. See, Affidavit of Kevin Franchetta, Exhibit B. By statute[1], the Board must notify all non-tenured teaching staff members by May 15 of the status of their teaching positions for the subsequent year. According to petitioner, approximately 157 non-tenured teaching staff members receive similar notifications.

[1] N.J.S.A. 18A:27-10

Petitioner did not receive a Rice[2] notice prior to the Board's meeting of May 12, 2010. The Board asserts a Rice notice is not necessary when the Board of Education is considering the status of massive numbers of non-tenured teaching staff members. It is simply impractical and not necessary to "Rice" all the non-tenured teaching staff members for such a routine or generic termination.

Subsequent to serving non-renewal notices upon staff members, many were reassured that they would ultimately be rehired and that the notices were merely in compliance with the May 15, 2010, deadline set by statute. In fact, approximately 151 non-tenured teaching staff members were rehired, notwithstanding the May 13, 2010, notice to the contrary. See, Affidavit of Kevin Franchetta, ¶8.

Petitioner argues that the Board intended to rehire most if not all of the non-tenured teaching staff members back after the May 12, 2010, meeting and May 13, 2010, notice. And petitioner was among those who would be rehired. Discussions connected with that process took place on June 1 and 2, 2010, according to petitioner. Petitioner was reassured by the supervisor of the English department, vice-principal and principal that he would be included with those non-tenured teaching staff members rehired for the 2010-2011 school year. See, P-1, Letter of Theodore A. Peters, Principal (retired). Peters, in his letter, noted his high regard and praise for petitioner. Peters indicated that petitioner was being recommended for renewal based upon actual observations, as well as evaluations of other administrative and supervisory staff.

During the non-tenured teacher renewal process, Vineland students were taking their final examinations. Petitioner observed many improprieties, defects, and other deficiencies during the final examination process. In particular, petitioner observed teaching staff members providing students with answers to examination questions. Ultimately, the teaching staff member or members provided the students with erroneous answers resulting in several students receiving failing grades. Petitioner also observed teaching staff members adding points or subtracting points during the grading process, reflecting scores that did not correlate to the students' performance on the

[2] Rice v. Union City Regional High School Bd. of Ed. 155 N.J. Super. 64 (App. Div. 1977), certif. denied, 76 N.J. 238 (1978).

examinations. The scores were weighed based upon last name, ethnicity, and teacher preferences.

Petitioner raised these concerns with his colleagues and supervisors. The concerns were raised in a protective, non-accusatory fashion. For example, in a June 1, 2010, e-mail to the Supervisor of English, petitioner stated:

> I am trying to honor the students' aptitudes by taking a big picture look at the actual essay in front of me and giving it a grade relative to their skill level. I certainly don't want a student that has clearly developed writing aptitude to suffer a poor grade over semantics. But I am having an extremely tough time reconciling the two simultaneous but seemingly competing standards. In other words, how well could a student possibly have answered a question if they unquestionably fail to answer it? In extreme cases, do I just "knock a point off" as has been suggested, or do I ignore the difficulty entirely and just credit whatever writing skills/aptitudes are displayed?

Similarly, petitioner submitted a detailed letter to Dr. Banks, Superintendent of Schools, dated June 8, 2010, again reiterating his concern for improper test administration and scoring.

> It is my first hand experience with the English finals, however, that has been most troubling. From the beginning, there has been a calculated agreement among several teachers that the dual scoring format could be "worked around" by teachers working in pairs that agree to provide a second grade that agrees to within one point of the first. I have witnessed this firsthand. I have also witnessed negotiation of scores, "trading" of points between teachers who have potential scoring disagreements ("I'll add two points to Jane's paper of you add one point to John's), special deals made for particular favorites, and even prejudged scores that were given based on last names that were either recognizes, or in some cases, mocked because of their ethnicity.

Counsel for the Board avers that the determination as to which non-tenured teaching staff members to rehire was made in or around June 4, 2010. Consequently,

there is no nexus between petitioner's complaints regarding test taking and the Board's decision not to renew him.

Ultimately, petitioner learned that he was not going to be renewed in spite of oral assurances to the contrary. Rumors about petitioner's exclusion from the renewal list surfaced between the period of June 4 and June 8. Union members and other teaching staff members were beginning to learn who "did not make the cut." The word was leaking out that petitioner was among those who "did not make the cut."

On or about June 15, 2010, petitioner requested reasons for his non-renewal. The Board responded that it was a "reduction in force" or RIF. See, Petitioner's Exhibit C. On June 17, 2010, petitioner requested an appearance before the Board for what is otherwise known as a Donaldson[3] hearing. Superintendent Banks stated that: "Your request for a Donaldson appearance is denied, as you are the subject of a RIF and not a nonrenewal."

In or around July 2010, the Board advertised to fill approximately forty teaching staff positions. Petitioner qualifies for three of the teaching staff positions advertised by the Board (Language Arts Teacher in the Middle School, an English teacher, and an English Teacher – READ 180). Petitioner argues that the Board's net reduction in work force was approximately six non-tenured teaching staff members (157 noticed for non-renewal and 151 rehired). Since the Board is currently advertising to hire forty new teaching staff members, there was no reduction in force achieved. Petitioner argues that the actions of the Board are disingenuous and unlawful.

[3] Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974), codified at N.J.S.A. 18A:27-4.1.

LEGAL ANALYSIS

Law Regarding Non-Tenure-Dismissal

A board of education has broad discretionary authority in regard to the granting of tenure. Donaldson v. Board of Educ. of North Wildwood, 65 N.J. 236, 240-41 (1974). A board's discretionary authority is not unlimited, and its action will be set aside if it was taken for arbitrary or capricious reasons. Id. at 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. Donaldson, supra, 65 N.J. at 241. Thus, evaluations of classroom performance are not necessarily the controlling factor. Dore v. Bedminster Board of Educ., 185 N.J. Super. 447, 453-54 (App. Div. 1982).

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.

Here petitioner asserts three statutory or common law rights that were violated forming his claim for emergent relief. They are; 1) inappropriate reasons for his removal; 2) denial of a Donaldson hearing; 3) violation of the Rice notice.

1. Conflicting Statement of Reasons

Pursuant to N.J.S.A. 18A:27 -3.2, a non-tenured teaching staff member may request in writing a statement of reasons for non-reemployment and an informal appearance before the district board of education. Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974). Here, petitioner satisfied both of the procedural prerequisites to make such a request. The request for a statement of reasons followed the Board's

May 13, 2010, notice of non-renewal. The Board's May 12, 2010, decision to send these notices was not one of choice, but one demanded by statute. The May 15, 2010, deadline is not discretionary, it is obligatory. But the Board's June 16, 2010, letter stating it's reason was a "reduction in force" confused petitioner since he believed he was being non-renewed. See, Petitioner's Exhibit C. He did not perceived that a formal RIF was taking place.

The expression "reduction in force" is a legal term of art in public employment. Petitioner argues that the Board is confusing or comingling a case of non-renewal of a non-tenured teaching-staff member with a formal "reduction in force."

The actions of the Board must be viewed in context with the present fiscal environment. As indicated, the entire state of New Jersey is experiencing fiscal difficulties. The Vineland Board of Education is facing a budget cut of $18.5 million. See, Affidavit of Kevin Franchetta, ¶6. In this context the Board notified 157 teachers that they would be non-renewed for reasons of economy, budgetary consideration, etc. See, Minutes of Board of Education, Notification to Non-Tenured Teachers, supra. While the minutes and notices do not specifically state "reduction in force," the sum and substance of the Board's actions were, in fact, just that. And the Board had to take action by May 15, 2010, as required by statute. N.J.S.A. 18A: 27-10. The Board met its statutory obligation in notifying all non-tenured teaching staff members that their contracts would not be renewed and that the reason for their non-renewal was for budgetary reasons. And the Board intended to rehire many of the non-tenured teaching-staff members, once the budget matters were settled.

When petitioner requested reasons for his non-renewal, the language "reduction in force" was provided. However this language did not substantively change the nature of the action taken in May from a non-renewal to a reduction in force, necessitating a different procedure. The terminology is merely semantics and did not trigger any other substantive obligation upon the Board. I **CONCLUDE** that petitioner was non-renewed because the Board wanted to reduce its work force. The Board satisfied its obligation by providing petitioner with a lawful and valid notice of reasons for its action. The

underlying motives for petitioner's non-renewal are a separate consideration and must be addressed at a plenary hearing.

2. Donaldson Hearing

The second procedural protection raised by petitioner is that he was denied a Donaldson hearing. The right to a Donaldson hearing is codified at N.J.S.A. 18A:27-4.1 This statute states in part:

> 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.

It is undisputed that petitioner made a valid request to appear before the Board. And it is also undisputed the request was denied by the superintendent. See, Petitioner's Exhibit D. The superintendent concluded that petitioner was subject to a reduction in force and therefore not entitled to an appearance before the board. I **DISAGREE**. Petitioner falls in the category of a non-renewed, non-tenured teacher. Consequently, he is entitled to an informal appearance before the Board. The Board cannot deny that right which is codified at N.J.S.A. 18A:27-4.1, by merely re-titling its action as a reduction-in-force in lieu of a non-renewal.

3. Rice Notice

Petitioner asserts his rights were violated pursuant to Rice v. Union City Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), certif. denied, 76 N.J. 238 (1978). Pursuant to the Rice decision, a public body is required to provide the employees with reasonable notice of its intention to consider in closed session, personnel matters related to them. Such matters include employment appointment, termination of employment, terms and conditions of employment, evaluation of

performance, promotions or discipline. The Rice notification process allows the employee to request a public hearing on such matters.

Here, petitioner suggests that he was entitled to a Rice notice in advance of the Board's May 12, 2010, meeting. Similar circumstances were addressed in Oliveri v. Carlstadt-East Rutherford Bd. of Ed., 160 N.J. Super. 131 (App. Div. 1979); and in Jamison v. Morris School Dist. Bd. of Ed., 198 N.J. Super. 411 (App. Div. 1985). In both of the aforementioned matters, the Courts concluded that the Boards of Education technical violations of the Rice notification requirements were cured. There is also a body of law that holds that technical violations may be corrected and those corrections will relate back to the date of the initial action in question. See, Davis v. Somers Point Bd. of Ed., 327 N.J. Super. 535 (App. Div. 2000).

In Oliveri, six non-tenured teaching staff members were non-renewed. Public and non-public meetings were held in conjunction with the non-renewal decision-making process. While initially there were technical violations of the Rice procedures, the Board ultimately cured the deficiency in a subsequent meeting. And, the Court also concluded that plaintiff had constructive notice or actual notice to the Board's meeting and agenda.

A similar result was also reached in Jamison. There, the school board denied a vice-principal reemployment in her third year. The vice-principal's non-reemployment was a result of a reduction in force of school administrators. Plaintiff contends that she lacked notice that her employment status would be considered at the Board's meeting and, thus, had no opportunity to request a public discussion at an open meeting. The Jamison court, relying on Oliveri, concluded that the constructive notice, rather than actual notice, is sufficient.

Applying these principles to the present matter, it is clear that most, if not all, non-tenured teaching staff members recognize that their contracts come up for renewal in April and/or May every year until tenured. Since this was petitioner's second year of service, he had already been through the procedures involved with reappointment of non-tenured staff in 2008-2009. Moreover, the Board published and posted notification,

as well as prepared an agenda for its May 12, 2010, meeting. The agenda included a line item for non-tenured staff member. See, Agenda and Resolution of Meeting Dates. (C-1).

I **CONCLUDE** that, collectively, petitioner knew, should have known, or had access to information of what was coming before the Board in May 2010. Thus, no Rice notice violations occurred. Moreover, the Board discussed the personal matters in public, in bulk. The public session minutes reflect a generic or general discussion involving all non-tenured staff members. Rice notices are intended provide staff member notice when a Board or public body, upon its own initiative, is going to act on matters involving personnel. The Board's action was mandated by statute and the statute is a public record. Therefore, it should have come as no surprise to any staff member that the Board was fulfilling its statutory duty.

Emergent Relief

Based upon this background, I now analyze petitioner's rights to emergent relief. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in relevant part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

CONCLUSIONS

I **CONCLUDE** that petitioner will suffer irreparable harm if he is not granted a Donaldson hearing. Petitioner is entitled to a hearing pursuant to the determination made in Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236. Petitioner is a non-tenured teaching staff member who was entitled to this procedural protection originally determined by our Supreme Court which was later codified at N.J.S.A. 18A:27-4.1 If petitioner is not afforded his right to informally appear before the Board of Education, he will suffer irreparable harm. This is a right that has been created by common law and codified in a statute. It cannot be denied by the superintendent by semantically altering the reappointment process for non-tenured teaching staff members. If this right is not afforded, the statute is violated and irreparable harm will result.

I also **CONCLUDE** that petitioner's legal right is settled as it relates to his right to an informal appearance before the Board of Education for the reasons set forth above.

I further **CONCLUDE** that petitioner has a likelihood of prevailing on the merits as it relates to his rights protected under Donaldson.

I further **CONCLUDE** that the balance of equities favor petitioner in terms of granting him a right to an informal appearance before the Board of Education. There is materially no prejudice or consequences to the Board by allowing petitioner to appear and make his case for re-hire or renewal.

Finally, I note that petitioner raised serious allegations of improprieties as to test taking, favoritism, skewing grades, racial bias in test grading, and other disturbing improprieties. As a matter of public policy, this information should be presented to the Board of Education. Moreover, the Board should consider whether this information

shared by petitioner with staff members and management formed the basis of petitioner's name being excluded from those staff members who were renewed. Petitioner has more than adequate credentials, excellent performance appraisals and remarkable results as it relates to the performance of his students on the HSPA tests. The Board has been designated by the state as one in need of improvement. And the Board is currently advertising for English teachers. It seems that when a teaching-staff member has a 100% pass rate on HSPA tests in a district this is designated "in need of improvement" and the staff member is highly rated by his principal, an opportunity exists for all.

ORDER

Based upon the foregoing, petitioner's request for emergent relief, seeking a Donaldson hearing, is **GRANTED**. A Donaldson hearing shall be scheduled as soon as is practical, but before August 30, 2010. Petitioner's request for continued and immediate employment is **DENIED**, without prejudice. A hearing on the merits of petitioner's claim that the Board acted arbitrarily and capriciously in not renewing his contract for the 2010-2011 school year will be held on **August 30, 2010, at 9:30 a.m.**, at the Office of Administrative Law, 1601 Atlantic Avenue, Suite 601, Atlantic City, New Jersey.

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

July 21, 2010
DATE

W. TODD MILLER, ALJ

sd

DOCUMENTS RELIED UPON AND IN EVIDENCE

For Petitioner:

Petition for Emergent Relief, with attachments/exhibits

P-1 Petitioner's Letter to Theodore E. Peters, Principal (retired), July 2010

P-2 Petitioner's Resume

For Respondent:

Affidavit of Business Administrator Kevin Franchetta, with attachments/exhibits

By the Court:

C-1 Minutes of Board of Education of City of Vineland meeting, May 13, 2009; Resolution #A.28 (setting dates for BOE meetings); Agenda for Regular Meeting of May 12, 2010; and Agenda for Regular Meeting of June 9, 2010

WITNESSES

For Petitioner:

Jeremy Rasmussen

For Respondent:

None

#230-10

CEREBRAL PALSY LEAGUE OF UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – the Cerebral Palsy League of Union County (CLP) – owns and operates Jardine Academy, a private school for the disabled (PSD) which serves children with disabilities who require medical as well as educational services. Petitioner appealed the Department's determination to disallow $137,319 of salary and fringe benefits for three of its employees – two music therapists, and a coordinator of instruction – for the 2003-2004 school year. The Department found that the employees were in unrecognized job titles without Department approval, and petitioner was ordered to refund tuition payments to the affected public school sending districts.

The ALJ cited to *Youth Consultation Service, Inc. v. New Jersey State Department of Education, Office of Fiscal Policy and Planning*, in finding, *inter alia*, that: the determination of whether salaries and related benefits of certain employees should properly be considered in establishing tuition rates payable to PSDs requires an examination of what an employee actually does; based on the CLP's job description and testimony at hearing, the duties of the music therapist are such that they do not require an instructional certificate, and the duties of the coordinator of instruction position likewise do not require an administrative certificate with an endorsement as supervisor; and the Department improperly determined that the salaries and fringe benefits of the three employees in question were non-allowable costs. The ALJ ordered that the duties of the music therapist position correlate to those of a non-certificated teacher aide or paraprofessional rather than a teacher, and the duties of the coordinator of instruction position correlate to those of a teacher rather than a supervisor; accordingly, the Department had no basis upon which to disallow the $137,319 of salary and fringe benefits for the three positions.

Upon full consideration of the record, and exercising the required deference to the ALJ's implicit credibility assessments, the Commissioner determined to adopt the Initial Decision as the final decision in this matter, for the reasons stated therein.

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

July 29, 2010

OAL DKT. NO. EDU 11301-07
AGENCY DKT. NO. 138-5/07

CEREBRAL PALSY LEAGUE OF UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Exceptions of the Department first maintain that the Administrative Law Judge (ALJ) erred in rejecting the Department's disallowance of the salary and benefits of Dawn Huss. In so determining, it charges, she found that the Coordinator of Instruction position was more akin to the responsibilities of the "Head Teacher" position in *Youth Consultation Service, Inc.* [YCS] *v. New Jersey State Department of Education, Office of Fiscal Policy and Planning*, Commissioner's Decision No. 394-07, decided October 4, 2007. The Department advances that the evidence in the record regarding the actual job functions in YCS is distinguishable from that present in this matter. In YCS, it argues, the ALJ's decision turned on hearing testimony which elaborated on the duties listed in the job description of Head Teacher. Here, it charges, there was no such elaboration but only "conclusory statements that the job function is not supervisory," nor are there any facts in the record to establish that the duties of the Coordinator of Instruction position differed in any

meaningful respect from the job description provided to the Department. (Department's Exceptions at 2-3, quote at 3) Also instructive, the Department points out, is that the job description for this position "even states that administrative/supervisory experience and a Masters degree is preferred." (*Id.* at 4) Most importantly, it argues, it is critical that the Department be allowed to rely on job descriptions provided by the school during the audit process in reaching its determinations. The Department, therefore, argues that as Ms. Huss did not possess a Supervisor's certificate in the 2003-04 school year and the record is devoid of factual support for a conclusion that her duties were limited to a non-supervisory role, the determination disallowing her salary and benefits for this school year must be upheld. (*Id.* at 4-5)

Next, the Department contends that the ALJ's rejection of its disallowance of the salaries and benefits of Joanne Schlachter and Cynthia Pellegrino – employed as music therapists during the 2003-04 school year – because they "did not provide direct instruction, but rather assisted properly certified personnel with the supervision of pupil activities," similarly has no basis in the record. The Department contends that the record does not contain any evidence whatsoever of which instructional staff music therapists assisted but rather, again, contains only "conclusory statements" that these individuals did not teach music but only assisted instructional staff. Absent any definitive testimony regarding the specific instructional staff that these individuals assisted, it professes, the Department's determination disallowing their salaries and benefits must be upheld. (Department's Exceptions at 5-7, quote at 6)

Pages 1-28 of petitioner's Reply Exception submission is a verbatim presentation of its post-hearing brief advanced below. Petitioner concludes this submission by arguing that the crux of this case is the Department's position that its consideration of this matter was properly limited to an examination of the language of the individuals' job descriptions without regard to what their duties actually were. This position, petitioner argues, is wholly belied by the Commissioner's

decision in *Youth Consultation Service, supra.* Here, in line with the principles established in YCS, the ALJ looked beyond the language of the job descriptions alone and found the unrebutted testimony of the school's witness, Patricia Tekel, as to actual duties these individuals performed to be credible. Petitioner argues that this credibility determination is entitled to "considerable deference." It urges that the Commissioner adopt the Initial Decision in its entirety. (*Id.* at 31)

Upon full consideration of the record – which included transcripts of the hearing conducted on April 15 and 16, 2009 – and exercising the requisite deference to the ALJ's implicit assessment of the credibility of the witnesses,[1] the Commissioner is compelled to adopt the recommended Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/29/10

Date of Mailing: 7/30/10

[1] 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)) A reasoned review of the record, with this governing standard in mind, does not provide a basis for concluding that the ALJ's implicit credibility assessments and resultant fact finding were without the requisite level of support.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11301-07
AGENCY DKT. NO. 138-5/07

CEREBRAL PALSY LEAGUE OF UNION COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

David B. Rubin, Esq., for petitioner

Joyce D. Atkins, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: August 31, 2009 Decided: June 14, 2010

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Cerebral Palsy League of Union County, (CPL or petitioner) appeals the determination of the respondent, New Jersey State Department of Education,

Division of Finance (respondent or Department) that disallowed approximately $137, 319 of salary and fringe benefits for three of its employees for the 2003-2004 school year. The Department found that the employees were in unrecognized job titles without Department approval. As a consequence of this determination, petitioner was ordered to refund tuition payments to the affecting public school sending districts.

The respondent filed an Answer to the petition on June 14, 2007. On October 18, 2007, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. The matter was scheduled to be heard on December 8 and 11, 2008, but adjourned due to the unavailability of the respondent's witness. Hearings were held and concluded on April 15 and 16, 2009, and the record closed on August 31, 2009. At the request of the undersigned, the time for the issuance of the Initial Decision was extended to June 14, 2010.

FACTS

Based on the record, I **FIND** the following **FACTS**:

Petitioner, Cerebral Palsy League of Union County, Inc., owns and operates Jardine Academy, a private school for the disabled (PSD). Petitioner operates two campus locations, in Cranford and Union. The Union campus serves severely disabled students from approximately four to twelve years old who require medical as well as educational services. The Cranford campus serves a similar population from ages twelve to twenty one. CPL, like all private schools for the disabled in this State, are authorized to receive special-needs students from public school districts (sending districts) when it is determined it is "impractical" for the district to provide specialized education programs for these students. N.J.S.A. 18A:46-14(g). The sending districts send their students to the PSD and pay tuition. The tuition assessed, however, must not exceed the "actual cost per pupil as determined under rules prescribed by the Commissioner of Education and approved by the State Board of Education (State Board). N.J.S.A. 18A:46-21.

The "Tuition for Private Schools for Students with Disabilities" rules, N.J.A.C. 6A:23-4.1 to -4.16, impose stringent bookkeeping and accounting practices (N.J.A.C. 6A:23-4.4), and require the submission of detailed budgets (N.J.A.C. 6A:23-4.3). The rules prohibit inclusion of numerous specified costs in calculating tuition (N.J.A.C. 6A:23-4.5) and require annual detailed audits by the Department (N.J.A.C. 6A:23-4.9).

The administrative rules further require PSD use recognized job titles. N.J.A.C. 6A:23-4.4(j). Significantly, if a PSD determines that the use of an unrecognized job title is desirable, the PSD must request approval from the county superintendent to use the proposed title. N.J.A.C. 6A:23-4.4(j); N.J.A.C. 6A:9-5.5(b). Such request must include a detailed job description. N.J.A.C. 6A:9-5.5(b)(1). The county superintendent then exercises his or her discretion regarding approval of the request and determines the appropriate certification and title for the position. N.J.A.C. 6A:9-5.5(b)(2). If the PSD fails to obtain approval for the unrecognized position title, the costs of salaries and fringe benefits of the untitled employees are not allowable in the calculation of the actual cost per student. N.J.A.C. 6A:23-4.5(57).

On June 12, 2003, the Department of Education sent all PSD directors an annual letter that embodied these provisions. (P-1.) Attached to the letter was a list of recognized job titles for PSDs for the 2003-2004 school year. The letter provided: "Private schools should attempt to use the titles from the attached listing but may apply for approval of an unrecognized title through the county superintendent's office in the county where the private school is located." Further, the letter also set forth the process used by the county superintendent to determine whether to grant or deny a request to use an unrecognized job title:

> The county superintendent reviews proposed job titles and job descriptions to determine the following: if the proposed job description requires certification and if a similar job title currently exists. If the proposed job description does not require certification, the request for approval of a new job title will be denied on the basis that it doesn't require certification. If the proposed job description may be fulfilled under an existing job title, the county superintendent will recommend that the school use the existing job title. If the proposed job description requires certification and cannot be

> performed under an existing job title, the county superintendent will make a determination of the appropriate title for the position.
>
> [(P-1.)]

The letter further provided that unrecognized-position titles must be approved annually even if previously approved. Finally and most significantly it was stated that "the costs of salaries and fringe benefits of unrecognized position titles which are not properly approved in accordance with [the administrative code] are considered non-allowable costs."

CPL submitted audited financial statements to the Department for both campuses of the Jardine Academy for the 2003-2004 school year. Upon receipt of the statements, James Verner, a section supervisor of the Office for Fiscal Policy and Planning of the Department conducted a desk review of the financial statements in November 2005, by comparing the information in the audit to CPL's Fiscal Information Form. After comparing these statements, he had concerns. Thus, on or about December 22, 2005, Verner notified CPL about his concerns and requested that CPL provide him with the contracts, job descriptions, licenses, and school certifications for three CPL employees: Joanne Schlachter, Cynthia Pellegrino, and Dawn Huss. (P-6; R-3.)

On January 25, 2006, Verner notified CPL that the employment contracts of Schlachter and Pellegrino reflected the position titles of "Music Therapists" and the employment contract of Huss reflected the position title of "Coordinator of Instruction"; all of which were unrecognized titles. (P-7; R-4.) Consistent with P-1, he advised CPL that pursuant to N.J.A.C. 6A:23-4.2(r) and 4.4(j) private schools for the disabled using an unrecognized-position titles must provide documentation that the position title was approved by the respective county superintendent. In the absence of an approval, the school must immediately request retroactive approval from the Union County Superintendent of Schools for the 2003-2004 school year. Finally, he noted that if approval was granted, a copy of same should be submitted to him.

In that same letter, Verner noted, inter alia, that:

> If the proposed unrecognized position title and job description may be fulfilled under an existing recognized position title, the county superintendent will recommend that the school use an existing position title which would be considered in compliance. However, the staff member who held or holds the position must hold the proper school certification for either the recognized position title or an unrecognized position title approved by the county superintendent. If the proper school certification is not held by the staff member, the salary and fringe benefits associated with the position are considered non-allowable costs in accordance with N.J.A.C. 6A:23-4.5(a)(6).
>
> If the county superintendent determines that the function(s) of the unrecognized position title(s) does not require school certification, the unrecognized position title(s) will not be approved. The school must request county superintendent approval of the position as an aide based on the job description submitted to this office for the positions of Coordinator of Instruction . . . and Music Therapist. If no such approval exists and retroactive approval cannot be obtained, the salary and fringe benefits associated with these positions are considered non-allowable in accordance with N.J.A.C. 6A:23-4.5(a)(57) . . . . [A] county superintendent . . . of schools approval of any recognized position title and paraprofessional title is required on an annual basis.

When Patricia Tekel (Tekel), Jardine Academy's director of operations, received Verner's letters she contacted the office of Union County Superintendent of Schools Dr. Carmen Centuolo to schedule an appointment. Both the purpose and outcome of that February 2006 meeting are disputed by the parties. Following that meeting, Debra Wolfel, CPL's executive director and Charles Zalewski, CPL's director of finance, notified Verner in letters dated February 15, 2006, that:

> We have met with Dr. Carmen Centuolo, Union County Superintendent of Schools, and Ms. Heather Mills Pevonis, Union County Supervisor of Child Study, to address the issue of unrecognized job titles and to review job descriptions. Based on the outcome of our meeting, Dr. Centuolo recommended that we use existing recognized job titles for those position titles in question. As such, per Dr. Centuolo's instruction, enclosed please find amended

> Annual Program and Fiscal Information Report for the 2003-2004 school year. Furthermore, included are the amended 2004-2005 and 2005-2006 Annual Program and Fiscal Information Reports with the corrected position titles to ensure that we remain in compliance.
>
> [(P-9, R-6.)]

Upon receipt of CPL's letters, Verner e-mailed Dr. Centuolo on March 30, 2006, concerning CPL's proposed use of existing job titles for the positions. (P-10.) He advised Dr. Centuolo that:

> Beginning in the 2004-2005 school year, no retroactive approval of unrecognized job titles were being granted which was agreed upon by all the county superintendents and the private schools were made aware of this decision prior to the 2004-2005 school year. **In addition, approximately a year ago a committee of three county superintendents was formed and chaired by Dr. Patrick Piegari to review all requests for approval of unrecognized job titles along with standard written response forms for all requests**.
>
> [(R-6.) (Emphasis added.)]

He advised Centuolo to contact Dr. Piegari.

Following Verner's e-mail to Centuolo, the Union County Supervisor of Child Study Heather Mills-Pevonis sent an e-mail to Centuolo on April 4, 2006, wherein she stated:

> I spoke with Susan Ballestero, Director of Personnel for the Cerebral Palsy League (Jardine Academies) . . . this afternoon, where she admittedly thought that meeting with Carmen and me on February 2, 2006 would rectify their unapproved job titles for the previous year's dating back to 2003-04. **In memorializing our meeting we agreed that Ms. Tekel and Ms. Ballestero sought guidance on how to proceed (meaning going forward) with their title dilemma of unrecognized job titles and were advised to use approved titles; they were not requesting retroactive approval**. I provided them with the latest approved title list and we briefly discussed the titles in question with the county superintendent and me.

> To date there has not been any request submitted to this county office requesting the superintendent to review and/or approve an unrecognized job title. I further shared the process of submitting in writing a formal request for an unrecognized position titles [sic]. Citing the specifications Mr. Verner directed me to on our website.
>
> [(P-12).]

On April 11, 2006, CPL's Director of Personnel Susan Ballestero submitted a formal request to Dr. Centuolo for retroactive approval of the unrecognized-position titles of "Music Therapist" and "Coordinator of Instruction." (P-14.) In her letter, Ballestero stated:

> At the time of our meeting in February, we understood that unrecognized position titles and job descriptions from 2003-2004 could be fulfilled under existing recognized position titles because they had the appropriate school certification. However, as per instructions from Heather Mills-Pevonis and Jim Verner, we are writing to request retroactive approval of the unrecognized position titles for the school year 2003-2004.
>
> [(P-14.)]

On September 11, 2006, Dr. Centuolo advised CPL that she had denied its request for retroactive approval of the unrecognized-position titles of "Music Therapist" and "Coordinator of Instruction." (P-19.) Additionally, she advised CPL that the Department's Committee of County Supervisors had reviewed CPL's proposed-job descriptions and had concluded that the positions did not meet the Department's licensing requirements. Further, she noted that the job description for the "Music Therapist" position title could be fulfilled under an approved "Music Teacher" position title, which requires the holder of the position to hold a New Jersey school certification as a music teacher and that the job description for the "Coordinator of Instruction" position title could be fulfilled under the existing approved "Supervisor of Curriculum and Instruction" position title, which requires the holder of the position to hold a New Jersey school certification as a supervisor. (P-19.)

On January 10, 2007, Verner notified CPL that consistent with the Department's September 11, 2006, decision unless it could provide documentation that Schlachter and Pellegrino held the required certifications for the existing job titles (music teacher and supervisor of curriculum) for the 2003-2004 school year, their salaries and fringe benefits would be considered non-allowable costs. (P-20, P-21.)

On February 13, 2007, Debra Wolfel addressed the issues outlined in Verner's January 10, 2007, letter regarding the 2003-2004 Audit for each CPL campus. (P-24, P-25.) Regarding the music therapist position, she stated:

> While I appreciate Dr. Centuolo's recommendation of using the existing recognized title of Music Teacher . . . utilization of that title does not reflect the function and nature of this position/expenditure. The nature of the Music Therapy provides activities that are supplemental to and assist in the instructional process; in no way does this position teach music. Per the *NJ Private Schools for the Disabled Chart of Accounts Appendix B*, this account line . . . is for salaries of all certified staff providing related services to children which would include physical therapist, occupational therapist, speech therapist, counseling and school psychologists, etc. Music Therapy in [sic] not a related service.
>
> [(P-24, P-25.)]

Therefore, this expenditure was classified as a salary for an assistant or aide to the instructional process. (Ibid.)

Regarding the Coordinator of Instruction position, she stated:

> While I appreciate Dr. Centuolo's recommendation of using the existing recognized title of Supervisor of Curriculum and Instruction, . . . utilization of that title does not reflect the function and nature of this position/expenditure. In the position of Coordinator of Instruction, Ms. Dawn Huss, did not provide supervision nor was she required to assist teachers in improving instructional methods and the learning process. This position was not intended to improve instructional services; Rather the position of Coordinator provided assistance in the coordination and support of teaching and administrative duties.

[(P-24.)]

Therefore, this expenditure was classified as a salary for support services–school administration. (Ibid.)

On May 24, 2007, CPL filed a verified petition of appeal with the Commissioner wherein it alleging that the Department's determinations were arbitrary, in that the functions actually performed by Schachter, Pellegrino, and Huss did not require the certifications mandated.

DISCUSSION, FINDINGS AND CONCLUSIONS

N.J.S.A. 18A:46-13 provides that every school district is obligated to provide a free and appropriate education (FAPE) to students who are classified as disabled and in need of special services. A district that lacks the ability to deliver the necessary services may satisfy its obligation by sending special needs students to a State-approved facility or program. N.J.S.A. 18A:46-14.

A PSD may charge its sending districts for tuition for its services; however, the tuition may not exceed the certified cost per student. N.J.A.C. 6A:23-4.1. Each fiscal year a PSD is required to submit audited financial statements for review by the Department, which forms the basis for determining the certified actual cost per student and the final tuition rate the PSD may access to a sending district. N.J.A.C. 6A:23-4.9. The Department reviews PSDs audited financial statements to ensure that non-allowable expenses are not being charged to the sending districts.

N.J.A.C. 6A:23-4.5 sets forth the various types of non-allowable expenses that a PSD must exclude from the certified actual cost per student calculation. Subsection (a)(57) of his rule specifies that a PSD may not charge its sending districts for the costs of salaries and fringe benefits of unrecognized-position titles which are not properly approved in accordance with N.J.A.C. 6A:9-5.5.[1]

[1] During the 2004-2005 school year this process was governed by N.J.A.C. 6:11-3.3.

The Department provides annual notice to the PSDs regarding these procedures. For the 2003-2004 school year, a letter was sent to all PSD directors on or about June 12, 2003. The letter iterated that the PSD should minimize the use of unrecognized job titles and that a PSD must apply for approval of same. The letters further explained that such requests must be forwarded to the county superintendent where the PSD is located and the job description would be reviewed to determine if the job responsibilities could be fulfilled under a recognized job title and whether a certificate was required.

Music Therapist

The determination of whether salaries and fringe benefits of certain employees should properly be considered in establishing tuition rates payable to PSDs requires one to look beyond titles and determine what the employee actually does. Youth Consultation Serv. v. Dep't of Educ., EDU 3573-06 (consolidated), Initial Decision (August 20, 2007), adopted, Comm'r (October 4, 2007), <http://lawlibrary.rutgers.edu/oal/search.html>. Here, the written job description for the title "Music Therapist" requires the individual to assist classroom teachers and other certified staff in meeting defined goals and objectives of students using music as a medium. The music therapist is responsible for:

> Maintaining and safeguard each family/student's right to privacy, respect and confidentiality;
>
> Assist the interdisciplinary team in the assessment of the student's musical interest, responses, knowledge skills and abilities;
>
> Assist the classroom teacher or school certified therapist in assessing the usefulness of specific musical equipment, materials, and resources available for the student's specific handicap as well as assist in determining the most effective approach to motivate the student through music. Assist in conducting individual and group music sessions, as planned, to effect changes or growth;

> Assist in planning individual and group music sessions to meet each student's goals and objectives;
>
> Assist in evaluating the overall music program and suggest necessary changes as needed;
>
> Participate as an active member of the Direct Service Team and attend appropriate workshops and professional meetings to increase professional knowledge and skills;
>
> Introduce to interdisciplinary team new program activities and suggest improvement for existing activities to meet the needs of students;
>
> Request inventory and maintain music equipment;
>
> Attend annual IEP meetings when requested;
>
> Carry out related duties as requested by the Therapy Program Specialist or Principal; . . . . .
>
> [(P-44.)]

According to Dr. Piegari, the Committee's determination consisted of a review of the actual job responsibilities and a determination of whether the responsibilities were those of a certified music teacher or those of a non-certified teacher position. In his view, a certified music teacher would:

1. "Assessment of students' musical interests and knowledge of skills and abilities."

2. "Work with the classroom teacher or other certified therapists, look at musical equipment, materials, and specific resources that are available." A music teacher "would be able to provide that specific direction and support."

3. "Look at the most effective approach to motivate students through music." Contribute a major role of the music teacher.

4. "Assist the interdisciplinary team in evaluating the overall music program, and suggesting necessary changes."

5. "Introduce to interdisciplinary team new program activities and suggestions for improvement to existing activities, to meet the needs of students."

Piegari was a "little" surprised that CPL used the term "assist" in the job description. Typically an art or music teacher runs their program with some coordination or work with a classroom teacher. Here, the job description starts with "assist" and then the rest of the sentence gets into more direct instruction. He found this to be a "little inconsistent" and a "little bit of a dichotomy" as assisting is more of a secondary role, but then it gets into a very specific role.

Dr. Centuolo testified the job description specifically required the music therapist to instruct the students and work with the students in therapy; they were going to be addressing the child's IEP and assessing the students. In her view, these are all the things that you would do as an instructional staff member. Further, if the music therapists performed as CPL indicated, then the staff person merely assisted the teacher. No special expertise, no special theory or certification was required and could be performed by an aide. Centulo concluded that the assistant was there to motivate the children. Since that staff person was merely assisting in the educational process, their salary would have to be commensurate with that type of duty and not classified as an instructional staff member, nor would they need an unrecognized title approval. Ultimately, the issue was whether the person was assisting or was an actual teacher.

Tekel recalled that when she and Balastero met with Heather Mills-Pevonis in February 2006, they talked about the function of the music therapist in the school and it was acknowledged at that time that the music therapist does not teach music but instead assists the classroom teacher and the different therapists and uses music as a modality for instruction. Indeed, she recalls she made it "pretty clear" that the music therapist doesn't teach music; it's just music as a modality that Ms. Mills-Pevonis and she agreed to it. Thus, the music therapist does not teach music, but rather assists the instructional staff by providing activities that are supplemental to and assist in the instructional process.

I **FIND** that the Department's failure to acknowledge that the music therapist is not providing direct instruction, among the functions and responsibilities noted in the job description, is critical in reviewing its determination.

N.J.A.C. 6A:9-2.1 defines a "Paraprofessional" as school aide or classroom aide who **assists** appropriately certified personnel with the supervision of pupil activities.[2] Pursuant to N.J.A.C. 6A:14-4.5(b), a teacher aide may:

> **provide supplementary support** to a student or students with disabilities when the IEP team has determined that the student requires assistance in areas including, but not limited to, the following:
>
> 1. Prompting, cueing and redirecting student participation;
>
> 2. Reinforcing of personal, social, behavioral, and academic learning goals;
>
> 3. Organizing and managing materials and activities; and
>
> 4. Implementation of teacher-designed follow-up and practice activities.
>
> [N.J.A.C. 6A:14-4.5(b) (emphasis added).]

Clearly, what distinguishes a teacher's aide/paraprofessional from a teacher is that the latter is responsible for the direct instruction of students, while a "teacher aide/paraprofessional" merely assists a properly certified professional who is ultimately responsible for supervising students. In Dowding v. Monroe Board of Education, 1990 S.L.D. 1711, 1712, the State Board of Education held

> Whether or not an . . . assignment is a teaching staff assignment requiring an [appropriate] certification 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.

I **FIND** that duties as enumerated in CPL's job description for the music therapist and attested to by Ms. Tekel are more like those of a "teacher aide" or "paraprofessional" than a teacher. They describe support and assistive functions rather than direct instruction. The music therapists do not teach music; but rather assist the instructional staff by providing activities that are supplemental to the instructional process.

I **CONCLUDE** that based on the CPL job description and Tekel's testimony that the duties of the music therapist are such that they do not require an instructional teacher certificate in order to perform their functions.

Coordinator of Instruction

CPL describes the responsibilities for this position as requiring one to monitor and assess the overall environment within each assigned classroom and ensuring the effective delivery of integrated educational and therapeutic services to their optimal potential. Provide support and technical expertise to the instructional team in formulating and implementing strategies to effectively meet the individual needs of each student. Additionally, the coordinator is a liaison between all in-house team members, parents and department coordinators. Finally, the coordinator is required to facilitate the implementation of each student's Individualized Education Program and assure that all support and related services are consistent and complimentary. As coordinator, responsibilities include:

> Maintain(ing) and safeguard(ing) each employee/family/student's right to privacy, respect and confidentiality;
>
> Maintain(ing) ongoing communication with the Principal, Nursing Coordinator, Social Worker, and Parents/Guardians regarding student's educational program;
>
> Assist teachers and therapists in creating an educational environment conducive to student learning and development as well as assist team members in maintaining appropriate,

[2] During the 2004-2005 school year the regulation in effect provided the purpose of a school or classroom aide is to **assist** "in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel . . . ." N.J.A.C. 6:11-4.6 (emphasis added).

useful, and compliant plan books, data sheets, lesson plans, class registers, therapy logs by regular review;

Provide orientation and ongoing support training for all team professional and para-professional staff;

Investigate and recommend conferences and educational seminars for team members . . . ;

Assist team staff in the development and attainment of professional development goals . . . ;

Review and approve purchase orders and check requests relevant to the implementation of individual educational plans . . .;

Assist the Principal and Vice Principal in developing and implementing staff recruitment plans and in the development and implementation of applicable policies and procedures;

Schedule, attend, facilitate and provide documentation on in-house team meetings, progress meetings, IEP planning meetings, and monthly case review meetings regarding status of student's program as well as facilitate and document special interdisciplinary team meetings;

Attend bi-monthly Program Coordination meetings for the purpose of disseminating information, discussing concerns and formulating plans to meet the identified needs of the students;

Track all student specific program recommendations and equipment requests to assure they are carried out in a timely fashion;

Assist in the development and implementation of all Quality Assurance programs, including Middle States Strategic Plans;

Track IEP related services and report all gap s [sic] and or anticipated gaps to Education Plan Coordinator for resolution;

Carry out additional related assignments as requested by the Principal, Vice Principal and/or Executive Director; . . . .

The Committee denied the request for retroactive approval of this position because it was concluded that the position could be fulfilled under an existing title of

"Supervisor of Curriculum and Instruction." Piegari then detailed the individual responsibilities contained in the job description to validate the Committee's decision.

Dr. Centuolo agreed with Pregari's assessment that the job description described a supervisor of instruction's position. CPL requires the coordinators to report to a principal, thus she assumed that it was the supervisor's position at a minimum. Further, she recommended that the position require a supervisor's certificate due to the number of supervisory responsibilities listed in the job description.[3] She recalled telling CPL that based on their description of the title that position didn't require a degree, or it seemed to be an administrative assistant's position. However, the job description was not consistent with CPL's oral representation during their meeting.

However, witness Tekel specifically recalled her meeting with Heather Mills-Pevonis in February 2006 where the functions of the coordinator of instruction were discussed. CPL specified that the coordinator would be engaged in the educational program of each individual student; would coordinate the therapy with the educational process and the IEP.

She further recalled stating that the coordinator of instruction does not supervise or evaluate anybody. Further, as coordinator, she does not formulate the curriculum. Nor does she determine whether the certified staff is retained or renewed. At the meeting, Mills-Pevonis agreed the job title of teacher was appropriate.

CPL contends the supervisor of curriculum and instruction does not supervise nor assist teachers in improving instructional methods and the learning process, but rather provides assistance in the coordination and support of teaching and administrative duties. N.J.A.C. 6A:9-12.3(c) provides:[4]

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[3] For example, the position requires the coordinator to conduct performance appraisals.

[4] During the 2004-2005 school year the regulation in effect provided a supervisor's endorsement is required:

> For supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This

> A supervisor's endorsement is required:
>
> for both supervisors of instruction and athletic directors who do not hold a standard principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.

In Youth Consultation Service, supra, EDU 3576-06, the Department determined that the job description for an unrecognized "Head Teacher" title matched the duties of the recognized supervisor title, which requires a supervisor's certification. However, at the hearing it was established the actual duties and functions of the position differed greatly from the written job description. Ibid. Indeed, the ALJ acknowledged that the references in the job description would reasonably lead to a conclusion of supervisory status without further explanation. However, based on the testimony of the Superintendent, it was concluded that the primary duties involved direct student instruction, which reflected a status of a lead-person rather than that of a supervisor charged with the authority and responsibility for the continuing direction and guidance of the work of instructional personnel. Thus, the ALJ found that the duties correlated to those of certified teachers of the handicapped rather than supervisors and that the lack of a supervisor's certificate was not a basis for disallowing the employees' salaries and fringe benefits. Ibid.

Here, I **FIND** that the duties of the "Coordinator of Instruction" are comparable to the responsibilities of the "Head Teacher" position in Youth Consultation Service, supra. Tekel testified that the function of the coordinator of instruction was to help the educational program of each individual student; to coordinate the therapy with the educational process and the IEP. Additionally, she noted that the coordinator of

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> endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.
>
> [N.J.A.C. 6:11-9.3(c).]

instruction does not supervise or evaluate anybody or get involved in the formulation of curriculum. She does not take part in the hiring process.

Given the job descriptions and Tekel's testimony, I **FIND** that the individual serving in the coordinator of instruction position was not required to possess an administrative certificate with an endorsement as a supervisor as the responsibilities do not reflect a school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. See N.J.A.C. 6A:9-12.3(c).

Based on the record, I **FIND** and **CONCLUDE** that the Department improperly determined that the salaries and fringe benefits of Sclachter, Pellegrino, and Huss were non-allowable costs because the "Music Therapist" and "Coordinator of Instruction" positions were unrecognized job titles; their job responsibilities as written in their respective job descriptions could be fulfilled under existing job titles of music teacher and supervisor of curriculum and instruction; and the aforementioned employees did not hold the requisite certifications.

ORDER

I **ORDER** that the duties of the music therapist correlate to those of a teacher aide or a paraprofessional rather than a teacher and the lack of a teacher's certificate is not a basis for disallowing Sclachter and Pellegrino's salaries and fringe benefits.

I further **ORDER** that the duties of the coordinator of instruction correlate to those of a teacher rather than a supervisor and therefore the lack of a supervisor's certificate is not a basis for disallowing Huss' salary and fringe 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.

June 14, 2010

DATE

IRENE JONES, ALJ

Date Received at Agency: 6/15/10

Date Mailed to Parties: 6/15/10

sej

APPENDIX

WITNESSES

For Petitioner:

Charles Lalewski

Patricia Tekel

For Respondent:

James Verner

Patrick Piegari

Carmen Centuolo

EXHIBITS

For Petitioner:

P-1 Memorandum from R. Rosenberg, dated 6/12/03

P-2 E-mails to/from N. Morfogen and S. Balestero, dated 9/26/05-9/29/05

P-3 E-mails to/from N. Morfogen and S. Ballestero, dated 10/18/05

P-4 Letter from J. Verner to M. LaForge, dated 11/21/05

P-5 Letter from M. LaForge to J. Verner, dated 12/21/05

P-6 Letter from J. Verner to D. Wolfel, dated 12/22/05

P-7 Letter from J. Verner to D. Wolfel, dated 1/25/06

P-8 Handwritten notes of 2/2/06 meeting

P-9 Letters (2) from D. Wolfel, C. Zalewski to J. Verner, dated 2/15/06

P-10 E-mails from J. Verner to C. Centuolo, dated 4/4/06

P-11 E-mails from C. Zalewski to N. Morfogen, dated 4/4/06

P-12 E-mails to/from H. Mills-Pevonis and J. Verner, dated 4/4/06-4/5/06

P-13 E-mails from N. Morfogen to C. Zalewski, dated 4/5/06

P-14 Letter from S. Ballestero to C. Centuolo, dated 4/11/06

P-15 Letter from D. Wolfel to c. Centuolo, dated 6/9/06

P-16 Letter from C. Centuolo to D. Wolfel, dated 6/19/06

P-17 Memorandum from C. Centuolo to P. Tekel, dated 9/11/06
P-18 Memorandum from C. Centuolo to P. Tekel, dated 9/11/06
P-19 Letter from C. Centuolo to P. Tekel, dated 9/11/06
P-20 Letter from J. Verner to D. Wolfel and C. Zalewski, dated 1/10/07
P-21 Letter from J. Verner to D. Wolfel and C. Zalewski, dated 1/10/07
P-22 E-mails to/from H. Mills-Pevonis and J. Verner, dated 1/9/07-1/12/07
P-23 E-mails to/from K. Attwood, J. Verner, C. Centuolo, dated 1/31/07
P-24 Memorandum from D. Wolfel, dated 2/13/07
P-25 Memorandum from D. Wolfel, dated 2/13/07
P-26 Letter from D. Wolfel to K. Attwood, dated 2/17/07
P-27 Letter from R. Cicchino to W. Wolfel, dated 3/8/07
P-28 Letter from R. Cicchino to W. Wolfel, dated 3/23/07
P-30 Letter from D. Wolfel to R. Cicchino, dated 4/4/07
P-31 Letter from D. Wolfel to R. Cicchino, dated 4/4/07
P-32 E-mail from J. Verner to C. Centuolo, dated 4/11/07
P-33 Letter from K. Attwood to D. Wolfel, datdd 4/30/07
P-34 Letter from K. Attwood to D. Wolfel, dated 4/30/07
P-35 E-mails to/from L. McCormick and C. Centuolo, dated 5/16/07
P-36 Letter from D. Wolfel to K. Attwood, dated 6/5/07
P-37 Letter from D. Wolfel to K. Attwood, dated 6/5/07
P-38 Letter from R. Cicchino to D. Wolfel, dated 12/5/07
P-39 Letter from R. Cicchino to D. Wolfel, dated 12/5/07
P-40 Respondent's Answers to petitioner's Interrogatories
P-41 NJDOE List of Recognized Position Titles for 2003-2004
P-42 Jardine Academy Request for Retroactive Approval Comments (undated)
P-43 2003-2004 Expense Spreadsheet
P-44 Music Therapist Job Description
P-45 Coordinator of instruction Job Description

For Respondent:

R-1 Letter dated 11/21/05
R-2 Letter dated 12/21/05

R-3 Letter dated 12/22/05

R-4 Letter dated 1/25/06

R-5 Letter dated 1/10/07

R-6 Letter dated 2/15/06

231-10E

OAL DKT. NO. EDU 6819-10
AGENCY DKT. NO. 135-6/10

SCOTT E. RIXFORD,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law on July 9, 2010 – 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 he concurs with the ALJ – for the reasons stated on the digital recording – that petitioner has not satisfied his burden of establishing the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); most notably, he has failed to demonstrate: irreparable harm, that the legal right is established in his favor, or that he has a likelihood of prevailing on the merits of the underlying controversy.

Accordingly, the instant application for emergent relief is hereby denied. However, notwithstanding that this *pro se* petitioner's petition of appeal was inartfully titled "Petition for Declaratory Ruling and Injunctive Relief," it is clear on its face that the underlying relief being sought by petitioner is a rescinding of the Board's hiring action. Consequently, this matter is being returned to the OAL for such further proceedings as may be required to resolve this underlying issue.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/29/10

Date of Mailing: 7/29/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF
OAL DKT. NO. EDU 6819-10
AGENCY DKT. NO. 135-6/10

SCOTT E. RIXFORD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,

Respondent.

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

Application for Emergent Relief having been filed by Scott E. Rixford, Chief School Administrator for the Borough of Woodland Park appearing pro se and Jeffrey R. Merlino, Esq., appearing on behalf of the Woodland Park Board of Education The undersigned having heard oral argument from both sides and having reviewed briefs submitted by both sides does hereby deny the application for Emergent Relief based on the petitioner's failure to establish any potential for irreparable harm, a failure to establish a likelihood of prevailing on the merits of the underlined claim and an acknowledgement that the Emergent Relief requested, that being a denial of an offer of contracts to seven previously riffed employees of the Board, is moot because all seven employees have already been offered contracts.

It is further **ORDERED** that this matter is being returned to the Commissioner of Education for a determination of whether the contracts offered to the seven full-time employees can be or should be rescinded.

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** 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 14, 2010

Date

JEFFREY A. GERSON, ALJ

sej

cc: Robert Giordano, Clerk

235-10

ANTONIO N. LEWIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured principal, who had most recently been employed by the Board as superintendent – filed a petition and an application for emergent relief, contending that respondent violated his tenure and seniority rights under *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:6-11 when it failed to assign him to a position as principal after the Board declined to renew his contract as superintendent. Emergent relief was denied following oral argument in July 2009, and the parties filed cross-motions for summary decision on the issues.

The ALJ found, *inter alia,* that: respondent Board admitted in its opposition to petitioner's motion for emergent relief that it may be responsible to find a position for petitioner, but in its subsequent filing contends that it owes no duty to Dr. Lewis, and considers him no longer employed by the District; it was stipulated by the parties that petitioner never resigned from his position as principal during his tenure as superintendent and did not otherwise abandon his tenure rights to that position with the District; *N.J.S.A.* 18A:17-20.4 protects a superintendent's tenure rights; and the only way the Board can keep petitioner from a position within its district is to successfully file tenure charges against him. The ALJ concluded that petitioner has tenure rights to a principal's position in the Asbury Park School District and granted his motion for summary decision, ordering the Board to return petitioner to a position for which he is qualified under his principal certificate and to compensate him for back salary and benefits.

Upon comprehensive review, the Commissioner was compelled to concur with the ALJ's conclusion that summary decision is appropriately granted to petitioner, finding that the current applicable law – *N.J.S.A.* 18A:17-20.4 – makes this determination mandatory and not discretionary in nature. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The Commissioner ordered the Board to forthwith reinstate petitioner to a principal position consistent with his tenure and seniority rights and to compensate him for back pay and emoluments from the date of his termination as superintendent of schools to the date of his reinstatement as a principal.

This synopsis is not part of 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 4, 2010

OAL DKT. NO. EDU 8425-09
AGENCY DKT. NO. 164-7/09

ANTONIO N. LEWIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioner's reply thereto – submitted in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

The Board's exceptions – in relevant part – recast and reiterate its arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that these were fully considered and addressed by the ALJ in his Initial Decision, they will not be revisited here.

Upon his comprehensive review, the Commissioner is compelled to concur with the ALJ's conclusion that summary decision is appropriately granted to petitioner. In so determining, the Commissioner is cognizant that current applicable law provides him no recourse in this regard. Specifically, *N.J.S.A.* 18A:17-20.4 – in pertinent part – states:

> ...A superintendent of schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district.

As this provision clearly and unequivocally expressly preserves all tenure rights previously accrued by a contract superintendent promoted from within a district, the result in this matter is mandatory, not discretionary in nature.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. The District is hereby ordered to forthwith reinstate petitioner to a principal position consistent with his tenure/seniority rights and to compensate him for back salary and emoulments from the date of his termination as superintendent of schools on July 1, 2009, to the date of his reinstatement to a principal's position.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|04|10

Date of Mailing: 8|04|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8425-09
AGENCY DKT. NO. 164-7/09

ANTONIO N. LEWIS,
Petitioner,
v.
ASBURY PARK BOARD OF EDUCATION,
Respondent.

Robert T. Pickett, Esq., for petitioner

Michael J. Gross, Esq., for respondent (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: May 20, 2010 Decided: June 21, 2010

BEFORE **RONALD W. REBA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Pursuant to N.J.A.C. 6A:3-1.6, on July 23, 2009, petitioner Antonio Lewis filed a petition of appeal with an application for emergent relief. Petitioner contends that respondent Asbury Park Board of Education (Board or District) violated his tenure and seniority rights under N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11 by failing to assign him

to a position as principal within the Board's jurisdiction after the Board declined to renew his contract as superintendent. The case was transmitted to the Office of Administrative Law (OAL), where it was filed on July 27, 2009. Following oral argument on July 31, 2009, emergent relief was denied on the basis that petitioner could not establish that he would suffer irreparable harm if the requested relief were not granted.

The parties have now filed what I consider to be cross-motions for summary decision on the issues submitted in the original petition of appeal.

FACTUAL DISCUSSION

The petitioner argues that the Asbury Park Board of Education has an affirmative duty to return him to a principal position, for which he is tenured, a fact which has not been refuted by the respondent. In its opposition to the motion for emergent relief, respondent admitted that it may ultimately be responsible to find a position for petitioner or make him financially whole. It now makes the argument that it owes no duty to Dr. Lewis and considers him no longer an employee of the school district.

Antonio Lewis became principal of Asbury Park Middle School in 1992, and acquired tenure as a principal with the Asbury Park School District in 1995. Lewis remained in his principal position until 1999, when he was appointed interim school superintendent for the District. In 2001, Lewis was appointed school superintendent and signed a five-year contract with the District. In 2005, the District rescinded Lewis's five-year contract and the parties entered into a separate four-year contract that ran from 2005 to June 30, 2009. The District declined to renew Lewis's contract as superintendent at the end of that contract, and Lewis was not returned to any position with the District and is not currently on the District's payroll. The parties agree that at no time did Lewis resign his position as principal.

Lewis seeks to be reinstated in his tenured position as principal with the District, and seeks back pay and all benefits to which he would have been entitled had he been reinstated to a principal position at the end of his contract as superintendent, to the date of his reinstatement to a principal position with the District. It is undisputed that the

District currently employs five school principals, two of whom have yet to acquire tenure as principals. Also, the District has recently advertised to replace one of the principals due to an expected retirement.

LEGAL ANALYSIS

The purpose of tenure laws is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)); N.J.S.A. 18A:28-1 to -18; N.J.S.A. 18A:6-10 to -18.1 (Tenure Employees Hearing Law). A tenured teaching staff member may not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after the appropriate procedural requirements under the Tenure Employees Hearing Law have been met.[1] N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10.

In 1991, the Legislature passed and Governor Florio signed into law an act "concerning certain supervisory personnel in local school districts, amending N.J.S.A. 18A:17-15, N.J.S.A. 18A:17-20 and N.J.S.A. 18A:28-5, and supplementing Title 18A of the New Jersey Statutes." L. 1991, c. 267. While that act replaced lifetime tenure with contract tenure for superintendents, N.J.S.A. 18A:17-20.4, which is part of that act, states that "[a] superintendent of schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district." Ibid.

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[1] According to N.J.S.A. 18A:28-9:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Thus, a tenured teaching staff member could also lose his job as a result of a reduction in force.

It is acknowledged by respondent that Lewis did not lose his tenure rights when he was promoted from principal to superintendent by the District. Lewis argues, however, that the District has "de facto dismissed" him as a principal, because he is ready, willing, and able to perform the duties of a principal with the District but the District refuses to place him in a principal position or any other position for which he is qualified. I agree.

The District argues that summary decision should be granted to the District because petitioner had no legal right or entitlement to a principal's position following the natural conclusion of his superintendence. (District's Brief, May 3, 2010, at 2.) However, on August 10, 2009, in response to Lewis's application for emergent relief in this matter, the District stated that, "[i]n fact, as repeatedly acknowledged by [the District], [Lewis] is protected by tenure, and is entitled to some assignment at (or above) his tenured Principal position." (District's Letter Brief, August 10, 2009, at 1.) It appears that the District has assumed inconsistent stances during the course of this matter, taking one position for purposes of Lewis's application for emergent relief and then taking a different position for purposes of the District's motion for summary decision. Such inconsistencies are barred under the doctrine of judicial estoppel, which precludes "a party from asserting a position in a case that contradicts or is inconsistent with a position previously asserted by the party in the case or a related legal proceeding." Tamburelli Properties Ass'n v. Bor. of Cresskill, 308 N.J. Super. 326, 335 (App. Div. 1998). While the District's motion must fail for other reasons, this tribunal uncomfortably notes that the District appears to have taken opposite positions depending on what relief it seeks. While petitioner's' application for emergent relief failed due to his failure to show irreparable harm, this tribunal gave attention to the District's assurance that Lewis "is entitled to some assignment at (or above) his tenured Principal position" in assessing Lewis's right to emergent relief and why it was premature at that time. Had the District taken its present position at the inception of this appeal, all of the issues could have been addressed in a single, financially expeditious cohesive decision instead of duplicating efforts, which is not only unfair to the petitioner, but also to the citizens of Asbury Park and other individuals ultimately affected by this case.

The District argues that Lewis does not possess a seniority right to a principal's position because there has been no reduction in force, and, accordingly, any seniority right Lewis may have had remains inchoate. (District's Brief, May 3, 2010, at 2.) While the District may correctly argue that seniority rights only arise from a reduction of force (commonly referred to as a "RIF") under N.J.S.A. 18A:28-9, N.J.S.A. 18A:28-11, and N.J.A.C. 6A:32-5.1, the tenure laws include only two ways in which a tenured teacher may be removed. The first way is a RIF under N.J.S.A. 18A:28-9 and the second way is through the procedural requirements of the Tenure Employees Hearing Law. A RIF is not at issue here. Thus, I **FIND** that the only way in which the District can keep Lewis from a position with the District is to successfully file tenure charges against him. In the absence of such charges, the District has violated Lewis's tenure rights by failing to place him in a position as principal or another position for which he is qualified. I further **FIND** that the District's argument that seniority rights lay dormant until there is a RIF cannot overcome Lewis's tenure right to a position with the District unless the respondent successfully files tenure charges against Lewis. Again, as the District "emphasized" in its August 10, 2009, Letter Brief, "[Lewis] is protected by tenure, and is entitled to some assignment at (or above) his tenured Principal position."

Finally, the District argues that by operation of N.J.S.A. 18A:17-20.1, Lewis's employment in the District ceased when he was not reappointed to another term, and, accordingly, he is not entitled to claim a principal's position. (District's Brief, May 3, 2010, at 4.) As the District points out, "[i]t is a fundamental principle of statutory construction that courts must look to the plain language of the statute to determine its meaning," and "[w]here the language is clear, the court need not look beyond the statutory terms to determine the legislative intent." (Ibid.) While the District correctly outlines the rules of statutory construction, those same rules work against the District. According to N.J.S.A. 18A:17-20.1, if a school board does not wish to continue to employ a person as superintendent, one way to effect this desire is to give the superintendent proper notice "in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term." Thus, the District argues, Lewis's "employment with [the District] permanently ceased on June 30, 2009, and accordingly, he was not entitled to return to a Principal's

position." (District's Brief, May 3, 2010, at 5.) However, N.J.S.A. 18A:1-1 defines "employment" as including "employment in a position," whereas "employee" includes "the holder of any position or employment." Emphasis added. These definitions make it clear that "employment" in N.J.S.A. 18A:17-20.1 refers to the position of superintendent, and does not affect any tenure rights Lewis has in another position within the District. Indeed, as stipulated by the parties, Lewis never resigned from his position as principal during his tenure as superintendent and did not otherwise abandon his tenure rights to a principal position with the District. As a result, the only way in which Lewis's employment as a principal with the District could "permanently cease" is if the District successfully brings tenure charges against Lewis.

The District's ultimate position is that Lewis's "appointment to Superintendent of Schools was a one way street, precluding him (and any other similarly situated person) from 'coming back down' to a lesser, previously held position." (District's Brief, May 3, 2010, at 2.) However, the law holds otherwise, as N.J.S.A. 18A:17-20.4 protects a superintendent's tenure rights. Indeed, there would be little incentive for a tenured teaching staff member to accept a school board's invitation to ascend to a superintendent's position unless there were safeguards in place that would allow that person the right to return to his or her former position at the end of his or her superintendent's contract. An example would be a recently tenured principal who did not have enough years to retire taking a superintendent's position, and after a brief term he is released by a new school board. Under the District's position this individual is not only without his superintendent's position, but also loses all employment with the district. This could not be what was intended by the framers of the 1991 legislation that eliminated lifetime tenure for superintendents, but provided those who take such a position with the protection of contract tenure and the retention of any tenure rights in a previous position. Thus, a school board cannot so easily remove a tenured teaching staff member who "doesn't work out" as superintendent. Indeed, as stated by the court in Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 298 (App. Div. 1960) (citations omitted), "[t]enure is a status, a protection, not a contract. As a status, tenure protects all teachers who have it, the merely adequate as much as the excellent." While the District exercised its right not to renew Lewis's superintendent contract, Lewis's

tenure rights to a position for which he is qualified with the District remain. Under the facts of this matter, the District must place Lewis in a position for which he is qualified.[2]

The case that I find is most analogous to the instant case, as pointed out by the petitioner, is a 1995 final decision entitled Dunn v. Elizabeth Board of Education, 96 N.J.A.R.2d (EDU) 279. In that case, the commissioner upheld the decision of the ALJ, who ruled that a superintendent could not during his contractual time period be removed by the board and reassigned to an assistant superintendent's position which he formerly held and to which he had tenure. In his decision the commissioner stated:

> Thus, in the present instance, while the board was free to unilaterally relieve petitioner of his duties for the remainder of his contract, it was not free to assign him the duties of Assistant Superintendent instead. Petitioner's Tenure right to that position should he choose to exercise it, will arise upon expiration of his contract.

The commissioner in the Dunn case acknowledged that a superintendent may elect to use his tenure rights to a former position once his contract has expired. I can only conclude from a reading of this case that Dr. Lewis also has this option, which cannot be unilaterally barred by the District.

N.J.A.C. 1:1-12.5 provides that summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). In this case, there are no material facts in dispute. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

[2] After the hearing petitioner forwarded a notice issued by the Asbury Park Board of Education advertising an open principal position. Petitioner has applied for this position, and I bring it out so as to dispel any complaint that Lewis should not bump a sitting principal, tenured or otherwise. The position is open and no sitting principal would be affected if petitioner is appointed to this position.

CONCLUSION

Based on all of the above, I **CONCLUDE** that Dr. Lewis has tenure rights to a principal's position in the Asbury Park school district.

ORDER

The respondent's motion for summary decision is hereby **DENIED**. The petitioner's motion for summary decision is hereby **GRANTED**, to the extent that the District must return him to a position for which he is qualified under his principal certificate and compensate him for back salary and all benefits from the date of his termination as superintendent of schools on July 1, 2009, to the date of his restoration to a principal's position.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 21, 2010
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: 6/22/10

Date Mailed to Parties: 6/23/10

/cad

OAL DKT. NO. EDU 6526-10
AGENCY DKT. NO. 128-6/10

NIRAM, INCORPORATED,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY AND THE BENNETT COMPANY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|04|10
Date of Mailing: 8|04|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 6526-10

AGENCY DKT. NO. 128-6/10

NIRAM, INCORPORATED,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD BERGEN COUNTY AND THE BENNETT COMPANY,

Respondents.

James J. Tarnofsky, Esq., for petitioner Niram Incorporated (Hedinger & Lawless, attorneys)

Jeffrey Merlino, Esq., for respondent Village of Ridgewood Board of Education (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Jeffrey S. Watson, Esq., for respondent The Bennett Group

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the Village of Ridgewood Board of Education's (Board) determination to accept the bid of The Bennett Group (Bennett) for addition and roof

replacement at Hawes Elementary School. On June 23, 2010, petitioner filed a Motion for Emergent Relief/Temporary Restraints to stop the Board from entering into or taking any actions in furtherance of the construction contract with Bennett for Hawes Elementary School, which was scheduled to be heard on June 30, 2010. In support of the motion, petitioner submitted a verified petition, brief, certification of service and certification of Roman Graure, president of Niram Incorporated. Respondents submitted briefs in opposition to the motion, as well as certifications from Frank Bennett, president of Bennett and Anthony Gasparovich, which the undersigned received on June 29, 2010. Oral argument on the motion was held on June 30, 2010.

FACTUAL DISCUSSION

I **FIND** the following to be the **FACTS** of this matter.

In April 2010, Ridgewood advertised bids for an addition and roof replacement project at Hawes Elementary School. The bids were opened on May 27, 2010. Ridgewood determined Bennett to be the lowest responsible bidder, with a bid of $3,718,000. Petitioner was the second lowest bidder with a bid of $3,797,000. Ridgewood awarded the contract to Bennett on June 14, 2010. Bennett listed Reiner Group (Reiner) as its heating, ventilating and air conditioning systems (HVAC) and sheet metal subcontractor. Reiner was prequalified in HVAC before the date of the bid. Reiner was prequalified in sheet metal on June 14, 2010.

The bid specification states that, if the bid is over twenty thousand dollars the bidder and its prime subcontractors must be prequalified prior to the time and date that the bids are received. It then states that the bidder and its subcontractor must be prequalified in one of the following disciplines: General Construction or General Construction/Alterations & Additions, or Plumbing, or HVAC or Electrical or Site work or Roofing Membrane Modified Bitumen or Pile Driving.

The bid specification discusses the pre-qualification of bidders. It states that "all bidders and subcontractors for plumbing and gas fitting work, heating and ventilating

systems and equipment, electrical work, structural steel, and ornamental iron work must be prequalified by NJSDA to trade or work classification and aggregate rating limit, pursuant to N.J.S.A. 18A:7G-33 et seq., on which they submit bonds" The bid specification has a requirement that where any portion of the subcontract costs more than twenty thousand dollars, the subcontractor must be pre-qualified. The bidder must submit documentation in accordance paragraphs A and B of section 32 of the bid specification. The cost of the sheet metal work to be done by Reiner is fifty thousand dollars.

On June 10, 2010, Reiner contacted the Department of treasury to determine what was required to have sheet metal added to the HVAC classification. He submitted information on two recent completed projects and his classification was amended to include sheet metal.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Petitioner claims that Bennett's bid was not responsive because Reiner was not prequalified as a sheet metal subcontractor prior to the time and dates the bids are received, in accordance with the bid specifications. N.J.S.A. 18A:18A-8 (b) provides in part:

> . . . there will be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract the furnishing of plumbing and gas fitting, and all kindred work, and of the heating and ventilating systems and equipment, and electrical work, structural steel and ornamental iron work, each of which subcontractors shall be qualified in accordance with N.J.S.A. 18A:18A-1 et seq.

The statute clearly does not require sheet metal subcontractors to be prequalified. The bid specifications do not explicitly state that sheet metal subcontractors must be prequalified. The Bid specifications stated that, if the subcontractor's work costs over twenty thousand dollars, the subcontractor must be prequalified. There is nothing in the bid that stated the prequalification of the subcontractor must be prior to the date the bid was submitted. That requirement only applies to plumbing and gas fitting, heating and ventilating systems and equipment, electrical work, structural steel and ornamental iron work sub contractors. Reiner was prequalified in sheet metal on June 1, 2010.

Legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency. Meadowbrook Carting Co., Inc., v. Borough of Island Heights, 138 N.J. 307, 314 (1994). While minor or inconsequential discrepancies and technical omissions can be waived, material conditions contained in bidding specifications cannot be waived. Terminal Const. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 411 (1975). New Jersey Courts have developed a two-prong test for determining if a deviation is material: (1) does waiver of such defect deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) does it adversely affect the competitive bidding process by placing a bidder in a position of advantage over other

bidders, or by otherwise undermining the necessary common standard of competition. Meadowbrook Carting, supra, 138 N.J. at 315. The Meadowbrook Court aptly cited from Terminal Const. Corp., supra, regarding the limitation on the doctrine of strict compliance for bids:

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived. 67 N.J. at 412

In this matter, even if the sheet metal subcontractor had to be prequalified prior to the date the bid was submitted, that deficiency would not have constituted a material defect and was waiveable. A waiver does not deprive Ridgewood of the assurance that the contract will be performed in accordance with its requirements. Reiner is now prequalified in sheet metal work and was listed in the bid as the subcontractor who would do the sheet metal work. Bennett was not given an advantage over the other bidders that would not undermine the necessary common standard competition. The bid did not advertise that the sheet metal subcontractor had to be prequalified prior to the date of the bid. In addition, Reiner was the company listed as the sheet metal contractor, and he is now prequalified. The sheet metal work costs fifty thousand dollars. The total bid was 43,718,000.00.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that the legal right underlying his various claims is settled and that he has a likelihood of prevailing on the merits of his claims.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

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

June 30, 2010
DATE

KIMBERLY A. MOSS, ALJ

jb

238-10R

E.P.F., 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.	:	

SYNOPSIS

This residency matter was remanded to the OAL in May 2010. Petitioner filed a *Pro Se* residency appeal, challenging the respondent Board's determination that her niece, M.W., is not entitled to a free public education in the Mt. Olive School District. Petitioner stated that she is M.W.'s guardian, her niece relocated from Florida to live with her because of conflicts with her stepfather and because she missed petitioner and her grandmother, and M.W.'s parents will continue to support her financially. Respondent Board filed a counterclaim seeking payment of tuition for the number of days M.W. attended school in the district. The ALJ determined that M.W. is not entitled to a free public education in Mt. Olive schools, and that the district is entitled to reimbursement for tuition for the period of M.W.'s ineligible attendance at the rate of $75 per day. The Commissioner adopted the findings of the ALJ, but remanded the case to the OAL for factual findings regarding the tuition due to respondent.

On remand, the ALJ found that: M.W. attended school in respondent's district for 34 days, from February 5, 2010 until March 26, 2010; M.W. was not eligible for a free public education in Mt. Olive schools; the per diem tuition rate in Mt. Olive this year is $75; and respondent did not seek pre- or post-judgment interest. The ALJ concluded that the correct amount that the Board can bill E.P.F. for M.W.'s ineligible attendance is $2,550, and ordered petitioner to make payment in this amount within fourteen days of the date of this decision.

Upon review of the supplemented record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and directed petitioner to compensate the Board in accordance with this decision.

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

Mailed 8/05/10

238-10R

OAL DKT. NO. EDU 5428-10
(EDU 1980-10 ON REMAND)
AGENCY DKT. NO. 18-2/10

E.P.F., 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 and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

This residency matter was remanded to the OAL on May 12, 2010 solely for expansion of the record to include evidentiary findings with respect to the amount of the tuition due and owing the Board of Education of Mount Olive as a consequence of minor child, M.W.'s, ineligible attendance in the District's schools. Upon review of the supplemented record, the Commissioner is in accord with the ALJ's conclusion – based upon the certification of Susan M. Decker, the District's Assistant Superintendent for Business – that petitioner must compensate the Board in the amount of $2,550.00 for the period of M.W.'s ineligible attendance in the Board's schools (February 5, 2010 through March 26, 2010, a total of 34 days, @ $75.00 per day).

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein. Petitioner is directed to compensate the Board in accordance with this decision and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/05/10

Date of Mailing: 8/05/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05428-10
AGENCY DKT. NO. 18-2/10
ON REMAND EDU-1980-10

E.P.F., ON BEHALF OF MINOR CHILD, M.W.,

Petitioner,

v.

TOWNSHIP OF MOUNT OLIVE BOARD OF EDUCATION, MORRIS COUNTY,

Respondent.

Kathryn J. Kingree, Esq. for petitioner (Algeier Woodruf, Attorneys at Law, attorneys)

Aaron Mizrahi, Esq. for respondent (Schwartz Simon Edelstein Celso & Zitomer, attorneys)

Record Closed: June 30, 2010 Decided: July 7, 2010

BEFORE **LELAND S. MCGEE, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 1, 2010, Petitioner, E.P.F. filed a pro se residency appeal with the Department of Education challenging respondent Mount Olive Board of Education's ("Respondent" or "District") residency determination pursuant to N.J.S.A. 18A:38-1, and N.J.A.C. 6A:22-3.1 AND 3.2. The contested case was forwarded to the Office of Administrative Law (OAL), where it was filed on March 9, 2010, and docketed as EDU 01980-10 pursuant to N.J.S.A. 52:14B-2(b). A hearing was held on March 25, 2010, on which date the record closed. An Initial Decision was issued on April 5, 2010.

On May 12, 2010, the Commissioner of Education remanded this matter to the OAL because the record contained insufficient evidence concerning the per diem tuition rate, or the number of days chargeable to E.P.F., for the period of M.W.'s ineligible attendance. The matter was transmitted to the OAL on May 24, 2010. By letter dated May 26, 2010, counsel for Respondent provided a Certification from Susan M. Decker, Assistant Superintendent for Business for the District. A telephone conference call was held with the parties on June 23, 2010 to confirm whether additional evidentiary proceedings would be necessary. By letter dated June 23, 2010, the undersigned memorialized the result of conference call. Petitioner stated that she did not wish to have any further evidentiary hearings in this case. She agreed to submit any objections to the Susan M. Decker certification, in writing by June 28, 2010. E.P.F. offered no opposition. On June 30, 2010, the court was advised that E.P.F. was represented by counsel, and a request was made for an extension of time to file an opposition to the certification. A telephone conference was held on July 7, 2010 to determine whether an evidentiary hearing would be necessary. The parties agreed that it would not be necessary and the record closed.

FINDINGS OF FACT

Based on the documents of record, I **FIND**:

1. On or about January 27, 2010, Petitioner's niece, M.W. was denied admission to the District as an affidavit pupil.

2. On February 5, 2010, M.W. was admitted into the school district pursuant to N.J.S.A. 18A:38-1(b) pending the outcome of Petitioner's February 1st appeal.

3. M.W.'s last day of enrollment in the District was March 26, 2010, and she was enrolled for thirty-four (34) days for which she was ineligible.

4. The per diem tuition rate of the Mount Olive School District is seventy-five ($75.00) dollars.

5. Multiplying 34 days by the daily tuition rate of $75.00 results in a tuition bill of $2,550.00 for the 2009-2010 school year.

6. Respondent did not specifically request prejudgment interest in its Motion to Dismiss the Complaint and request for relief, nor did it provide an interest calculation pursuant to N.J.A.C. 6A:3-1.17(a)(1).

7. Respondent did not file a petition for post-judgment interest in accordance with N.J.A.C. 6A:3-1.3 nor did it propose an interest calculation pursuant to N.J.A.C. 6A:3-1.17(a)(2).

CONCLUSIONS AND ORDER

Accordingly, I **CONCLUDE** that the correct amount that the Mount Olive School District can bill E.P.F. for M.W.'s improper attendance at the Mount Olive High School is $2,550.00 without interest.

It is **ORDERED** that E.P.F., within fourteen days of the date of this decision, make payment to the Mount Olive Board of Education in the amount of $2,550.00 unless the parties agree to another payment schedule.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 7, 2010
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency:

July 7, 2010

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 8 2010.
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

OAL DKT. NO. EDU 620-10
(EDU 10129-09 ON REMAND)
AGENCY DKT. NO. 228-9/09

B.S. on behalf of minor child, D.L.S,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner observes that the Attendance and Residency Officer signed the settlement agreement on behalf of the Board. The settlement agreement was not signed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor does the file contain a copy of the Board's resolution approving the settlement and designating the Attendance and Residency Officer to sign the agreement on its behalf. Therefore, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/05/10
Date of Mailing: 8/05/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 620-10

AGENCY DKT. NO. 228-9/09

B.S. o/b/o D.L.S.,

Petitioner,

v.

EWING TOWNSHIP

BOARD OF EDUCATION,

Respondent.

B.S., for petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: June 14, 2010 Decided: June 14, 2010

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 9, 2010, 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 and Release Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

June 14, 2010
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: JUN 24 2010

Date Mailed to Parties: JUN 24 2010
/mev

B.S. o/b/o P.L.S. v. Ewing Bd. of Ed.	OAL DKT. No.: EDU 05 620-20 Agency Ref. No.: 228-9/09 Settlement Agreement

Petitioner, Barbara Seigle, Parent, and the Respondent, Ewing Board of Education, represented by Jeffrey F. Belz, Esquire, having resolved the above referenced petition, hereby agree as follows:

1.) Petitioner shall withdraw P.L.S. from the Ewing school district within 5 days of the last school day of the 2009/2010 school year.

2.) Petitioner shall pay the Ewing Board of Education $3,000.00 for tuition, payable in monthly installments of $50.00 beginning on August 1, 2010 and on the 1st of the month thereafter.

3.) Respondent agrees not to pursue this settlement or any order of the Commissioner approving this settlement as a judgment in the Superior Court so long as Petitioner remains current with the monthly payments. Respondent may pursue a judgment however if Petitioner is more than seven (7) days late on a payment.

4.) This settlement agreement does not represent any admission of liability as the matters at issue

5.) Each party shall be responsible for their own attorney's fees, if any.

Barbara Seigle 6/14/10
Barbara Seigle, Petitioner Dated

[signature] 6/14/10
David Mikalauskas Dated
Ewing Bd. of Education, Respondent

239-10

OAL DKT. NO EDU 10720-09
AGENCY DKT. NO. 307-11/09

IN THE MATTER OF THE TENURE	:	
HEARING OF KURT HALVORSEN,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

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 observes that the President of the Board of Education of the City of Trenton 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 Stipulation of Settlement consistent with the concerns set forth above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/06/10
Date of Mailing: 8/06/10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 10720-09

AGENCY DKT. NO. 307-11/09

IN THE MATTER OF THE TENURE HEARING OF KURT HALVORSEN, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY.

Rocky L. Peterson, Esq., appearing for petitioner, Board of Education, City of Trenton (Hill Wallach, attorneys)

Richard P. Flaum, Esq., appearing for respondent, Kurt Halvorsen, (DiFrancesco, Bateman, Coley,Yospin , Kunzman, Davis and Lehrer, attorneys)

Record Closed: July 2, 2010 Decided: July 9, 2010

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

In this manner, petitioner, the Board of Education of the City of Trenton, Mercer County (hereinafter "Trenton") preferred and filed tenure charges with the Commissioner of Education on November 5, 2009, against respondent Kurt Halvorsen (hereinafter "Halvorsen") in which it charged Halvorsen, a tenured teacher, with

insubordination and unbecoming conduct, as a result of which it sought his removal. He appealed that action. The matter was transmitted to the Office of Administrative Law (hereinafter "OAL") on November 18, 2009, 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. An in-person prehearing conference was held on January 7, 2010, at which time Halvorsen was then represented by Arnold M. Mellk of the firm of Wills, O'Neal and Mellk. The due process hearing was then set to be heard on February 4,5, 8 and 10, 2010 at the OAL, Trenton, New Jersey and a prehearing order relative to same was thereafter issued on January 11, 2010.

On the first scheduled hearing date, the parties orally agreed under oath and on the record to all of the terms of a settlement and which was to be followed up with an appropriate resolution by Trenton thereafter. Edward A. Cridge, Esq, appeared on behalf of the Wills firm at that time with Halverson. However, when the executed agreement was not forthcoming, Trenton moved to have the terms of the agreement enforced, which motion was stayed pending the substitution of counsel on behalf of Halvorsen after the Wills firm moved for withdrawal on his behalf on April 15, 2010. At the same time, although the substitution of attorney was granted by this tribunal, it was also ordered that any entitlement to back pay would be stayed and that he would remain in no-pay status until a final administrative decision on the merits of the pending tenure charges due to the delays occasioned by him in this matter. Halverson and his new counsel, whom he ultimately retained on April 23, 2010, were invited to appear at the OAL to answer the motion for enforcement by Trenton on April 26, 2010. At that time and instead of pursuing that motion, the parties met and agreed to resolve all disputed matters, subject once again to obtaining all of the requisite signatures and the Board resolution by Trenton. Upon receipt of the fully executed original agreement, which included the signatures of the Trenton board President and the Trenton board Secretary (J-1), on July 2, 2010, 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.

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

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

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

July 9, 2010
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: JUL 12 2010

Date Mailed to Parties: JUL 12 2010

/mev

EXHIBITS

Jointly submitted

J-1 Settlement Agreement received at the OAL on July 2, 2010

P-1 in evidence 7-2-10 SB

HILL WALLACK LLP
202 Carnegie Center
CN 5226
Princeton, NJ 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF TENURE CHARGES AGAINST KURT HALVORSEN, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	OAL DOCKET NO.: EDUTH 10720-2009S AGENCY REF. NO.: 307-11/09

STIPULATION OF SETTLEMENT

WHEREAS, the Board of Education of the City of Trenton ("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 Trenton Public School District; and

WHEREAS, Kurt Halvorsen ("Halvorsen") is a tenured teacher employed by the Trenton Public Schools; and

WHEREAS, the Board drafted a Statement of Tenure Charges and Statement of Evidence against Halvorsen dated August 18, 2009, attached hereto as Exhibit A, with the charges being based upon Insubordination and Unbecoming Conduct; and

WHEREAS, a copy of the Statement of Tenure Charges and Statement of Evidence were forwarded by Jayne S. Howard, Business Administrator and Board Secretary to Halvorsen via regular and certified mail, return receipt requested under cover dated August 18, 2009, attached hereto as Exhibit B; and

WHEREAS, the cover letter from Ms. Howard to Halvorsen dated August 18, 2009 provided Halvorsen with the required fifteen (15) day period to respond to the charges in writing and notified him of his right to attend the meeting of the Trenton Board of Education on September 29, 2009, at which time the

Board would discuss the charges and provide Halvorsen with an opportunity to respond to the Board directly; and

WHEREAS, Halvorsen failed to respond to the charges in writing within the fifteen (15) day period and failed to attend the Board meeting on September 29, 2009; and

WHEREAS, on October 16, 2009, the Board passed a Resolution and executed a Certificate of Determination in approval of a Statement of Tenure Charges and Statement of Evidence against Halvorsen, attached hereto as Exhibit C; and

WHEREAS, the Statement of Tenure Charges and Statement of Evidence were filed with the Commissioner of Education under cover dated November 5, 2009, attached hereto as Exhibit D, under Docket Number EDUTH 10720-2009S; and

WHEREAS, Halvorsen, through counsel, filed an Answer to the Statement of Tenure Charges dated November 10, 2009, attached hereto as Exhibit E, generally denying all allegations; and

WHEREAS, the parties have exchanged discovery; and

WHEREAS, said discovery demonstrated that the tenure charges concerned allegations that Halvorsen did not complete mandatory requirements of teachers regarding the academic assessment of students, and not any allegation of malicious conduct, nor conduct involving moral turpitude; 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 and the public interest, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Commissioner of Education; and

WHEREAS, Halvorsen has been advised by counsel of the Commissioner's sole discretion to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate; and

WHEREAS, Halvorsen will submit a letter of resignation of his employment to the Board, effective February 8, 2010, upon execution of this agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Dismissal of All Claims

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The parties agree and consent that upon approval of this Stipulation of Settlement by the Commissioner, the within tenure charges shall be dismissed. Halvorsen agrees to resign from his employment with the Board effective upon the adoption of this agreement by the Board of Education. Halvorsen further waives any right to, and will not, seek reinstatement in his tenured position, and releases any and all claims that could have been raised in the tenure proceeding. Halvorsen agrees that he will not apply for any future position of employment with the Board. Halvorsen further acknowledges that he is permitted to keep and negotiate four (4) payroll checks that he erroneously received from the Board subsequent to the filing of the tenure charges against him. However, Halvorsen and the Board agree that the 120-day period of unpaid suspension directly following the filing of tenure charges will now begin on December 22, 2009 instead of on November 6, 2009. The Board has no objection to, and will not oppose, any application by Halvorsen for unemployment benefits. The Board agrees to fulfill its obligations under applicable law with respect to Halvorsen's COBRA rights and benefits. 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. Public Interest

Settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation where all parties agree to these terms of settlement. The parties are in agreement that it is in the best interests of all parties for Halvorsen to resign from his employment with the Board. Therefore, the parties agree to move forward with a prompt settlement, which causes the Board no financial prejudice, and which avoids further unnecessary litigation.

3. No Admission

The execution of this agreement does not constitute any admission by either party as to the nature, quality, veracity, or demonstrability at trial of the allegations set forth in the tenure charges. The parties mutually acknowledge that this

matter has been litigated and resolved in good faith, and agree that Halvorsen is resigning from his employment with the Board in good standing. The Board shall respond to any inquiry by a prospective employer by providing Halvorsen's dates of employment, position, and salary history, and shall indicate that his reason for leaving his employment was "resignation in good standing."

4. Board Approval

The Board President has been duly authorized by the Board at its Executive Session on February 8, 2010 to execute this Agreement on behalf of the Board of Education. The Board will execute a Resolution adopting the terms of settlement shortly after the February 8th Board Meeting.

5. Assent to Terms

Both parties hereby acknowledge having entered into this agreement with a full understanding of their rights and that they were fully informed of the implications of this agreement by legal counsel. Neither party enters into this agreement under duress. Both parties enter this agreement by their free will and volition. Both parties were given the opportunity to fully consider the terms and conditions of this settlement. Either party may revoke their consent to this Stipulation of Settlement within seven (7) days from the execution thereof by delivering written notification of revocation to the other party. It is understood that if this agreement is revoked, it will not be effective or enforceable. By signing this Stipulation of Settlement, Halvorsen acknowledges the Commissioner's sole discretion to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

6. Entire Agreement

This agreement represents the entire understanding of the parties as to the settlement 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.

7. 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 parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

PETITIONER

TRENTON BOARD OF EDUCATION

By: Nicola Tatum
~~L. DIANE BANKS CAMPBELL~~
Board President NICOLA TATUM

DATED:

RESPONDENT

KURT HALVORSEN

By: Kurt Halvorsen
KURT HALVORSEN

DATED: May 25, 2010

ATTEST:

By: Jayne S Howard
JAYNE S. HOWARD, Board Secretary

DATED: June 28, 2010

TRENTON BOARD OF EDUCATION

All Together — Better!

Rodney S. Lofton
Superintendent of Schools

Kathleen Smallwood Johnson, Esq.
Executive Director of Human Resources, Negotiations, and Legal Affairs
609.656.5459 • 609.989.2682 fax
kjohnson@trenton.k12.nj.us

May 13, 2010

Mr. Kurt Halverson
2219 Old York Road
Bordentown, NJ 08505

Re: Health Benefits

This letter serves to clarify your eligibility to the health benefits you hold pursuant to your employment with the Trenton Board of Education. You have entered into a Stipulation of Settlement with the Trenton Board of Education regarding your termination of employment. Pursuant to the settlement, you have resigned from your employment effective February 8, 2010. However, due to the nature of the settlement negotiations, the finalization of settlement terms and final execution of the Stipulation of Settlement, you remained suspended from your employment through April 26, 2010. Therefore, you are entitled to medical insurance coverage under the benefits policy you had as an employee of the Trenton Board of Education through April 26, 2010.

Sincerely,

Kathleen Smallwood Johnson, Esq.

Cc.
Jayne Howard, Business Administrator

HILL WALLACK LLP
202 Carnegie Center
Princeton, New Jersey 08543-5226
(609) 924-0808
Attorneys for Petitioner Trenton Board of Education

IN THE MATTER OF TENURE CHARGES AGAINST KURT HALVORSEN, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO.: AGENCY REF. NO.: **STATEMENT OF TENURE CHARGES**

The undersigned, Kathleen Smallwood Johnson, Executive Director of Human Resources, Negotiations and Legal Affairs for the Board of Education of the City of Trenton, County of Mercer, State of New Jersey ("Petitioner"), pursuant to N.J.S.A. 18A:6-10 and 18A:6-11, hereby institutes the following tenure charges against Board of Education of the City of Trenton tenured teacher, Kurt Halvorsen ("Respondent") for Insubordination and Unbecoming Conduct.

CHARGE ONE
INSUBORDINATION

1. Respondent began employment with Petitioner on September 1, 1995 for the 1995-96 school year.

2. Respondent was appointed as a Teacher of Social Studies/Language Arts Grade 7 at the King Middle School.

3. On September 1, 1996, Respondent was reassigned to teach Language Arts Grade 8 at the King Middle School.

4. On September 1, 1997, Respondent was assigned to Washington Elementary School to the position of Grade 2 Teacher.

5. Respondent taught at the Washington Elementary School for the 2007-08 and 2008-09 school years.

6. On November 30, 2007, Respondent failed to submit his grade book for the 2007-08 school year to Gloria Tunstall, Principal of Washington Elementary School as required by school policy.

7. On December 5, 2007, Respondent was issued a written reminder to submit his grade book by December 6, 2007. Respondent failed to comply with this request.

8. On December 10 and 11, 2007, Mrs. Tunstall issued additional written requests for Respondent's grade book. Respondent did not comply with these requests.

9. On December 14, 2007, Mrs. Tunstall met with Respondent and his TEA representative to discuss the reason why Respondent had not submitted his grade book. for the 2007-08 school year.

10. On January 7, 2008, January 24, 2008 and March 5, 2008, Mrs. Tunstall made additional requests and inquiries relating to Respondent's 2007-08 grade book.. Respondent did not comply with any of these requests.

11. On November 10, 2008, Mrs. Tunstall issued Respondent a memo requesting his grade book for the 2008-09 school year. Respondent was noncompliant with the request.

12. On January 22, and January 30, 2009, Mrs. Tunstall made additional written requests to Respondent for his 2008-2009 grade book. Again, Respondent did not comply with the request.

13. On February 26, 2009, Mrs. Tunstall met with Respondent and his TEA representative to discuss the reason why Respondent had not submitted his grade book for the 2008-09 school year.

14. To date, Respondent has not provided his grade books for either the 2007-08 or 2008-09 school years.

WHEREFORE, the Respondent should be terminated for Insubordination and should also be suspended without pay for 120 days after certification of the charges in accordance with N.J.S.A. 18A:6-14.

CHARGE TWO
UNBECOMING CONDUCT

1. Respondent began employment with Petitioner on September 1, 1995 for the 1995-96 school year.

2. Respondent was appointed as a Teacher of Social Studies/Language Arts Grade 7 at the King Middle School.

3. On September 1, 1996, Respondent was reassigned to teach Language Arts Grade 8 at the King Middle School.

4. On September 1, 1997, Respondent was assigned to Washington Elementary School to the position of Grade 2 Teacher.

5. Respondent taught at the Washington Elementary School for the 2006-07 and 2007-08 school years.

6. On November 30, 2007, Respondent failed to submit his grade book for the 2007-08 school year to Gloria Tunstall, Principal of Washington Elementary School as required by school policy.

7. On December 5, 2007, Respondent was issued a written reminder to submit his grade book by December 6, 2007. Respondent failed to comply with this request.

8. On December 10 and 11, 2007, Mrs. Tunstall issued additional requests for Respondent's grade book. Respondent did not comply with either of these requests.

9. On December 14, 2007, Mrs. Tunstall met with Respondent and his TEA representative to discuss reason why Respondent had not submitted his grade book. for the 2007-08 school year.

10. On January 7, 2008, January 24, 2008 and March 5, 2008, Mrs. Tunstall made additional requests and inquiries relating to Respondent's grade book. Respondent has not complied with any of these requests.

11. On November 10, 2008, Mrs. Tunstall issued Respondent a written request for his grade book for the 2008-09 school year. Respondent was noncompliant with the request.

12. On January 22, and January 30, 2009, Mrs. Tunstall made additional written requests to Respondent for his 2008-09 grade book. Again, Respondent did not comply with the requests.

13. On February 26, 2009, Mrs. Tunstall met with Respondent and his TEA representative to discuss the reason why Respondent had not submitted his grade book. for the 2008-2009 school year.

14. To date, Respondent had not provided his grade books for either the 2007-08 or 2008-09 school years.

WHEREFORE, the Respondent should be terminated for Unbecoming Conduct and should also be suspended without pay for 120 days after certification of the charges in accordance with N.J.S.A. 18A:6-14.

Kathleen Smallwood Johnson
Executive Director of Human
Resources, Negotiations and Legal
Affairs, Trenton Board of Education

Subscribed and sworn to
before me this 18 day
of August, 2009

Kenneth A. Skroumbelos
Attorney at Law
State of New Jersey

OAL DKT. NO. EDU 4192-10
(EDU 371-10 ON REMAND)
AGENCY DKT. NO. 6-1/10

T.T. and I.D., on behalf of minor child, D.T.,	:	
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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|06|10

Date of Mailing: 8|06|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4192-10

AGENCY DKT. NO. 6-1/10

(ON REMAND EDU 371-10)

T.T. and I.D. o/b/o D.T.,

Petitioners,

v.

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

Respondent.

T.T. and I.D., petitioners, pro se

William R. Burns, Esq., for the respondent (Destribats, Campbell, Magee, Staub & Burns, attorneys)

Record Closed: July 2, 2010 Decided: July 2, 2010

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 29, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

1. The respondent withdraws its claim against I.D. and the settlement applies to remaining petitioner T.T.

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

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.

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 2, 2010
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: JUL 12 2010

Date Mailed to Parties: JUL 12 2010

/cad

7/2/10
T.T. & I.D.
O/B/O D.T.

Petitioner

v.

Hamilton Township
Board of Education

Respondent.

Before Commissioner
of Education of NJ

Agency-6-1/10
EDU-00371-10

Settlement
Agreement, Default
Judgment, Dismissal
& Release

INT
T.T

The petitioners Tiasha Tyson, (Mother) Pro Se & Irvin Davis (Father) Pro Se appearing & Hamilton Township Board of Education by & through their Attorney William R. Burns, Esq of the Firm of Desteibats Campbell Magee Staub & Burns, LLC. Do hereby Agree & Stipulate to the Following:

A) The petitioners agrees to withdrawal and dismiss Appeal EDU 371-10, 6-1/10 in the above captioned T.T & I.D O/BO D.T. Said petition is hereby withdrawn

B) The HTBE agrees that I.D. is removed from this action & is not a party to this agreement. T.T agrees to be solely responsible for the amount of Restitution to the District.

C) T.T. shall pay the HTBE the sum of $6500.00 (six thousand five hundred) Dollars less $750 for payment received for a total due of $ ~~[illegible]~~ ~~INT $ 750 $ 5750~~. Said payments to be made as follows:

D) $100.00 (one-hundred) Dollars a month w/ 1st payment due Sept ~~August~~ 1, 2010 ~~until~~ & every month thereafter till the remaining $ ~~5750~~ is paid or until decision of Commissioner is received whichever is first

D) If T.T. fails to make two consecutive payments a default civil judgment shall be entered against T.T. in the amount of $ 8000.00 minus any payments received plus costs & Attorney Fees

E) So long as timely payment are made School Records and diplomas shall not be withheld. If two payments are missed School Records shall be withheld until the full payment is received ($6500.00) if a default judgment is entered the full amount shall be $13,000.00

F) The Reasons for this Agreement were placed on the record on 7/2/2010 befor Judge Reba

G) No other promises or agreements have been made, this 4 page Agreent w/ the record established on 7/2/2010 is the totality of the Agreement between the parties

H) ~~##~~ I.D. placed on the record that his petition is withdrawn

I) HTBE shall not seek contribution from I.D.

I.I. INT

INT

5) All parties freely and voluntarily enter into this agreement w/o duress of coercion no other promises & no threats have been made

Petition OAL DKT - 371-10
Agency Docket 6-1/10 is hereby withdrawn

Tiasha Tyson 7-2-10
Tiasha Tyson - Petitioner Date

William R Burns 7/2/10
William R. Burns Date
Board Attorney HTBE

Michael Gilbert 7/2/10
Michael Gilbert
HTBE

And as for the the withdrawal of the Petition only, for the reasons placed on the record only

The Honorable Ronald W Reba J. O.A.L. 7/2/10
The Honorable Ronald W Reba J. O.A.L. Date

And for the reasons placed on the Record.

234-10

IN THE MATTER OF THE TENURE	:	
HEARING OF CAROL ZIZNEWSKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EDISON, MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

The petitioning Board certified charges of insubordination and conduct unbecoming against respondent – a tenured elementary teacher and reading specialist – for: failing to provide services to her students, engaging in improper conduct toward other staff members and supervisors, and disregarding administrative directives and Board policies. The extensive record of this matter includes transcripts of 43 days of hearing at the OAL, the testimony of 22 witnesses, and 193 exhibits from the petitioning Board documenting multiple incidents of harassment and intimidating and threatening behavior demonstrated by respondent against her coworkers, as well as an on-going pattern of defiant behavior and disrespectful attitude toward respondent's building principal. Respondent denied the charges.

The ALJ found, *inter alia,* that: the prolonged and unusual number of hearing dates in this matter afforded the parties exhaustive opportunity to fully present their cases; respondent's claim that she is exempt from the tenure statute as it applies to teachers because she was a reading specialist is without merit; the Board's witnesses presented credible testimony, amply supported by documentation, while respondent's testimony was self-serving, contradictory, and not credible; respondent failed to follow district policies regarding Basic Skills and ESL instruction, thereby denying services to children in need; and overwhelming evidence supports the Board's contention that respondent, over many years, engaged in repeated and unprovoked verbal abuse and intimidation against co-workers and supervisors, creating a hostile work environment. The ALJ concluded that the Board has carried its burden to prove the charges against respondent, and ordered her dismissed and removed from tenured employment.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. Respondent was dismissed from her tenured employment, and the matter transmitted to the State Board of Examiners 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.

Mailed 8/03/10

234-10

OAL DKT. NO. EDU 4727-08
AGENCY DKT NO. 153-5/08

IN THE MATTER OF THE TENURE	:	
HEARING OF CAROL ZIZNEWSKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EDISON, MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent and the Board of Education (Board), and the Board's reply to respondent's exceptions.[1]

The respondent's exceptions substantially reiterate the substance of her post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously sustained the Board's charges. Respondent asserts that: 1) the ALJ erred in concluding that the respondent willfully refused to provide services to students; 2) the ALJ erred in finding respondent guilty of other instances of unbecoming conduct; 3) the ALJ erred in finding that respondent was guilty of insubordination; 4) the tenure charges filed against respondent were technically deficient; and 5) the taking of respondent's tenure is too severe a penalty. Respondent generally maintains that she never

[1] Subsequent to her counsel's submission of respondent's exceptions on May 19, 2010, Ms. Ziznewski submitted a letter to the Commissioner dated June 22, 2010, attempting to appeal the ALJ's April 1, 2010 decision denying respondent's motion to be relieved as counsel. Any appeal of the ALJ's denial of the motion to be relieved of counsel should have been made to the Office of Administrative Law as an interlocutory appeal pursuant to *N.J.A.C.* 1:1-14.10(j)5. It should also be noted that correspondence from individuals who are represented by an attorney is not permitted. Therefore, the Commissioner did not consider Ms. Ziznewski's June 22, 2010 letter.

refused to provide basic skills instruction to any students during her employment as a reading specialist. In her exceptions, respondent also points out that she has received positive evaluations and that she was never warned that her conduct was inappropriate. Respondent further suggests that the tenure charges were only brought against her because she challenged educational decisions made with respect to certain students, and she exercised her personal rights in previous disputes with the school district.

The Board's reply also reiterates the positions advanced in its post-hearing submission at the OAL and in its original exceptions, which urged the adoption of the Initial Decision. In its reply, the Board again cited examples of students who were refused basic skills instruction by the respondent. The Board further emphasized respondent's numerous acts of inappropriate conduct towards her colleagues and supervisors that constitute unbecoming conduct and insubordination. In reply, the Board also contends that respondent's exceptions are a distorted narrative of the 2006-2007 and 2007-2008 school years at John Marshall Elementary School.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the 43 hearing dates conducted at the OAL between September 2, 2008 and December 15, 2009, the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct and insubordination. As a threshold matter, the Commissioner agrees with the ALJ that respondent's argument that the tenure charges were deficient because the charges only named her as a teacher as opposed to a reading specialist is without merit. For purposes of a violation of the tenure removal statute, *N.J.S.A.* 18A:6-10, it is irrelevant whether respondent had tenure as both a reading specialist and a teacher.

The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by him in weighing the testimony and evidence, and in concluding that the record overall overwhelmingly supported the Board's charges. Notwithstanding respondent's contentions to the contrary, the Commissioner finds no basis in the record, which includes transcripts of all 43 days of hearing, to reject either the ALJ's recitations of testimony or his determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner also finds that 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 insubordinate and unbecoming conduct to be fully supported by the record and consistent with applicable law.

The extensive record includes credible evidence of multiple confrontations that the respondent had with other staff members, at times in front of the students, during which respondent engaged in loud, intimidating and threatening behavior that created an uncomfortable and tense work environment. The Board also proved that respondent engaged in an on-going pattern of exhibiting a defiant and disrespectful attitude toward the authority of her building principal. The details and history of respondent's inappropriate behavior towards other teachers, supervisors and school principals that amounted to unbecoming conduct are extensively outlined in the Initial Decision and need not be repeated here.

With respect to her performance, respondent repeatedly refused to conform to the overall district policy of balanced literacy, and instead continued to maintain her own method of teaching. Additionally, there were several documented incidents of unbecoming conduct including, respondent's failure to complete the appropriate reading assessments; the willful failure to provide basic skills services to certain students; and a total inability to work with the classroom teachers to properly identify, service and help those students in need of basic skills instruction. It is clear from the record that because of respondent's conduct the basic skills program was not being efficiently and effectively implemented at the John Marshall School. Finally, respondent routinely disregarded requests of her supervisors and boldly refused to even accept that the elementary supervisors were her supervisors, despite the fact that the administration repeatedly informed respondent that the elementary supervisors were indeed her direct supervisors. This type of behavior by a teaching staff member undoubtedly amounts to unbecoming and insubordinate conduct that cannot be tolerated.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that the "[f]actors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the individual's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner October 14, 1997, slip. op. at 32, *citing In re Hearing of Ostergren, Franklin School District*, 1966 *S.L.D.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967). It is also well 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)

The Commissioner recognizes that the charges in this matter are serious in nature and finds that the inappropriate behavior of respondent necessitates the termination of her employment. Respondent's unbecoming conduct and insubordination was not the result of an isolated incident, but rather a pattern of egregious conduct that escalated during the 2006-07 and 2007-08 school years which resulted in a hostile, uncomfortable environment at the John Marshall Elementary School. The record in this case is overflowing with examples of unbecoming conduct and insubordination, but the Commissioner finds it most troubling that respondent's attitude, and repeated failure to adhere to district policy, was detrimental to the students who were in need of basic skills instruction.

The record also demonstrates that respondent has been unwilling or unable to improve her inappropriate behavior for the betterment of the school environment. Her responses to the charges against her range from complete denial of the alleged behavior to allegations that such behavior was inconsequential in nature and/or provoked by others, a position which is completely inconsistent with the testimonial and documentary evidence. Finally, the Commissioner does not find that the record before him provides any indication that the respondent will improve her interpersonal relationships with fellow staff members, yield to the

authority of her building principal without continued conflict, or adhere to the mandated procedures and policies regarding the basic skills program. The Commissioner considered respondent's extended employment with the District, and nonetheless determines that the incidents proven to have occurred demonstrate that she is unfit to remain in her position. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); *aff'd* 131 *N.J.L.* 326 (*E. & A.* 1944).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent is hereby dismissed from her tenured position with the Edison Township School District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/03/10

Date of Mailing: 8/03/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4727-08
AGENCY DKT. 153-5/08

IN THE MATTER OF THE TENURE HEARING OF CAROL ZIZNEWSKI, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Viola S. Lordi, Esq., appearing for petitioner, Edison Township Board of Education, (Wilentz, Goldman and Spitzer, attorneys)

Philip Feintuch, Esq., appearing for respondent, Carol Ziznewski, (Feintuch, Porwich and Feintuch, attorneys)

Record Closed: March 24, 2010 Decided: May 5, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, Petitioner, the Edison Board of Education (hereinafter " Edison" or the 'Board") charges respondent, Carol Ziznewski (hereinafter "Ziznewski") a tenured teacher, with unbecoming conduct and insubordination and seeks her removal. Ziznewski appealed the action.

This matter was transmitted to the Office of Administrative Law ("OAL") on June 18, 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. It was assigned to this administrative law judge on June 23, 2008. On July 9, 2008, an in-person prehearing conference was scheduled and held in the above captioned matter, after which, by agreement, the case was scheduled for hearing and to be heard on September 2, 9, 10 and 12, 2008 at the OAL, Mercerville, New Jersey. A prehearing order was issued on the same day. Notwithstanding the specific agreement of the parties regarding the scheduling of the matter, on the first day of hearing on September 2, however, the parties advised that they needed five or six additional dates for hearing, and, accordingly, the following dates were cleared on this ALJ's calendar, offered, added and agreed to, to wit: October 17 and 27 and November 13, 21 and 26, 2008. (The date of October 16, 2008, was also offered but rejected by respondent's counsel due to two older matters he had scheduled at OAL-Newark for the same day.) On the next scheduled date of September 9, however, the parties further advised that, in addition to the previously requested six additional days, they would need six additional days in order to complete the hearing. As a result, the following additional dates were secured and agreed to at that time: December 9, 16 and 19, 2008, as well as January 21, 22 and 23, 2009, it being specifically understood and agreed to by the parties that the entire matter would have to be concluded within that extended time frame. The date of Decemeber 19, 2008, was later adjourned at the request of the parties due to inclement weather (ice conditions) in Northern New Jersey, from which they both traveled. The parties were further cautioned to schedule and conduct their remaining examinations in accordance with that extended time frame. However, they failed to meet that timeline and instead requested further additional time to complete this matter. Thus, while this tribunal was acutely concerned about the length of time it took the parties to present this matter, it reluctantly asceded to the requests of the parties and scheduled the matter for the following additional dates: March 2 (adjourned on the hearing date at the request of the parties due to a "nor'easter" snow storm), March 3, 4, 5, 6 24, 25 and April 20, 21, 22, 23, 24, 28 and 30, May 6, 19, 20, August 14, 18, 19, and 20, September 2, 17 and 22, 2009. It is noted that this tribunal had offered the additional dates of June 1, 2 and 10, 2009, as further hearing dates, all of which were rejected by respondent's counsel who was

vacationing until June 12, 2009. Thereafter, this tribunal attempted to provide further June dates but was unable to do so due to vacation plans of petitioner's counsel. The scheduled date of September 23, 2009, was adjourned in advance on the morning of the hearing due to the illness of Board's counsel. It was rescheduled and heard on October 5, 2009. The next scheduled date of October 8, 2009, was adjourned in advance on October 6, 2009 due to the untimely and tragic death of the daughter of respondent's counsel. The additional scheduled dates of October 9 and 16 were adjourned at the same time due to the same request. The matter reconvened and was heard on November 4, 2009. The next scheduled dates of November 13 and 17, 2009, were adjourned in advance on November 12, 2009, due to the illness of Ziznewski. The matter was continued and heard on November 23, 24 and 30 and December 2 and 15, 2009.

At the conclusion of the testimony on December 15, 2009, the parties sought transcripts in accordance with statute. However, upon their receipt of those transcripts, the parties then advised that there were significant errors in a number of them which required correction by the transcribing agency, after which such correction on February 23, 2010, the parties were given until March 24, 2010, to submit their post-hearing briefs, since that date was extended under the 30 day rule by one day at the request of the Board's attorney, without objection from opposing counsel, when it was represented that the initial submission on behalf of respondent had not been received by Board's counsel in accordance with the original deadline. Although this understanding was apparently an error in the office of Board's counsel and that respondent counsel's brief was actually timely delivered to that office and was subsequently reconciled by the parties, the final reply response by respondent was nonetheless not received until March 24, 2010, pursuant to the acquiesced deadline. Upon receipt of those briefs at that time, the hearing record closed on March 24, 2010.

JOINT STIPULATION OF FACTS

At the commencement of the hearing on September 2, 2008, the following Stipulations of Facts was presented by the parties (J-1):

1. Ziznewski earned her bachelor's degree from Kean College in 1973.
2. Ziznewski earned her master's degrees from Kean College in 1976 and 1994.
3. Ziznewski has elementary certification, reading specialist certification, supervisor certification, and a certificate of eligibility to be a principal.
4. Ziznewski has served as a teaching staff member in the Edison Township Public Schools during the period from 1973 to the present.
5. Ziznewski was assigned to Lincoln Elementary School and James Madison Primary School as a reading specialist from January, 1993 June, 1990.
6. Ziznewski was assigned to John Marshall Elementary School as a reading specialist for the 1990-1991 school year.
7. Ziznewski was assigned to James Monroe Elementary School and the Benjamin Franklin Elementary School as a reading specialist for the 1991-1992 school year.
8. Ziznewski was assigned to James Monroe Elementary School as a third grade teacher for the 1992-1993 and 1993-1994 school years.
9. Ziznewski was assigned to Washington Elementary School as a reading specialist from the 1994-1995 and 1995-1996 school years.
10. Ziznewski was assigned to James Monroe Elementary School and Benjamin Franklin Elementary School as a reading specialist for the 1996-1997 school year.
11. Ziznewski was assigned to Lindeneau Elementary School and Lincoln Elementary School as a reading specialist for the 1997-1998 school year.
12. Ziznewski was assigned to Lincoln Elementary School and John Marshall Elementary School as a reading specialist from the 1998-1999 school year to the 2000-2001 school year.
13. Ziznewski was assigned to John Marshall Elementary School as a reading specialist from the 2004-2005 school year to the 2007-2008 school year.

TESTIMONY OF THE WITNESSES

Twenty two witnesses testified in this matter and their relevant testimonies are summarized as follows.

Rosanne Traficante, Ed.D.

Rosanne Traficante, Ed.D., was employed at the time of the commencement of the hearing by Edison as the Assistant Superintendent for Curriculum and Instruction, which title she had held since 2004. She has since retired but remained the authorized liaison for Edison during the course of the hearing. She received her undergraduate degree in English from Immaculata University and her certification in secondary education in 1973, her Master's degree in educational theory from Rutgers University in 1985, and her Doctorate in Education from Rutgers University in 1993.

She began her employment as a teacher of English in the Elizabeth school district in 1974 and served as a curriculum resource teacher there between 1980 through 1985. She was a supervisor of English in the Marlboro school system between 1985 to 1988 and an assistant principal at Howell High School between 1988 and 1993. She then commenced her employment at Edison as a middle school principal at the Woodrow Wilson School (grades 6 through 8) before assuming her current role in 2004. She possesses New Jersey certifications in the areas of English, supervisor and principal.

During the course of her doctoral program, which consisted of inter disciplinary subjects including anthropology,sociology, philosophy and language arts, she became interested in language acquisition, i.e., how we use it and how we teach it. The previous methodology of teaching in the academic area was known as "product teaching", which focused on the use of a single course of instruction to be used by the entire class, such as the use of a single novel to be utilized by the entire class on a uniform basis. She noted that a paradigm shift occurred at Edison which has since embraced student centered approach to learning, otherwise known as "process teaching." In that methodology, instruction occurs at the level of the student and which is at his or her own individual level. She indicated that Edison has adopted and now soley espouses the process method, which occurs and includes an assessment of each child by reading specialists. The teachers in Edison have been provided with instruction

regarding "balanced literacy." As part of that process, reading specialists provide coordinated instructions for students who are identified as having deficient basic skills, which instruction is done in concert with the "running record" of the primary or classroom teachers.

In the area of the curriculum, she is responsible for following the guides, and the supervisors report directly to her pursuant to the curriculum and instructions of the Edison board. There are two elementary level supervisors among the eleven Edison elementary schools to implement the program, Joan Hagie and Suzanne Capraro. Their jobs include observation of non tenured as well as sometime observations of tenured teachers. Each has specialized tasks and responsibility for specific schools. Hagie is responsible for reading in the Basic Skills Instruction model(hereafter "BSI") and her assignment is primarily at the John Marshall School (hereinafter "Marshall"). She organizes meetings regarding BSI and collects student assessment data, known as Developmental Reading Assessments (hereinafter "DRA") from the reading specialists. Capraro is responsible for the science area and she also observes teachers at the Marshall School. The process model is the only district model. Teaching begins at the level of the student such as small group, matching of levels to the student and not beyond one's level, and the opportunity for "scaffolding."

The teacher of record/classroom teacher recommends a pupil for basic skills based upon multiple measures which recommendation is then transmitted directly to the reading specialist. But the running record drives the assessment. The supervisor collects the schedules of all reading specialists, charts the DRA's and make sure that the students are identified for appropriate services including such opportunities as extended school year. The reading specialists are required to coordinate with the classroom teacher.

She knows Ziznewski, having met her in Spring 2004 while she was still at the Woodrow Wilson School and serving as a facilitator there. Subsequently she became aware of Ziznewski through Dr. Mary Ann Banks, Assistant Superintendent/Principal and Gerald Young, principal of Marshall. She was aware that on October 18, 2006,

Young wrote to Banks and advised that Ziznewski had not yet met with her reading groups in grades 1 and 2, which were her assignments for the year. Further, even though Young had told her that grade 1 that would be a "push in program" for the forthcoming year, it was nonetheless his understanding that Ziznewski planned to pull out students in both grades 1 and 2 instead (P-3). Traficante understood that Edison's published guidelines required that the meetings with the reading groups should have taken place by the first week in October.

Concerns were expressed to her by both of her supervisors. As a result, she directed both supervisors to meet with Ziznewski to schedule a meeting with her, which was done on October 23 (P-4) and which was held on October 24, 2006. She was instructed in that memo to bring three or four copies of DRA's which she had administered to students who had attended the Summer Literacy Academy (current second graders) as samples of her assessments, along with her lesson plan book so that they could review instruction that had occurred to date as well as lessons that she was planning for her students. However, she failed to produce any of the requested samples of her assessments or lesson plan book at that meeting. Instead, she began her own comments there by stating "I don't have any intention of answering anything." She also challenged the authority of both of the supervisors to ask any questions of her, even though it was their full understanding that they were the supervisors of the reading specialists. It was further noted that Ziznewski had not begun to meet with the students until October 16, 2006 and, further, despite the preference of Young that she "push in to first grade classrooms", she nonetheless had performed all instruction in a pullout setting. Ziznewski did not confirm or deny the statements at the time. Nor, did she reply to any of their questions, offer any information, or share any of the requested items (P-5).

Dr.Traficante reacted, based upon receipt of that conference memo, by contacting both supervisors about their upset with having been treated disrespectfully by Ziznewski at the conference. She instructed Young to have a second meeting set up with her. However, on December 11, 2006, Young wrote to Traficante and advised her that he had had two cancellations of the second meeting with Ziznewski (P-7 and 9),

both of which were at her request. She noted that the BSI forms were ultimately produced sometime in December, 2006, although she does not know if the lesson plan was similarly produced at that time.

She also indicated that the guidelines for Basic Skills programs are circulated annually (P-25). They have been circulated in that fashion since 1993 or 1994. Those guidelines indicate that the classroom teacher may recommend to the reading specialist any student who was not making sufficient progress in language arts or math. The reading specialist is then required to schedule in such students for help accordingly and in conjunction with the classroom teacher. If a reading specialist intends not to take a child into the BSI, there must be a basis of data to support the difference. The DRA is a method by which it may be deduced. Instruction in BSI should begin two weeks after school starts, with the expectancy that services should start in the beginning of October. It is a supplemental program and not a replacement for services. As a result, the role of the reading specialist to support the needs of the child in BSI.

Based upon the foregoing, It was her understanding that Ziznewski was not following the guidelines. The follow-up meeting was held on January 22, 2007, at which time Ziznewski once again questioned whether the supervisors could oversee her reading program and/or review her lesson plans. Traficante attended that meeting at which time Ziznewski also questioned the validity of the DRA. In response, Hagie had indicated that the DRA provides a "stronger tool of assessment", as well as opening up an effective dialogue with the teachers. Hagie further indicated that the assessment is required of all reading specialists. But Ziznewski nonetheless questioned the reliability of the DRA (P-10).

Traficante was concerned about the disrespect shown by Ziznewski to the two supervisors. She was rude and questioned them in a direct confrontational manner. She was not professional. She was sarcastic and had a tone of challenging the supervisors' roles over her and the right to ask for certain things. She showed a lack of propriety. Ziznewski also admonished Young by using a tone of sarcasm against him when she repeated in an insulent fashion what he had said. She also lectured at them.

The meeting was approximately one to one and one half hours long. At the end of the meeting, it was her opinion that Ziznewski viewed herself as being an advocate for the pupils and was being attacked on all fronts by the other professionals. But even though Ziznewski declared that she was an advocate at that meeting, Traficante did not believe it at the time.

But, on March 6, 2008, Traficante wrote to Young and instructed him to write Ziznewski and express the expectation that she follow the approved schedule and provide instruction to students, since she was aware that Ziznewski had refused to service students when Ziznewski had failed to provide the midyear DRA's for BSIs which were due to Hagie by February, 2007 (P-38). Thereafter, Young told her that he did follow up and relay the information to her, but, on March 10, 2008, Young advised her that he had been approached by Ziznewski and "made it clear" to him that Hagie was "not her boss." She also did not believe in the assessment and she would only do as he directed her (P-42). When Traficante saw this, she wanted another meeting scheduled, which was held on March 19, 2008. At that meeting, Ziznewski challenged the role of the DRA which she viewed as being an inappropriate research based tool (P-51). She also once again challenged the supervisors' roles in the process. At the same time, Ziznewski had failed to submit her reports in the requisite time periods. For example, the DRA score reports which were due on November 14, 2007, were not received until December 19, 2007. And the DRA score reports for January 30 were not received until March 19, 2008. Ziznewski was also questioned about her inflated assessment results and the trends which were demonstrated in her findings. Although the DRAs of the reading specialist can be off one level from the "running" records of any classroom teacher, there was a trend of significant deviation by Ziznewski involving more than one teacher. Such a trend would result in certain students not receiving instructions at the basic instructional level, and then not being able to "scaffold" into more complex concepts. She noted that reading specialists are to give instruction in remediation and not to be instructing in enrichment for basic level students (even though it is common practice to advance such instruction with gifted students), since the purpose and role of the reading specialist is to collaboratively work with the classroom teacher to bring the pupils up to the level of their peers. Thus, by March, 2008,

Ziznewski's views were contrary to and in violation of the instruction model of the district.

On January 22, 2007, Traficante attended a meeting along with Ziznewski and others, which was reduced to a report by Young (P-10). Previously, Ziznewski had been told to produce her teaching schedules by October, 2007, relative to the students she was assigned to instruct and the days when she would meet with them since such a production would demonstrate the education services which were to be provided to the pupils and the number of BSI services to be given to them. Thereafter, on April 10, 2008, Traficante wrote to Ziznewski with reference to the results of the March 19, 2008 meeting. In that memo, she expressed and summarized the meeting concerns regarding the failure by Ziznewski to produce the documents and a recording of the DRA levels, their importance, and the need to submit them on a timely basis (P-51). She noted that the DRA school reports which were due on November 14, 2007, were not received until December 19, 2007, and the school reports for January 30, 2008, were not received until March 19, 2008, date of that most recent meeting. She also reminded her that her inflated assessor results deterred supplemental instruction which was to be provided by the reading specialist. She noted: "In the broader context of the BOE-approved Balanced Literacy Program, assessment drives instruction as students are to be taught on their level." (P-51 at page1). She maintained that the district had wanted to track the most at risk pupils and that Ziznewski's DRA results had huge discrepancies at variance with the classroom running records, even though the classroom teachers had identified the need for such services of specific students who had repeated reading deficiencies within the classroom. Nonetheless, Ziznewski challenged everybody at the meeting and claimed that there were no such deficiencies. And, as a result of Ziznewski's continued failure to adhere to district procedures for screening and assessing the students with whom she worked, Traficante referred the matter to the acting superintendent of schools for further action. She indicated that the DRA is a "non negotiable" item and not to be challenged or disregarded by any one, including the reading specialists. She noted that, as early as November 13, 2007, the Marshall supervisors had explained all of the guidelines to the staff, including Ziznewski, including what the BSI was and how it was to be implemented (P-25). In

fact, Ziznewski was the first staff member to attend that conferencing (P-25 at page 3). It is supposed to be a collaborative effort by the reading specialist and classroom teacher, which includes supplementing, but not replacing, instruction. The role of the reading specialist is to reinforce and intensify the program which is otherwise conducted within the classroom. Ziznewski had also been told to identify her late filed DRA's to Young, which she eventually produced, although they did not arrive in a timely fashion.

On January 16, 2008, Traficante got a memo from Young regarding a second grade student, identified as A.P., in which the classroom teacher, Mrs. Jennifer Figueroa, had advised that A.P. was the poorest reader in the class, even though Ziznewski had dropped him from the BSI program and even though he had previously been recommended for BSI after his attendance at the previous Summer Literacy Academy program (P-26). As a result, Traficante ordered Young to implement the BSI program immediately for A.P. but, on January 17, 2008, Young wrote to her about the results of a parent-teacher conference which had occurred earlier that day and in which he reported that Ziznewski inappropriately challenged the other teachers' concerns in the presence of the parents (P-28), at which time he stated "Today I took part in one of the most embarrassing parent-teacher conferences in my 53 years in education." It was his opinion that Ziznewski acted in a highly unprofessional manner, and it was his further opinion that the mother of the child was confused after hearing Ziznewski's comments which, according to Mrs. Figueroa, were misleading. She knew that, if need be, referral of a child would go to the Intervention and Resource Services Committee (hereinafter "I&RS"). In any case, Ziznewski was ordered to provide her with services two days a week.

On January 28, 2008, Young wrote to Ziznewski about complaints from two other teachers who had been concerned that Ziznewski was not implementing the BSI for their own students pursuant to his schedule. As a result, Traficante told Young to monitor all children who were to receive instructions to make sure they were properly receiving those instructions. At the same time, she increased the after-school academy funding in order to offset the various educational services shortfalls of Ziznewski. She also got Mrs. Deborah Bredahl, the district's funding coordinator, to release money from

Title I funding for snacks and supplemental funds for this additional after-school instructions for them. All this occurred because Ziznewski was unable to and did not provide appropriate services for a number of identified students at that time.

Then, on February 7, 2008, Hagie wrote to Ziznewski regarding the Lindamood Bell academic materials, which were to be utilized in her programming (P-34). She was also told to focus her time with the children pursuant to a process of specialized intensity for certain students. Her function was not to provide enrichment but rather intensive, strategy based instructions. Then, on March 5, 2008, Hagie sent a memo to Ziznewski in which she requested her to supply her mid year DRA's for all the BSI students and the children who attended the Summer Literacy Academy in 2007 that she was supposed to support (P-37). She noted that the Marshall school is a K through 5 program and is one of the 11 elementary schools in the district. Traficante had spoken to Hagie about needing to make a clear submission deadline since they had already been due in January 2008 and, as result, they were past due by two months. She ordered Young to contact Ziznewski and express the expectations that she was to follow the approved schedule and provide instructions to students. She further ordered him to tell Ziznewski that any attempt on her part to refuse to do her job would be reported immediately to the acting superintendent for further action and that a copy was to be placed in her personnel file (P-38). She noted that she was aware that Ziznewski had refused to service the students because of the requirement for her to provide the mandated reports. In response, Young wrote that, after he handed the required memo to Ziznewski, she indicated she would not be able to service the students in her BSI program until she completed her assessment assignment and that she then abuptly turned around and walked away after he told her that her report had been due in February, 2008 (P-39). In his follow-up memo to the acting superintendent, he indicated that she became quite angry and questioned how this can be done (ie., the providing of the reports at the same time that she was also expected to continue with her instruction of the pupils.). She also angrily indicated that Hagie was not her boss and that Young was going to be in a lot of trouble because she intended to report the situation to the Commissioner of Education. He felt that the information provided by her was presented to him in an intimidating matter (P-40). Young then wrote to Hagie on March 10, 2008,

and advised her about Ziznewski refusing to respond to any directive from Hagie, that she did not believe in the assessment and that Hagie was "not her boss."(P-42). As a result, Traficante ordered a meeting to be held on March 19, 2008. Hagie had previously written to Ziznewski on March 7, 2008, relative to the reporting of DRA levels and for the reports to be submitted no later than March 17, 2008. She had even authorized three full days of release time to Ziznewski for the week of March 10 in order complete the required reporting as an accommodation (P-41).

Then, on March 11, 2008, Young advised Dr.Traficante that two sisters, A.N. and A.N. (grades one and two, respectively) had been recommended for BSI but neither one was taken out for required construction by Ziznewski. He wanted emergency approval for supplemental instruction for them as a result, which Dr.Traficante approved (P-46). She noted the teachers are compensated to provide such services above and beyond the regular teaching rates in order provide those supplemental instructions. These funds come out of general education, and local levies, while BSI comes out of Title I funding.

Dr. Traficante also noted that there is an "English as a Second Language" (ESL) program in place at Edison, which consists of a K through 12 program. At the elementary school (K through 5) level, there are select sites where the students are gathered from among the eleven elementary schools. As part of that plan, the Marshall students would go to a planned program at the Washington School, except for what was scheduled for the 2006-07 school year, at which time Edison opened up a special section at the Marshall School. That ELS program initially contained only ten students (P-116), who had been screened out and found eligible out of 48 kindergarten, first and second grade students there. Previously there had been a much larger group assigned from Marshall to the Washington School. As part of the process of screening, an observation rating sheet (ORS) (P-65) for newly registered students had to be utilized by the reading specialist within 48 hours of assignment pursuant to regulation, which, in this case was Ziznewski. After that initial assessment, the child would move on to another teacher to confirm the ESL eligibility through the use of another test administration. Although Ziznewski had the primary screening responsibility at Marshall

for those students, Dr. Traficante found out that there were no ORS scores for them even though they had been determined eligible for the ESL services and had been recommended for such screening. Young had told her in late September, 2006 that the ORS was not being administered properly by Ziznewski and that various teachers were expressing concerns about children whom they felt needed specific help in that area, even though the results by Ziznewski indicated that they were otherwise proficient. As a result, she asked another educator, Mrs. Hook, to administer the ORS and, if necessary, an additional test known as the MAC II in order to determine any children who should be eligible for ESL. Mrs. Hook did the tests accordingly on October 13, 2006, at which time nine pupils were determined to still need ESL (P-116). She then reached out to the ESL supervisors in order to work out details in order to keep those children within the Marshall School in October, 2006, rather than put them back into the satellite schools for the 2006-07 school year since school was already in session for over a month and she was concerned about any additional changes or transitions for those children. Had they been properly identified in September, those students would have gone directly to the Washington School and, as a result, it would have saved the need to have those additional teacher costs generated by having to retain them at Marshall thereafter. Dr. Traficante made a calculated determination based upon the best interests of the children.

On November 21, 2006, there was a special meeting held with Ziznewski about the requirements relative to the 48 hour ESL screening, which Zisnewski challenged even though this is State law and, further, even though it had been in place for a long time by then (P-120). At that time, Ziznewski was also told not to identify placement options directly with parents. Young summarized the results of that meeting in a letter to Ziznewski on November 22, 2006 (P-121), which meeting had been also attended by Traficante and two other staff professionals, one being Martin Smith, who is the ESL program district supervisor for students at Marshall. At that meeting, Smith's official role as ESL supervisor was verified, along with the ORS testing requirements as well as the program development of the ESL. They were told that his role with reference to the reading specialists was to be the "point person" for programs as well as any parental concerns. Ziznewski was told to follow all steps of the district procedures regarding the

submission of required paperwork such as the ORS forms as well as the need for timely filing of the forms, all of which reflected State law as well as Edison district policy. The test results were to be in the student records of those screened in September and October so that the records would reflect that Edison was in compliance with the identified ESL students students.

However, notwithstanding those standing instructions to not interact directly with parents, on July 6, 2007, Traficante wrote to Ziznewski relative to the meeting which they were forced to hold with her on June 15, 2007, after a parent had informed Smith that Ziznewski was going to great lengths to keep his child out of ESL. Additionally, the parent expressed frustration to Smith about Ziznewski because of her repeated statements to him and her insistence that his daughter did not belong in an ESL program but that she rather belonged in regular programming at the Marshall School. He expressed anger at the district and the principal for her actions regarding his child. When confronted with that complaint at the June meeting, Ziznewski stated that she only sought to assist the parent to keep the child with her family at Marshall School. However, she was told that further testing by another teacher demonstrated the need for more screening of the child. Traficante noted that this action by her violated the instructions given to her the previous school term (as noted above) regarding non involvement with placement issues with parents. Further, Ziznewski failed to appreciate her role in the screening process, which process she still insisted was faulty. Thus, she concluded that Ziznewski had not changed at all since November, 2006. Rather, she persisted in justifying her role in the screening process, inappropriately challenged Smith's recognized role in the ESL and insisted what was still wrong with the overall program. In her letter to Ziznewski on July 6, 2007 (P-125), Dr. Traficante warned her that her repeated disregard of district procedures relative to screening and assessment of pupils, along with her inappropriate communications with parents in violation of district orders to the contrary constituted a deliberate disregard or an act of insubordination by her. She closed that letter by noting that she intended to request the Edison superintendent to make a recommendation to the Edison Township Board of Education to withhold her employment and adjustment increments for the 2007-08 school year.

On cross examination, she explained that the mandated, Edison Board-approved curriculum in reading and writing is known as balanced literacy and takes the form of process teaching. Ziznewski's methodology is not in keeping with that model. For example, in the process method, one is to teach children at their own level and use the DRA, which is correlated with the use of the running records, which are primarily created by the classroom teacher. Instead, Ziznewski disagreed with that approach and wanted to rely upon portfolios instead of the mandated lesson plan approach to instruction. Also, she refused to use the DRAs in a timely fashion. As a result, Dr. Traficante was forced to engage in five separate conferences with Ziznewski in order to address her resistance to following the district format, on November 21, 2006, January 22, 2007, June 15, 2007 October 24, 2007, and March 19, 2008. Prior thereto, she had noted no problems with her in the school years of 2004-2005 and 2005-2006 in Zisnewski's capacity as a reading specialist. She has also never formally evaluated Ziznewski although she is aware that Principal Young did evaluate her at the Marshall School. However, she does know that Ziznewski's assignment as a reading specialist required her to provide services for students who were identified in need of BSI and, further, that in the 2006-2007 school year she was required to administer ORS testing to students who had been screened for that purpose.

She got to know Ziznewski at the Marshall School after the elementary supervisors contacted her in late September/October, 2006, and advised that both of the supervisors had reached out to Ziznewski to get her reading schedule which, at that time was already late and not yet timely filed. Thereafter, sometime in probably mid October, Traficante told them to get their concerns in writing and for Ziznewski to produce the reading schedule since it was already so late. October 6 is usually the cut date for purposes of producing the schedules. However, by October 24, 2006, Ziznewski was still not producing the required documentation, which resulted in the need for the meeting with her to discuss it (P-5), since it's untimely production delayed instruction of needy students at Marshall. As a result of that meeting, Young advised her that he was still having difficulties getting a schedule from Ziznewski and that instruction was not being conducted in BSI.

She noted that teacher recommendations drive the need for assessments for pupils in grades kindergarten through grade two, while uniform screening occurs for children in grades three and up. The child is then fit into the schedule of the reading specialist, who is required to administer the DRA, which had been in existence at Edison since 2006, as a diagnostic tool and then coordinate it with the running record of the classroom teacher. It is not the function of the reading specialist to place the child in any particular program. She explained that the DRA is an instrument or a system of tasks to be completed by the pupil. The child is then rated based upon one's successful completion, or not, of those individual tasks. The administration of and scoring of the DRA are all standardized. However, there is a subjective element built into that program so that two different administrators of the DRA can come up with two different results. However, it was the overall or global disparity in the results generated by Ziznewski, which was at significant variance to the classroom teachers' overall need for services for the various pupils, which caused the district to become very concerned with her performance since Ziznewski had stated that many of those identified pupils did not need such services. Those numerous specific teacher concerns kept building over a period of time and were ultimately brought to her attention in 2008, at which time Dr. Traficante conducted a conference with Ziznewski on March 19, 2008, which was also attended by Supervisor Hagie and Principal Young. The conference focused on approximately eight specific students who had been identified as having significant reading problems because the DRAs generated by Ziznewski did not correlate with the running records of the classroom teachers as well as the DRAs conducted by teachers in the previous Summer Literacy Academy Program.

Ziznewski had previously been given instructions in training in the administration of the DRA's starting in, as she described it, the "practice year" of 2006, at which time the DRA concept was introduced as a uniform program at the Edison district. Although by October 2006, Principal Young had wanted all of the first graders to have their reading specialist programs conducted on a "push in" (classroom) level (P-3), he nonetheless acquiesced to having Ziznewski conduct her sessions in a "pull out" setting due to her claim of a physical disability in that she felt that she was uncomfortable sitting within each classroom's tiny young pupil chairs, even though he otherwise felt

that it would have been permissible and acceptable for her to have a large, adult size chair available within the classroom.

As the 2006 school year commenced to get underway with the new DRA programming, it nonetheless became necessary to have a conference with Ziznewski by October 24, 2006. Her performance there was counterproductive and negative. A memo announcing the conference had been presented to Ziznewski on October 23 (P-4), at which time she had been asked by the two elementary supervisors Suzanne Capraro and Lois Hagie to bring her lesson plan book and three or four copies of the DRA's administered to the students who had attended the Summer Literacy Academy. However, she failed to produce them at the conference and, in fact, she never did produce the required lesson plans at any subsequent meetings either. In addition, Ziznewski audio taped the meeting and virtually immediately announced "I don't have any intention of answering anything." (P-5). Consequently, she failed and refused to respond to any questions asked by the supervisors. Instead, she persisted in writing questions on Post-It Notes and handed them to her ETEA representative, Diane Keane, to verbalize for her. As part of that truncated process, she challenged the authority of the two supervisors over her since she contended that Deborah Bredahl, a Title 1 program coordinator, was actually her supervisor. And, even when they advised her that they were her supervisor, and not Bredahl, she persisted in refusing to cooperate with them. Further, it was discovered that Ziznewski did not even begin to meet with her assigned students until October 16, which was well after the time when she should have initiated her programming with them. Valuable time had been lost in order to properly administer to these children.

Further, at the follow-up meeting which was ultimately held on January 22, 2007 (which had been delayed a couple of times due to Ziznewski's delays), she still challenged whether or not she had to show her lesson plans to the supervisors, even though it had been clarified that she had to at the October meeting. She also once again questioned the necessity of reading specialists to complete and produce a DRA report and then proceeded to give a lengthy presentation with reference to her viewpoint, which was to the effect that she felt that teachers were satisfied with her

portfolio style of evaluating student reading progress, which she claimed that she presented to them on an ongoing basis. However, her approach violated uniform Edison Board of Education policy. It was the opinion of Dr. Traficante that Ziznewski blatantly refused to respond to the issues. She also did not like her demeanor as well as her refusal to take directions from and to confer respect toward her supervisors, which was consistent with her attitude at the October meeting. Yet, Dr. Traficante conceded that, as far as she knew, Ziznewski had not been told to produce the lesson plan at the January meeting, even though she had been previously instructed to produce it at the October meeting and failed to comply at that time as well as at all times thereafter.

Ziznewski also failed to comply with the job requirement that she was supposed to administer the ORS screening and testing of various ESL students during the 2006-07 school year (P-116), even though nine students had been identified by Mrs. Hook on October 13, 2006, as being in need of ESL instruction based upon her own ORS screening and testing results. They included eight students in kindergarten and one student in grade two. Ziznewski's job in that area was to properly and timely administer the ORS as directed by Principal Young. Yet, although she had been directed to do the ORS testing, the district has never found any test results in any of their students' records and she has failed to produce them at any point thereafter. As a result, these children had their educations delayed until sometime in November, 2006. Her conclusion was that Ziznewski did not service them. Her duty had been to screen the students and then place the results in the files, which she totally failed to do. Therefore, Ziznewski did not follow the procedures regarding screening of these children.

The case involving student A.P., a second grade student in the class of Mrs. Jennifer Figueroa, highlighted some of the significant concerns of Edison. Although he eventually received BSI services, he had failed to get them as of January 16, 2008, even though he had been recommended by his first grade teacher for such services and had been in the Summer Literacy Academy, which dictated a further immediate need for such services. On January 16, 2008, Young ordered Ziznewski to immediately begin BSI (P-26) for him, which occurred at a meeting held with the mother of A.P. It

was her opinion that the delay of instruction is the same as withholding of services and, as a result, it became necessary for Young to issue a direct order to Ziznewski in order to attempt to get her compliance since she had refused and failed to give A.P. services since the previous September.

At that same meeting, Mrs. Figueroa complained about the Ziznewski behavior and comments during that parent meeting. Although Ziznewski was not supposed to be part of that meeting, she nonetheless insisted on attending the meeting, which created an uncomfortable situation for the mother, according to Figueroa. Further, although Ziznewski apparently purportedly tested A.P. on December 11, 2007 (according to her claim at that meeting), she nonetheless failed to advise any faculty about the results of the testing, and in particular Figueroa, who should have received that testing information immediately. She also failed to share any information with the faculty before she divulged her complaints about the disparity in the testing results in the presence of the parent, which was also a breach of protocol.

Concerns were also brought to her attention about the child identified as A.O. and relative to teacher Mary Schaefer who had gotten into a verbal altercation with Ziznewski on October 5, 2007 (P-17) regarding to that child. Then, on January 17, 2008, Schaefer wrote to Young about being concerned that A.O. was not being taken for BSI, in addition to children T.J. and E.P., even though she had recommended these childre for those services (P-27). Yet, Ziznewski had said that they did not need them. In addition, Schaefer did not even recall A.O. having been taken out for testing by Ziznewski, even though Ziznewski had claimed that she had tested her twice. Schaefer also noted that Ziznewski frequently was either absent, arrived late, or was working on something else during the scheduled times for the children, which denied them appropriate instructional time. She also was concerned that there continued to be a rift in communication. Young directed Ziznewski to provide those services. Subsequently, on March 11, 2008, Young wrote to Dr.Traficante for emergency approval for supplemental instructions for the sisters identified as A.N. and A.N. (grades two and one, respectively) who were both struggling in their academics and whose parents had expressed concern about their deficiencies. Neither one was being taken for BSI

instruction by the Ziznewski even though their respective teachers had asked for the service. They both had been tested for ESL twice and tested out by only one point (P-46). Thereafter, Dr.Traficante held a conference with Ziznewski on March 19, 2008. Also present were Young, Hagie, and NJEA representative Donald Tarr. Ziznewski claimed that she had been attempting to utilize "enrichment books" for some pupils, which would force the students to read books and be exposed to vocabulary beyond their reading levels, but Dr.Traficante admonished her that such a procedure was in violation of established, clear-cut district policy to which she had previously received training, instruction and counseling by her supervisors. Ziznewski also once again persisted in challenging the validity of the elementary supervisors in overseeing the BSI program, even though that issue had previously been addressed at their meetings held on October 24, 2007 and January 22, 2008. The major problem was that instruction to those children was not forthcoming by Ziznewski, and nor was she permitted to decide when to provide services or not. She also had insisted to teach them above their performance levels, which was a violation of her role as a reading specialist. She also gave inflated assessments, which were false and, in the process, denied those children an appropriate education. Further, she failed to meet deadlines for the submission of the DRA reports for November 2007 and January 30, 2008. The impact was that she violated her professional responsibility to file her mandated reports in a timely fashion and, in addition, on a teaching level, she did not provide appropriate data to the school administration in order to track the progress of the students. As a result, Ziznewski was cited by her for failure to adhere to the district procedures for screening and assessing the students with whom she worked (P-51). (This had also been evidenced by her insubordinate attitude at the immediately previous meeting conducted with reference to her performance on January 22, 2007. (P-10). At that time she once again challenged the validity of the elementary supervisors' role over her and became argumentative with them.) She noted that if there is ever a difference of opinion regarding providing BSI services to a student, the principal makes the decision after having evaluated all of the appropriate test results. In this case, it was abundantly clear that at least seven separate teachers had questioned whether or not their students should have gotten BSI services since they all had determined their respective children to be eligible for them, all of which was in direct contrast to the opinions of Ziznewski. The teachers included

Mrs. Figueroa (grade 2), Mrs. Sica, Mrs. Schaefer (grade 1), Mrs. Hoffman (curriculum resource teacher), Ms. Kerry Peters, Mrs. Sandra Pellicane (grade 2) and Ms. Diane Keane. There was a universal concern that Ziznewski did not start BSI services for the children at their appropriate ability levels.

For example, the child A.P. was denied services by Ziznewski even though he had been identified for BSI services at the end of first grade, had attended the Summer Literacy Academy, and had also been recommended by Mrs. Figueroa when he entered her second grade class. She had found him to be a struggling reader even as late as January, 2008. The child A.O. had been recommended by Mrs. Schaefer by October, 2007 but Ziznewski rejected the child's need for it because she claimed she had tested her twice since September, 2007. Yet she never recalled A.O. having ever brought out of her classroom for such testing. However, according to Traficante, even assuming any such purported test results suggested no need for BSI, the school principal would have been required to order the servicing of the child for BSI and then get further diagnostic testing to confirm the status of the child one way or the other.

In that regard, on January 17, 2008, Principal Young specifically ordered Ziznewski to provide BSI programs for A.P. for two days a week (P-28). But then, in the presence of the parent for A.P., as well as the other teachers present, Ziznewski indicated that she intended to bring A.P.'s case up to the Intervention & Referral Services Committee (I&RS Committee). However, Dr.Traficante noted that referral to the I&RS Committee occurs only after delivery of services and the exhaustion of all strategies. In this case, not only were all other strategies not exhausted, but Young had specifically ordered Ziznewski to provide the extra reading services. Thus, it was her opinion that Ziznewski was insubordinate when she persisted in seeking the I&RS referral despite after receiving the order from Young.

In addition, Young also wrote to Dr. Traficante on the same date and expressed his upset with having participated in "one of the most embarrassing parent-teacher conferences in my 53 years in education." (P-28). He was very much embarrassed by Ziznewski's performance and outlandish attitude in the presence of the parent of A.P.

She contradicted the teachers who were present regarding A.P.'s reading ability and then interceded to the parent by claiming that he was proficient in reading. Young expressed the opinion that Ziznewski had acted in a "highly unprofessional manner" and that the parent was confused after hearing her comments which, according to Mrs. Figueroa at the meeting, were misleading . He was also most embarrassed that Ziznewski would contradict other teachers in front of a parent but was grateful that the other two teachers did not respond in kind in front of the parent. Then, on January 28, 2008, Young wrote to Ziznewski about her failure to implement the BSI program (P-30), which included A.P. Subsequently, on March 7, 2008, Young wrote again to Ziznewski and admonished her for failing to maintain her required teaching schedule and provide instruction after he was advised that she had requested time away from her students in order to complete her assessment of students in her classes (P-40) which letter he copied to John DiMuzio, acting superintendent. Concurrently, he wrote directly to Dimuzio and advised him about Ziznewski's inability to service her assigned students and complete her assessments (P-40). In that letter he also then stated: "I indicated Mrs. Hagie expects to receive a report as soon as possible. Mrs. Ziznewski indicated, angrily that Mrs. Hagie was not her boss and I was going to be in a lot of trouble because she will be reporting this situation to the Commissioner of Education. This information was presented to me in an intimidating manner."

On the same date of March 19, 2008, Dr.Traficante participated in a meeting with Ziznewski, Young, Hagie and N.J.E.A. representative Donald Tarr, at which time Hagie was present in order to review the DRAs and DRA results. Although Ziznewski supplied test scores at that time, she never provided the reports which formed the back up for the scores, which is what they wanted in the first place. Those scores also had been originally due on January 30, 2008 (P-51).

The matters involving the sisters A.N. and A.N. (grades two and one, respectively) represented another failing by Ziznewski. On March 11, 2008, Young wrote to Dr.Traficante and requested emergency approval for supplemental instruction for both of them because, even though they had both tested for ESL twice and only tested out by one point, they still only showed basic proficiency in English. They had

arrived in Edison on January 16, 2008 from the Philippines but were both in the grade level behind where they were placed at Edison where, due to their age, Enrollment had put them in their present grades. It was already too late to transfer them into another school since the year was almost completed by that point. The ordered need for emergency supplemental instruction for both sisters consisted of a a form of tutoring by a paid instructor. Someone had to be paid to provide that supplemental instruction because Ziznewski was not providing the BSI for them by March 2008. Dr.Traficante authorized the emergency instruction accordingly.

Dr.Traficante also noted that Ziznewski had been told to not use novels but to only meet the needs of the BSI children as part of her instruction since the classroom teachers were better prepared to provide the high quality children's literature which they needed and where such items were more appropriate for their usage. Yet, Ziznewski refused to follow that program and insisted upon directing and employing an enrichment program, which was beyond her scope. Further, in addition to her steadfastly disagreeing with the use of the DRA's, Ziznewski also refused to submit the test scores in accordance with the mandated deadlines, which constituted a deliberate disregard of an order of her supervisors, which was insubordination. In the process, she also undermined the district's goal to provide appropriate education for disadvantaged students. She had also violated a direct order by Young to produce the DRA's as well as her lesson plan book at the November 22, 2006 meeting (P-7). She never produced the lesson plan book pursuant to the October order even at the January 22, 2007 meeting, at which time she also still persisted in challenging the need to even have produced it at all (P-10). And, even though, as of December 11, 2006 she was finally doing her job at that time, she was supposed to have commenced it by October 6, 2006, and her failure to do in a timely fashion constituted a form of unbecoming conduct (P-9), according to Dr. Traficante.

She also never supplied the ORS forms at any time (P-121). Without them, the district was unable to advance appropriate ESL students into the next level of instruction called MAC II. Submission of the forms to back up the scores is required, and Ziznewski's failure to provide them was a direct violation of her responsibility in that

regard. Nine students had been identified by Mrs. Hook on October 13, 2006 as in need of ESL instruction based upon her ORS screening and testing and yet there were no ORS screening scores in eight of the students folders prior to that even though it had been recommended at registration that they needed to be screened (P-116). Thus, by June 15, 2007, Ziznewski was not following the prescribed screening procedures regarding ORS and for the ESL the programs (P-125), according to Traficante.

Further, as of March 19, 2008, Supervisor Hagie, in charting the various test results, noted inflated DRA scores by Ziznewski (P-51). The required previous November scores were not even reported by her until December, 2007 and the January 28, 2008 scores did not even come in from her until the March 19, 2008 meeting. It was at that time that Hagie plotted the test results, at which time she noted that the Ziznewski scores were inconsistent with the previous summer school scores (fulltime) and the running record scores (winter) which were culled from the other teachers. All of the Ziznewski scores indicated that there was purported much better achievement by the students over the results determined by all of the classroom teachers on a consistent basis. The net result would be to place students who had such inflated scores into a frustration level of learning above their actual abilities, and the actual gap in their learning would begin to widen even more. Dr.Traficante was forced to get involved with the evolving issues relative to Ziznewski when the in-house personnel at Marshall, including the supervisors and Principal Young, could not complete their tasks to get the lesson plans and timely reports from Ziznewski over time. In addition, ESL Supervisor Martin Smith had reported that, through the insubordinate actions of Ziznewski, some ESL students were also not getting their education. Dr.Traficante hoped to mediate these issues with Ziznewski and, in the process, she attempted to provide support for all of the concerned personnel. However, she did not meet with success, despite her best efforts. The need to open an ESL class at a cost of $10,000.00 to fill in the needs of some students demonstrated that they could not meet the needs of several students as well as the fact that two students were required to get a literacy coach because they were not being serviced by Ziznewski. It was her opinion that, had Ziznewski identified the ESL students earlier on in the year, they would have gone to the Washington School where the central ESL program was being undertaken

among the various schools. However, since she had delayed such identification until the following March, it was too late in the year to send them over since it would have been unfair to have approved those children for transfer at that late stage. Also, when Ziznewski failed to administer the ORS and further failed to produce the rating or screening sheets at all, Young was forced to conduct a survey which included the ESL teacher from the Washington School, who was then required to come over and administer the ORS in place of Ziznewski. In the process, Dr.Traficante attempted to work directly with Ziznewski between four and six times, after she had initially allowed Young and the several building supervisors to try to correct the problems directly with her.

Thus, although she initially had had no problems with Ziznewski between 2003 and 2006, problems did begin to escalate thereafter, during which time the role of the reading specialist changed during her tenureship as assistant superintendent. That included the introduction of balanced literacy in the regular education curriculum, which required all aspects of the reading program to be brought into sync. It also included the introduction of the Lindamood Bell program along with the uniform application of DRA's throughout the district, the latter of which was fully phased in by the 2007-08 school year.

All district reading specialists were expected to implement the complete programming by that time but Ziznewski fell very short of complying even though she had been provided with her anticipated schedule as early as the 2006-2007 school year (P-3), was given a comprehensive listing of "expected job areas" for the 2007-2008 school year (P-11), was supplied the requirements regarding the BSI improvement program (P-181) and the reporting of DRA levels and the timelines for the submission of January and June DRA levels (P-12), as well as the BSI guidelines for reading specialists on November 13, 2007 (P-25). And, despite all of the training in that regard, it became necessary for her to be nonetheless individually directed to her tasks and she then received specific instructions and limitations on her role as a reading specialist relative to the introduction of novels in her direct instructional time environment by February 7, 2008 (P-34). She then received a follow up directive on March 7, 2008 from

Lois Hagie regarding the reporting of DRA levels and her failure to timely file them (P-41).

Dr.Traficante also noted that all of the reading specialists and teachers had received a directive on September 22, 2007 to use the DRA. Ziznewski was one of eleven educators present during that meeting. Once a child would thereafter be referred to the reading specialist for BSI, it was required that the DRA had to be used. The multiple measures standard is the policy of Edison to place a child into BSI, in accordance with New Jersey State standards, which are designated as "core curriculum content standards." (P-181). A reading specialist must then administer the DRA, which is diagnostic, and it is meant to provide a deeper level of instruction in order to educate the child. It allows the reading specialist to specialize. However, in the process, the reading specialist does not identify the children. That is the function of the classroom teacher, who makes the initial of judgment about those needs. The role of the reading specialist is only to service them. As a result, even if the reading specialist questions the status of the child, the teaching specialization must continue unless and until a further directive is made by the school principal.

It was the conclusion of Dr.Traficante that, because of her failure to fulfill her duties as a reading specialist in the years 2006-2007 and 2007-2008, Ziznewski lost her increment and then tenure charges were ultimately preferred against her.

Lois Hagie

Lois Hagie is employed by Edison as a supervisor of elementary curriculum and instruction, which position she has held since August, 2004. She previously served as a classroom teacher for grades four through six between 1974 and 1999, after which she became a curriculum resource teacher between 1999 and 2004. As a supervisor at Edison, she is responsible for all content areas of grades kindergarten through five and observes non-tenured teachers for five of the eleven Edison elementary schools. In addition, she also coordinates and conducts curriculum development for all tenured and

non-tenured teachers in a fashion similar to the role she played as a curriculum resource teacher previously. She also observes tenured teachers.

She supervises language arts literacy, which utilizes the program introduced at Edison approximately eight to nine years ago and is known as the concept of "balanced literacy." The previous method was to have all students in grades one through five read the same book in an anthology with one reading method. In that way, all students were expected to read one book on one level. Over time, however, they turned to the new approach of balanced literacy, in which students are assessed on their reading ability. In small groups, there are guided instructions at their individual instructional levels in which they use books unique to their individual needs. A central or major book is only used in the large group where the teacher has control of all of the students at the same time.

She is aware that Marshall School has a kindergarten through grade five structure like most of the other elementary schools in Edison (with only two exceptions, which have grades one and two and grades three and four, respectively). At Marshall, they worked with various types of teachers, including gifted and talented, literacy development, reading specialists, literacy enrichment, and "Read One A" teachers. Starting in 2006-2007, another role of each supervisor included the training of reading specialist at the Edison Education Center in order provide consistent assessments. Prior to that time, there were three different assessment tools used and they were dependent upon the grade level involved as well as the use of different running records. In the prior setting, she found it difficult to determine any district-wide trends to illustrate progress or not so she started to collect data to observe the inconsistencies in the programming. A committee was formed at about the same time and began to use the "Wright" learning model to make it more consistent from grades kindergarten through four or five. The committee attempted to create a uniform running record, to be utilized on a one on one basis. In the 2005-2006 school year, they created and introduced a uniform concept or "package" of reading assessments, which resulted in determining what type of reading materials a child should be able to use in each of the the grades kindergarten through five. In the summer 2006, additional revisions were made to that

package, which added books to the running records for assessments. All teachers and specialists were trained in regarding its use. By 2007-2008, the new running record assessments were used by the classroom teachers. The result was that Hagie could now look at all the levels of the district and make proper evaluations of their pupils' needs. She was able to establish grade level patterns and trends as a result. At some point, the supervisors looked at the assessment tools used by the reading specialists, who needed a special layer or form of assessment to get more knowledge about the students. At the end of each school year, pupils were determined by their respective classroom teachers to be identified who were below grade level in order to receive BSI services. Starting in the summer 2005, the most at risk first and second grade students were directed to the Summer Literacy Academy, where they began to receive DRA services under the new model. Commencing in the 2006-2007 school year, the committee determined to adapt it to the regular school environment. The DRA is administered similar to the running record. The new system was introduced to the reading specialists in the fall 2006, at which time they received a package followed by training at Edison's Education Center. They then got the specialists together several times later that year for additional training.

As part of that training, the various instructors were advised that, after the initial referral by the classroom teacher prior to the summer recess, both the new classroom teacher and the assigned reading specialist were to get together early at the commencement of the next school year in the fall, in order to determine the needs for BSI for the identified students. The reading specialist was supposed to "push in" in the classroom in the early grades, although "pull-outs" would occur in the upper grades. The concept of a push-in would allow both teachers (i.e., the classroom teacher and reading specialist) to be in the same room at the same time, share the training and notes, and to make joint observations. In the 2006-2000 school year, the expectations were that the reading specialists were to be given a list of the attendees to the Summer Literacy Academy and then provide and share their assessments on a quarterly basis in order to accurately and timely chart the progress of each such child. The reading specialists were specifically instructed to do this and were also told to get the DRA reports in so that they could track these assessments by Hagie during that first year of

the new program. In that way, by year two (i.e., 2007-2008), Hagie would then be in the best position to determine the consistency in the actual leveling of the reporting and compare it to the classroom teachers' running records. This mandated the timely submission of the data from the reading specialists.

She explained that the concept of the single running record was developed and adopted by Edison in order to provide consistency with young readers. This was in contrast to the prior use of multiple test measures which had failed to establish a baseline for consistency. Thus, the use of one instrument only from one source (i.e., the single running record) became the mandate in the district. The classroom teacher became the primary source of those running records at the start of the school year, after which the identified students would then be referred to the reading specialists who were expected to start working with those children immediately thereafter and were expected to use the DRA in order to establish the appropriate reading level of the student. The BSI should begin by the third week of the school year. The push-in method within the classroom was to be employed up through the first grade. Thereafter, the pull-out method was the norm.

Hagie knows Ziznewski, and, as her supervisor, she got to interface with her regarding the new programming at Edison. One of her tasks in that regard was to gather information on the running records and the DRAs. Early on in the 2006-2007 school year, she was asked to check on the status of Ziznewski in order to find out why she had not yet started her schooling of instruction regarding her assigned students. As a result, she and fellow supervisor Suzanne Capraro asked for an October 24 meeting with Ziznewski and Principal Young at Marshall in a memo dated October 23, 2006, in which they indicated that they wanted to see her schedule, three or four samples of her DRA's and to set up a dialogue with her (P-4). The meeting took place on October 24 as scheduled. Also in attendance was Diane Keane, an ETEA representative, on behalf of Ziznewski. However, the meeting was not productive, according to Hagie, since, right from the start, Ziznewski (who had unilaterally determined to audiotape the meeting) announced: "I don't have any intention of answering anything." (P-5). As a result, she refused to answer any questions and instead persisted on writing questions on Post-it

Notes and handing them to Keane to verbalize for her. She also failed to produce any DRA's or her lesson plan and offered no explanation for their non production. Further, Ziznewski did not even begin to meet with her assigned students until October 16, and all of those instructions were even only taking place in a pull-out setting. She offered no explanation with reference to the concerns raised about those deviations from the expected procedures. Hagie noted that this was the first time that any teacher had ever refused to answer any questions or had determined to tape a session. Ziznewski also commenced to challenged the authority that Hagie and Capraro had over her, at which time she was specifically told by them that they were her supervisors and not Deborah Bredahl. It was the opinion of Hagie that Ziznewski acted in a defiant matter at that meeting. Hagie was so physically upset that she had received nothing from Ziznewski that she was forced to go to Dr. Traficante to express her upset.

Although, by mid November, Hagie eventually received DRA results, they only listed the levels and not the actual DRA reports, which had been previously requested. Then, after a couple of failed attempts to have a second meeting, a follow-up meeting was eventually held on January 22, 2007, since the issues involving the scheduling of the students and the use of pull-out methods by Ziznewski had not been satisfied or reconciled. Ziznewski did choose to speak at that meeting, which was also attended by ETEA president, Myron Fouratt in place of the building representative, Diane Keane. At the outset of that meeting, Ziznewski once again challenged the authority and validity of Hagie and Capraro to oversee her BSI program, which issue was immediately clarified by Dr. Traficante. She also questioned the necessity of reading specialists to complete a DRA report and, in the process, she gave a lengthy presentation on her opposing viewpoint. She questioned the reliability of the DRA even though she was told that the assessment was required by all reading specialists (P-5). She never produced the lesson plans and, instead, she asked Fouratt whether she had to show her lesson plans to the supervisors at all. He indicated that he was to explore that matter further even though the supervisors indicated that they could review the plans of all tenured and non-tenured teachers.

Further training was conducted with the reading specialists and all of the teachers after the start of the 2007-2008 school year. On September 28, 2007, both elementary supervisors and Deborah Bredahl conducted a meeting with the reading specialists and the literacy development teachers (LDTs), at which time the documentation and program materials for the BSI program were shared with the parties along with a specific instruction regarding the use of the DRA as the uniform learning assessment tool. The expectation was for the DRA to be produced at the end of each marking period for all Summer Literacy Academy/BSI students. They were also instructed in writing that all reading specialists should be working with their students by October 15 (P-11) and that it was expected that all data generated with reference to the affected children should be presumptively available for review at that time. In fact, on October 3, 2007, Hagie and Capraro wrote to the reading specialists and LDTs, at which time they were given further instructions and clarifications regarding all of the students from each school to whom they were signed in order to make sure that there was no question about who would be included in the BSI programming and assigned to them. Yet, just two days later, on October 5, 2007, Young wrote to Bredahl and advised that Ziznewski was not working closely with the first grade teachers regarding the students assigned from their classes to her and was challenging the need and requirement to take those assigned students. It was indicated that she did not plan to take those additional students and she stated that it was her entitlement to decide whom to take into the program (P-13).

Thereafter, on October 26, 2007, third grade teacher Kerry Peters wrote to Young and expressed upset with having been screamed at by Ziznewski while she was in the middle of instruction in her classroom with her students. At that time Ziznewski challenged the need to service the Peters children (P-22). She reappeared later at the same classroom and became argumentative with Peters, all which was once again conducted in the presence and hearing of her students. Peters felt demeaned and humiliated by the actions of Ziznewski.

She was also aware that the second grade teacher Jennifer Figueroa had complained in January, 2008, about the lack of attention to her identified BSI students

by Ziznewski. One student A.P., who had been in the Summer Literacy Academy and had been recommended by his first grade teacher for BSI assistance, and who was, pursuant to the reports of Figueroa, one of the poorest readers in her class in second grade, was nonetheless unilaterally dropped from the BSI program in September by Ziznewski because she had claimed that he was a good reader (P-26). Subsequently, Ziznewski apparently and purportedly tested A.P. on December 11, 2007, after which time she nonetheless failed to advise any faculty as to the results which, according to Ziznewski, was in direct contrast to the previous assessment levels which Figuaroa had scored for him. None of that information was ever shared by Ziznewski with the faculty prior to a confrontational meeting which took place on January 16, 2008, at which time Ziznewski invited herself to the staff meeting with the parent and acted acted arbitrary, rude and unprofessional with the staff there (P-28).

On March 4, 2008, Hagie was still forced to remind Ziznewski to send in her DRA reports for all children who had attended the 2007 Summer Literacy Academy as well as the recently assessed levels of her assigned BSI students (P-36 and 37). Those results had been due at the end of January, 2008. Although she eventually sent in the levels of the assessments, she nonetheless failed to send the DRA reports even though she had been so instructed. This failure denied Hagie the opportunity to timely monitor those children. Further, at the same time, Hagie was told by Young that Ziznewski was now advising that she could not service any of her students even at this late date until she completed her assessment assignment. Hagie felt that Ziznewski should have submitted the report in January and yet, by that admission to Young, she had yet to complete the January assessments, which represented a gross violation of her responsibility. Hagie felt compelled to put Ziznewski on notice regarding her requirement and responsibility to perform ongoing assessments of her students and to maintain accurate records of the information derived (P-41). Ziznewski's response was to make it clear to Young that Hagie was "not her boss" and that she did not believe in the assessment (P-42). Hagie viewed this as being insubordinate conduct by her. Young then ordered Ziznewski to provide Hagie with six samples of DRAs from first grade and six samples from the second grade. When she was finally given the opportunity to review the samples, Hagie found huge discrepancies of up to a full year

from Ziznewski's results versus the daily results of the Summer Literacy Academy teachers as well as the running records of the classroom teachers generated during the class year (P-52). She did an extensive charting of the students from their respective matriculations commencing in the autumn of 2006 through the mid year of 2008 for the ten students, all of whom who had been at-risk pupils from the Summer Literacy Academy program from Marshall School and were all BSI students, as a result of which she made the observations and determined the findings regarding the significant differences between Ziznewski's results and those of all of the other teachers. In the process, she indicated that she had more faith in the results of the reporting from the Summer Literacy Academy since that reporting was done every day for a three week period of time, during which time they were using the same testing instrument all the time. She also noted that the first marking period ended in the second week in November, 2007 but she did not receive the DRAs from Ziznewski until well after it, even though other reading specialists had given her their results in a timely fashion.

The significant contrast in the testing results demonstrated the following. Regarding J.B., Ziznewski had tested him out at the two to three grade reading level, even though the running record placed him only at the first grade level. His otherwise tested lack of progress was consistent with the results obtained the year before. She concluded that the Ziznewski levels were highly elevated and that it was impossible to have achieved such success given his history. The overall conclusion was that the Ziznewski results were inaccurate and inappropriate for this child. They were not believable since two years of classroom teachers and the summer DRA's by other teachers were totally to the contrary.

Regarding A.P., through the the first grade he was still a very weak learner. Yet, Ziznewski found him to be at the three to four grade level versus the other teachers who recorded him as being only at the first grade level. Once again, it was her conclusion that the Ziznewski results were tremendously inflated based upon A.P.'s lack of real progress. Further, A.P. was not even picked up for BSI services by Ziznewski in September, 2007, despite his low scores to date.

The child X.T. was found to be one full year apart on the learning level and his classroom performance did not reflect the Ziznewski test results.

The child S.A. was in the second grade but Ziznewski recorded him as being in the third to fourth grade level, which Hagie found to be inappropriate for this child.

The child L.A. was only in grade two at the end of the spring 2007 but was recorded as been in the fourth grade level by Ziznewski.

The child K.V. exhibited almost a year's difference by the end of 2007 with Ziznewski's results being inflated and elevated.

Another child named A.P. experienced one to one and a half grade level differences, with the Ziznewski results being the inflated test results. At the same time, she conceded that only the children A.K. and G.S. were found to have more consistent test results since they were at least found to at least be in the same grade year, although Hagie nonetheless still noted a significant deviation within the year's span for each of them. Overall, the Ziznewski test results did not give the district the correct reporting of information in order to provide appropriate services for these children or to even properly determine whether the correct children were still receiving services since most of her recorded reading levels would have caused those children to be removed from the BSI program even though they nonetheless still needed such services. Reading specialists deal with the most "at-risk" children and she was not reliable in reporting information about them. Further, if Ziznewski was reporting the students at inappropriately elevated DRA levels, then she was not providing instruction to them on the appropriate levels with the educational materials that she reported that was using at the time. This would illustrate Ziznewski's inappropriate base line for purposes of instruction.

In addition, she was also not following Edison's BSI instructional mandate. She continued to challenge the use of the Lindamood Bell program as late as February 5, 2008 (P-34) and she still persisted in requesting additional copies of novels for use with

her assigned children, even though as a reading specialist, her direct instruction time was limited each week and her time was "meant to be spent meeting the assessed needs of the BSI children to support their acquisition and the use of the skills and strategies to become more proficient readers", according to Hagie in response to her request for them on February 7, 2008 (P-35).

Problems regarding the reporting by Ziznewski started in the 2006-2007 year, when the second reporting phase was due. At that time Hagie first observed rather high, and therefore suspicious, test results being generated by Ziznewski. However, since it was the first year in which they used the new testing instruments, she did nothing to intercept her at that stage regarding those high scores. However, early in 2006 and prior to her discovery of the testing discrepancies being generated by Ziznewski, there was a general staff meeting to discuss the DRA's and the approach that Edison's supervisors intended to take regarding their administration and execution.

But, by October 23, 2006, even though Hagie was reluctant to express her evolving concerns about the elevated test scores being recorded by Ziznewski, the two supervisors found that no student instruction had been yet started by Ziznewski, which was another significant problem. As a result, Hagie and Capraro wanted a meeting with her to review her teaching status with the children assigned to her (P-4). Ziznewski had approximately 50 students assigned to her that first year. This was a serious concern since all indications were that instruction was being denied by Ziznewski by as early as the third week in September, 2006. Her first responsibility was the administration of the DRA's for her first and second grade students, which were to be coupled with the running records. The running records were utilized as assessments for the kindergarten through second grade students and these concepts were not new to the district. They had already been around for approximately eight years and there were many workshops conducted regarding its use and implementation. The running record as part of the assessment of a reading ability is a snapshot in order to evaluate comprehension, fluency, and the decoding of different types of compound words. and it involves reading behaviors to help the classroom teacher know what to teach. The DRA has a stronger basis to determine fluency and comprehension. The building principal

assigns the children to the reading specialist based upon the recommendations of the respective classroom teachers, and the reading specialist then establishes the scheduling of push-in sessions with each child. Reading instruction is supposed to begin by the third week in September, at which time the principal then signs off on the individual reading specialist schedules. Concurrent with the introduction of the DRA concept, Fountas and Pinnell became the standardized, published leveling system of all books used by the Edison and was meant to correct the system used by Edison up to the time, which had not been consistent across the board (P-53).

Several concerns were generated early on in the 2006-2007 school year about, which necessitated a meeting with Ziznewski in order to discuss the instruction provided to students who would be identified for BSI at Marshall. The meeting was called by the supervisors was conducted with Ziznewski, Young, and Diane Keane, on October 25, 2006, the results of which were reported by Hagie in her letter memo to the parties dated October 25, 2006 (P-5). Hagie was genuinely upset with the conduct exhibited by Ziznewski, which included her refusal to answer any questions, the fact that she unilaterally determined to tape record the proceeding, the use of the Post-it Notes by her, her challenge to their authority as supervisors over her, as well as her refusal to provide any of the requested items (i.e., the lesson plan book or copies of the DRAs administered to students who had attended the Summer Literacy Academy). In addition, Hagie noted that, not only did Ziznewski not even begin to meet with her students until October 16, but, according to Young at that meeting, all instruction to date had been in a pull-out setting, despite the program guidelines and the preference of Young that Ziznewski push-in to first grade classrooms. Once again, she stressed that Ziznewski did not confirm or deny those statements at the meeting.

She noted that the 2007-2008 school year began with a written instruction from Hagie and Capraro to all of the reading specialists and literacy development teachers on October 3, 2007, in which they were advised that the reporting of the DRA levels for all children who had attended the 2007 Summer Literacy Academy were due for each marking period, as opposed to all other students who were to have their DRA's done only in January and June of the year (P-12). Barely two days later, she was already

aware that Young was complaining about the attitude of Ziznewski, who had come screaming into his office the day before and claimed that she was being harassed by fellow teacher Mrs. Sica and that she did not plan to take additional students. Hagie understood that Ziznewski's acts constituted a willful failure to provide services to designated students. She was also not working closely with the first, second and third grade teachers regarding the BSI students who had been selected for that year (P-13). She subsequently became aware of concerns being generated by third grade teacher Kerri Peters, who complained to Young about several upsetting encounters she had with Ziznewski on October 22, 2007 (P-22). Hagie expected Young to follow up with any problems with her accordingly. She later became aware of further complaints against Ziznewski which were brought by A.P.'s classroom teacher, Jennifer Figueroa, in January, 2008, relative to her failure to adequately serve as the BSI needs of A.P. (P-59), as well as by Young after Ziznewski acted highly unprofessionally and negatively at a meeting which Figueroa had attended along with the mother of A.P. in January, 2008 (P-28).

In addition, Ziznewski was supposed to provide her DRA reports by January, 2008, but Hagie was forced to ask for them on March 4, 2008 (P-36), which she only got by March 17. However, in the process, Dr. Traficante was forced to give Ziznewski three days away for her reading specialist teaching assignment in order to complete them. Although other teachers have also been periodically excused from instruction to complete assessments, none of them have ever been excused in order to complete a report. This type of lack of timely filing has never occurred before in Edison, according to Hagie. She put Ziznewski on notice about her failings in that regard accordingly on March 7, 2008 (P-41). Thus, it was only upon receipt of that information late in the school year that she was able to begin her charting of the ten students who had been assigned to Ziznewski at which time she was able to determine the huge discrepancies in the test score results by Ziznewski versus the other teachers, as noted hereinabove (P-52). Thus, although she had had some evolving concerns about some of those students somewhere in the mid fall 2007, she was not able to compare the results adequately until receipt of the data in March, 2008, at which time she was then able to see the true discrepancies, which she characterized as being much more outlandish

than any other instructors' assessments in other unrelated students' matters where some minor discrepancies had been noted by her. And, in any case and adding to her concerns about Ziznewski's overall performance, she has never been provided with the DRA reports (i.e., the actual reading assessments) of any of the students from Ziznewski at any time despite her requests to the contrary. She has only received the levels from her for the Spring 2007 and in Spring 2008. Further, Ziznewski persisted in challenging her authority as being her supervisor or "boss" when Ziznewski complained to Young on March 10, 2008, at which time she made it clear to Young that Hagie was "not her boss" and that she did not believe in the assessment. Further, Ziznewski had indicated to Young, as he described it, "strongly," that she would not respond to Hagie's memo that she had directed to her. Rather, Ziznewski insisted that Young be her "messenger." (P-42).

Jennifer Figueroa

Jennifer Figueroa has been employed by Edison as a second grade teacher at the Marshall School since September, 1999. She received her Bachelor of Arts degree in psychology from Rutgers University (Livingston College) in 1995 and thereafter received her certification as an elementary education teacher at Keane University in 1996. Her first two years at Edison were spent as a first grade teacher, after which she moved on to and has remained a second grade teacher. She teaches all subjects in her class which averages 21 to 22 students per class. Some of her students receive BSI. She has no aides in her classroom this year, although she has had aides there in prior years. She described her classroom environment as having the typical noisy and quiet times, although she tries to maintain a focus throughout the day. Her policy is that if any adults do come in, she expects them to maintain a quiet demeanor and to be as low key as possible in order to avoid distracting the children.

She has known Ziznewski in her capacity as a reading specialist at Marshall for four years. On October 9, 2006, she complained to Young about having been bullied by Ziznewski after she had had two encounters with her on September 28 and October 6, 2006 (P-155), and overall she had felt uncomfortable about the outcome.

The first incident occurred around 9:30 AM at which time Ziznewski unexpectedly came into her classroom and motioned for Figueroa's paraprofessional, Dawn Normant, to go into the hall with her, after about five minutes of which the conversation there between the two of them there became loud enough to disrupt her class. As a result, Figueroa was forced to go over and closed the door to block the sounds. When Normant returned, she told Figueroa that Ziznewski had asked Normant to go into the hall to discuss Ziznewski's health problems. Figueroa felt it had been a distraction to her students but she did not say anything about it to Ziznewski at the time.

However, later that day and after school, at approximately 4:00 PM, Ziznewski entered the library at a time when Figueroa was speaking to fellow teacher Ami Hoffman. When Figuaroa completed her discussion with Hoffman, she moved on to speak to Ziznewski after she verified there was no one else in sight, at which time she told her "Carol, I don't appreciate what happened this morning. Don't come to my classroom and take people out of the room. You interrupted instruction time and you take services away from my students." Her voice was calm but firm. Ziznewski responded in a raised voice: "It's not like I do this all the time so I don't see what the big deal is." They both exchanged some additional basic comments in an elevated voice and the interaction ended. However, at approximately 4:15, Ziznewski sought her out and approached Figueroa while she was in another teacher's room and asked to speak to her privately. They adjourned to Figueroa's classroom at which point Ziznewski "chewed" her out in an elevated voice about the manner in which Figuaroa had approached her originally. At that point, Ziznewski tried to close the door and Figueroa said that she did not feel comfortable with the door closed, so she proceeded to open it. Figuaroa did not like the raised tone of Ziznewski's voice or being trapped in her own classroom. Ziznewski then yelled at her: "If this was such a problem you should have told Dawn to come back in." Figuaroa responded: "I would think that closing the door would give you a hint." They exchanged additional heated comments, during which Ziznewski got defensive and eventually walked out after Figueroa's husband momentarily popped into the classroom to pick her up for dinner. Figueroa was upset about the encounter and immediately notified Young about that incident.

This was not the first time that Ziznewski had yelled at Figueroa and had caused her embarrassment and upset. During the 2004-2005 school year, Figueroa, in addition to her classroom duties, was also assigned as an authorized computer technician at Marshall. At some point, Ziznewski had a student bring a note to her classroom and interrupted her during her instructions near the end of the day. Figueroa diverted her attention and gave a basic solution reply so that she could return to her class instruction. But then Ziznewski popped in and yelled at her that it was a problem with her printer, which incident occurred in front of the students, Mrs. Normant, and the special education teacher, Judy Richmond. Figueroa was speechless but then recomposed herself and offered to get a free moment to address Ziznewski's problem. The actions by Ziznewski embarrassed her to be yelled at by another adult in the front of the children. She felt that this could confuse the second graders and she also felt that Ziznewski was totally unprofessional. Figueroa does not believe in yelling at children. It is humiliating for the affected child and inappropriate for other children to also hear it. Thus, she was concerned for them being affected by this conduct by Ziznewski. Figueroa was so directly upset by that incident and the outlandish conduct by Ziznewski that she determined to quit her computer technical job at the end of the school year. At that point, Ziznewski was not yet assigned as the reading specialist for Figueroa's classes so she was able to avoid any further contact with her except as part of the I&RS Committee.

However, the second incident which caused her to speak directly with Young occurred on October 6, 2006, at which time Figueroa had wanted a child in her class (R.B.) to have BSI services after she had run her own running record which demonstrated the need for it. By that time, Ziznewski was assigned as the only reading specialist at Marshall to do those services, so Figuaroa approached her to get those services for the child. As she intended to explain the need, Ziznewski constantly interrupted her and cut her off. She then stated to Figueroa: "My schedule is full. I have too many students." (P-155 at page 530). Ziznewski refused to service the students in her inclusion class. In attempting to continue that part of the conversation, Ziznewski told her that years ago an inclusion class would not receive BSI services. Ziznewski then indicated that she wanted an observer present but rejected Young as

being that observer. Ziznewski had a confrontational attitude with her at that time. Figuaroa was upset. She felt intimidated being talked at the way she was and was also upset that a child who had dire need would not be getting needed services and in a timely fashion. Although R.B. eventually did get services by November, he, like the other students who had need at the time, were denied such services for the two months of September and October. This further upset her since struggling students were not getting help in a timely fashion. In addition, she was forced to provide services by herself within the classroom, which meant taking time away from other students in the process. That last confrontation with Ziznewski made her feel uncomfortable approaching her about any other children's needs anymore. On October 9, 2006, Figueroa requested Young to convene an Affirmative Action Investigation regarding the actions by Ziznewski in bullying and harassing her on more than one occasion (P-176 at page 596). Although she eventually was directed to Assistant Superintendent Dr. Banks as a result of her complaint, she has no idea what happened with her request for an investigation, although the results of that request by her are contained in the report of the assistant superintendent, which involved complaints from others as well (P-155).

Ziznewski never approached her again for the rest of that school year until May, 2007, at which time an issue arose regarding the child S.A., whom Ziznewski found to be two grade levels above Figueroa's assessment and whom Figuaroa had recommended for the Summer Literacy Academy. Figueroa had determined him to be level H, while Ziznewski determined him to be at level 38-P., which is equivalent to the third and fourth grade level. Figueroa knew the child as having been new to the district and she had had dialogue with his parents about him during the course of that year. As a result, and having seen him every day that year, she knew that he could not have gone from a starting point of kindergarten to first grade (when she received him into her class at the giving of the year) to Ziznewski's reported 3-4 grade level in one year.

As a result, when the school year 2007-2008 began, she felt it necessary to write a letter to Young on October 29, 2007 (P-176 at page 594) regarding the need to provide BSI services for a student who had been identified as having been a struggling reader, being the child A.P., by both his first grade teacher on her exit evaluation at the

end of the school year, as well as because of his attendance at the subsequent Summer Literacy Academy. She did not go directly to Ziznewski about getting the services in light of her experience with Ziznewski's confrontational attitude the year before as well as having overheard Ziznewski yell at students the year before in a confrontational tone as well is in the hallway, which actions and noises adversely affect classroom instruction. Instead, she wrote to Ziznewski on October 12, 2007 (P-176 at page 595) and asked Ziznewski if they could jointly meet with Young to discuss the concern about her BSI students since Figuaroa understood from her colleagues that Ziznewski had already begun services for their children but not hers. She noted that she had been compelled to seek the intervention of Young regarding any further contacts with her because Ziznewski's overall attitude had created such anxiety in Figueroa that she was forced to undergo medical attention for headaches and stomach problems as a result of the stresses and hostile work environment to which Ziznewski has persistently subjected her over time. But instead of coordinating with the presence of Young, Ziznewski unilaterally popped in and interrupted her during her classroom instruction on October 12. But Ziznewski never then engaged the issue further with Young and Figueroa, despite their efforts thereafter. Ziznewski stated that she had no BSI students in Figueroa's class, which was incorrect since the students A.P. and P.S. had been identified as such there. And it was the responsibility of the reading specialist to contact the classroom teacher about servicing specific students, which Ziznewski failed to do. Suzanne Capraro later confirmed the qualifications of A.P. and P.S. to receive those services in the one on one meeting which Capraro had with Figueroa on November 13, 2007 (P-25). And Young never said that Ziznewski did not have to service either of the students or that they did not require services.

Regarding P.S., Figueroa had performed a running record on him and had observed him repeatedly, and, in the process, she noted that his problem was comprehension and, as a result, he had a strong need for BSI. When he never got it at all from Ziznewski, Figueroa determined to spend extra time with him, which took time away from her other class responsibilities and which forced her to avoid other children who are more up to grade level. She felt that someone had to suffer in order to assist this child and that translated into the other children not receiving the full benefit of their

own services because of her need to divert her resources. In January, 2008, P.S. was reassessed and he had made such sufficient gains from her efforts that he no longer need BSI.

She also challenged the findings of Ziznewski regarding A.P., whose DRA on him indicated that he was a level 28 which is equivalent to the third grade. Figuaroa did not find that believable because he was a struggling reader who had come into her second grade class reading at the first grade level. He had also been a Summer Literacy Academy student the summer before. He had had problems with fluency (i.e., "reading like you speak", as she described it). He was limited to reading word by word and slowly. As a result, his comprehension had suffered. When Figueroa failed to get reading specialist services for him from Ziznewski, she gave him more attention herself, which, once again, was to the detriment of the others in her class. She noted that Ziznewski never approached her to give A.P. any services even though he was mandated to have them. And the same time, Figueroa never understood that Ziznewski had too many students and that, as result, she could not service A.P. accordingly. Nor did Ziznewski ever show up any of the initial meetings which were scheduled to discuss him. Figuaroa was also at the meeting on January 17, 2008, at which time Young ordered Ziznewski to immediately provide services for A.P. in her BSI program for two days a week (P-28). It was at that meeting that Ziznewski "interceded" and contradicted both of the teachers, Figueroa and special education teacher Sandy Pellicane, in front of A.P.'s mother and stated that her analysis of him was that he was a good reader, even though she had not worked with him that year (other than purported testing on December 11, 2007, which in any case she never shared her test results with any of the teachers.). In addition, she had absolutely no supporting documentation to reflect her viewpoint. Ziznewski also criticized Figuaroa's work in front of the parent and claimed that A.P. might have other problems. That surprised Figueroa since there was no other information supplied about any other needs by Ziznewski. Figueroa knew that he did not have any hearing problems or any learning disabilities since she had checked with the school nurse and knew there were no such deficiencies. And, curiously, although Ziznewski claimed that A.P. was a good reader, she also indicated that she intended to bring up his case to the I&RS Committee which, according to Figueroa, appeared to be

a direct contradiction. After that meeting on January 17, 2008, of equal concern to Figueroa was the fact that even though Young had ordered BSI services to be started, Ziznewski did not initiate them until two weeks later and never provided the BSI schedule to Figueroa, even though she is supposed to provide it. Instead, for the rest of the year someone would do a "pop-in" for Ziznewski at the Figueroa classroom to get him for the pull-out BSI sessions with Ziznewski.

Finally, Figuaroa attended a Marshall School staff meeting on February 14, 2008, at which time several of the teachers expressed specific concerns regarding what they perceived as being bullying, harassments and intimidating behavior by Ziznewski, her determination to pick and choose students with whom she would work based upon her own personal teacher relationships and ideologies, as well as for her failure to comply with Edison instructional policy and BSI programming (P-178).

It is noted that during the course of the cross-examination of Figueroa (who counsel for the district had advised was pregnant) on December 9, 2008, she became so emotionally distraught with what she said were facial expressions being made by Ziznewski and directed at her at the hearing that this tribunal had to take a brief recess in order for her to recompose herself, this occurring after the tribunal had previously instructed counsel for Ziznewski to have her refrain from making any facial gestures at any witnesses (none of which was observed by this tribunal since I was focused on compiling my bench notes and examining exhibits at the time). It is also noted that this was the second instruction which had to be given to counsel since, during the course of a prior examination of Joan Hagie in November, Hagie had also expressed upset and emotional distress with what she perceived as being threatening facial gestures by Ziznewski at her. As a result of the second warning, in which this tribunal suggested that one remedy would be to remove Ziznewski from the courtroom but allow her to listen in through a live audio transmission in another courtroom, her counsel volunteered another solution, which was to have Ziznewski turn her chair around 180° and face away from both the bench and the witness box during the remaining examination of Figueroa, which was done. The remaining part of the Figueroa examination continued on in that fashion.

On cross examination she indicated that, although a one level difference of opinion regarding the skills of a child is a possibility, the classroom teacher's opinion usually controls the need for BSI. And, except for her problems with Ziznewski, she has never had any such disputes with any other teacher. She was forced to go to Young in order to get a resolution of the conflict over her two recommended students for BSI, at which time Young decided in favor of Figueroa's determinations and directed Ziznewski to take her students.

Kathleen A. Sica

Kathleen Sica is a regular education first grade teacher employed by Edison at the Marshall School and has been employed since 1995. A 1975 graduate of Trenton State College (now, The College of New Jersey), she was previously employed by the Rahway Board of Education for twelve years, where she taught grades kindergarten, three, six, and basic skills for three years. While at Rahway, she worked with BSI kindergarten through second grade students in reading and shared a special class there with two other BSI teachers during that phase of her teaching assignments. She possesses a certification in elementary education (K through eight) and has taken fifteen credits in professional development education courses. She was voted "teacher of the year" at Marshall five years ago. In 2006-2007, her class included special education students and other students in need of services in addition to her regular education students.. The special education students did a pull-out in the morning session and a special education teacher did a push-in in the afternoon session. During the 2007-2008 school year, the class was an inclusion class, which consisted of Sica, an aide for one special education student, and the special education teacher for all of her special education students.

As a classroom teacher at Edison, she has participated in identifying children in need of BSI, which occurs at the beginning of the school year, when the classroom teachers must do assessments and perform running records. Reading inventories are most useful to assist in an analysis of identifying the children who may be struggling. She has conducted this type of analysis on an annual basis since 1995. She recalled

that on November 13, 2007, she met with supervisor Suzanne Capraro to discuss the criteria for her being part of the BSI program. Her concern was that certain students met the criteria but were not been provided such services at that time, including the child identified as A.G.. Her concern was that Ziznewski was supposed to be servicing them and, although she had given Ziznewski a list of such students early on in the class year, she never got a response from her. She had also spoken to Ziznewski about A.G., who was the only one of her class whom she did not take.

However, on October 7, 2007, Ziznewski challenged her at a meeting held then about the need to provide services at which time Ziznewski stated that she already had enough students in her classroom. The meeting took place in Ziznewski's room, at which time Sica felt it was necessary to bring in another teacher, Mrs. Garabatto (a first grade teacher) to be a witness since Ziznewski had previously been hostile to Sica. That meeting began with Ziznewski yelling at her that the assessments were invalid, even though Sica merely wanted it to know why A.G. wasn't being taken. She never even got an answer from her at that meeting. Sica left the meeting upset because she had been treated unprofessionally by Ziznewski and she never showed her any reason why A.G. should not have been taken. She complained to Young on the same day about the way she was treated by Ziznewski (P-176 that page 588) because she felt that Ziznewski had been disapproving, argumentative, and hostile to her, which caused her a great deal of stress and which resulted in her need to seek medical attention. Sica then participated in an Affirmative Action Investigation regarding Ziznewski in October, 2007 based upon that confrontation (P-176). At that time she not only discussed what had transpired regarding A.G. on October 7, 2007, but she also recited the interactions she had had with Ziznewski prior thereto during the weeks of September 21 and September 28, 2007 (P-176 at pages 589 through 591).

During the week of September 21, 2007, Ziznewski was negative and argumentative with her after Sica had left a list of five students in her school mailbox whom she felt needed BSI. In a negative manner, Ziznewski entered her classroom and announced something about not taking all five, if any, of her five students. And then toward the end of that same week, Ziznewski stated to her in an argumentative manner

that Sica's student's and should not be serviced by BSI since Sica had extra help in her class. In numerous disapprovingly loud responses, Ziznewski then rambled on and on about a document which purportedly stated that Sica's students would not be serviced by her since she already had extra help in her class (even other instructors had specific assignments for certain students). She never produced the document she was referring to and the more Sica asked her what she meant, the louder and more aggressive became the responses by Ziznewski. She felt hostile tension emanating from Ziznewski and was so upset that she reported the incident to Young the next day.

The week of September 28, 2007 represented another difficult and upsetting series of encounters with Ziznewski. During Sica's review of several student individual folders, she discovered a document in the file of W.R. which indicated that he had been referred to the I&RS Committee in kindergarten at his previous school. When she shared that information with Ziznewski the next day, Sica was told by her that she hadn't seen it in the office file and appeared annoyed about the new information. Later that day, Sica had another confrontation with Ziznewski about her students, during which time Sica described Ziznewski's responses as being "condescending" and her behavior as being "unprofessional and abusive" after Ziznewski engaged in a "disapproving rampage" about the assessment being unreliable and invalid (P-176 at page 590). At some point during that exchange, Sica felt it necessary to take a few physical steps backwards, yet only to be "badgered" again with additional comments from Ziznewski about assessments, criteria and other matters. Sica tried to keep her composure, took a breath, crossed her hands on her stomach, and faced Ziznewski, at which time Ziznewski mocked her. Although, at some point, Ziznewski apologized she did so by referring to her displeasure with her assessments, which, according to Sica, no one had ever criticized other than Ziznewski. She described this incident as illustrating how it was impossible to communicate with Ziznewski on any level, and it was further demonstrated by another incident a couple of days later in which Ziznewski rolled her eyes and looked away from Sica in an annoyed fashion as Sica was attempting to clarify an incident which was then ensuing between some boys and girls in the bathroom area.

Sica also noted that B.V. and A.G. were also the subject of her concern and appeared to be a good fit for BSI in accordance with the guidelines which they had received in 2007 (P-25). But A.G. never got BSI services through Ziznewski the entire year so Sica responded by servicing him herself and she also got the after-school literacy academy involved since he was a struggling reader and could only read one word at a time. But in the process, she did not initially press Young about her concerns because she understood that Young was having his own issues with Ziznewski even early on in that school year and, further, because she felt that, at least in the case of A. G., she was providing at least some basic services for him along with the after-school academy. He had been readily accepted into that program since he needed substantial services. The previous year he had gotten ESL and had a maximum need for support. He also later attended the Summer Literacy Academy after that year with Sica. A.G. remains a struggling reader even to this day.

She also challenged Ziznewski's announced use of "batch testing" regarding several of her recommended students in November, 2007, including A.G.(P-24). Batch testing is not used to determine entitlement for BSI since it does not give a broad view of the students' individual reading needs. Ziznewski's use of batch testing for A.G. claimed that A.G. was above the cut off line for such services. However, it only demonstrated the Ziznewski was wrong. Sica saw the ongoing need for him in her classroom. She never understood why Ziznewski refused to take A.G. at all since all of the data and running records pointed to the contrary. In fact, his running record, which Sica performed in April, 2008, revealed that he only tested out as being "E" under Fountas and Pinnell, which meant that he was at the beginning of first grade even at that late date (P-96). The running record is based upon the objective analysis and the questions are so clearly asked that it does not allow for interpretation.

On cross examination, she admitted that she did not recall how many times she had met with Ziznewski regarding students during the 2006-2007 school year. However, during the 2007-2008 school year, they met approximately five to six times during which times there were confrontation between them most of the time as she attempted to discuss and focus in on certain students. Ultimately, Ziznewski took all of her students

except for A.G. Prior to the 2007-2008 school year, she had never filed any formal complaints against Ziznewski but felt compelled to do so at that time because of her actions which kept escalating during that school year. It got so bad that Sica preferred not to go past Ziznewski's room in order to avoid any potential confrontations. She and many of the other staff attempted to avoid her for the same reason. Since the departure of Ziznewski from the school this year there has been no shouting by other teachers in the hallway and the overall atmosphere has been calm and cooperative.

Mary Schaefer

Mary Schaefer is employed by Edison as a first grade teacher. She received her Bachelor's degree in elementary education from Keane University in 2000 and her Master's degree in reading and fluency from Northern University in 2006. She began her employment at Edison in September, 2001 as a long-term substitute teacher. Thereafter, she became a fulltime teacher commencing in September, 2002 at Marshall School and has been assigned there continuously as a first grade teacher. She possesses a New Jersey certification in elementary education for the grades K through 8.

She got to know Ziznewski, who came to Marshall as a reading specialist in 2004, at which time Ziznewski had students from Schaefer's class assigned to her for BSI instruction. Commencing in that first year of interaction, Ziznewski sent a memo to Schaefer on November 19, 2004, at which time Ziznewski disagreed with the various prior year's teacher referrals or the recommendations by Schaefer for BSI instruction for various students (P-1). Schaefer did not agree or disagree with Ziznewski at the time. The school had just started in the district for the year and she wanted the opportunity to assess the parents, get her own assessments of her students, and verify what it meant to "exit" students, as suggested by Ziznewski in her memo. However, she was surprised that, after having had prior basic discussions with Ziznewski regarding the students, Ziznewski manifested these early positions regarding the non need for BSI instruction of the students. Schaefer wanted to see the actual tests and not just the results, but Ziznewski said it was confidential as to each child. She then relented but only showed Schaefer one child's test. But then, she was surprised to see that Ziznewski only

showed her a California test, known as a C. B. test, which was very old. She later found out that the Terra Nova testing would have been more appropriate, and when Ziznewski found out about that she became very upset with Schaefer and yelled at her for ten minutes in Ziznewski's room. She then persisted by following Schaefer on into the hall where she continued to shout at her. At one point she kept yelling at her and stated that this was the sole criteria and "this is how it is!" Ziznewski never did show her the test results of the other five students even though Schaefer wanted to see those tests and how they were being administered by her. She also wanted to know whether there was a verbal component in them. In addition, Ziznewski refused to service three of her students after November 29, 2004. As a result, on November 30, 2004, Schaefer wrote to Young about the need to keep the three students in BSI at least through midyear in order to ensure a secure foundation for them and to increase their confidence levels (P-2). But they were nonetheless exited out at the end of November after Young determined they should come out since he claimed that their scores looked pretty good, to which Schaefer objected. She nonetheless went along with his decision. She had no other disagreements with Ziznewski during the 2004-2005 school year and no further contact with her then. But she did not feel that Ziznewski was collaborative (which Schaefer steadfastly believes in) and Ziznewski routinely employed and possessed a verbal voice attack approach.

She had no interactions with her in the 2005-2006 school year, during which time Ziznewski did take all of her assigned students. She also avoided any interactions with her during the 2006-2007 school year, although she noted that during that year, the first grade hallway atmosphere where she worked was uncomfortable for everyone because Ziznewski was always yelling at some one there or from her room.

The 2007-2008 school year was a different matter, however. On October 5, 2007, Ziznewski entered her room during a lesson in order to pull four students to read a book to them. When Schaefer asked if the students were the BSI students that she should be taking and if any of those students were from the list that Schaefer had provided to her on October 2, Ziznewski became irritated and her voice started to rise in the immediate presence of the least one student. Schaefer felt uncomfortable with that

scenario. She allowed Ziznewski to take four students with her, none of whom were the four she previously recommended or who had been recommended by their prior kindergarten teachers. Ziznewski returned twenty minutes later and wanted to engage in a discussion about the four Schaefer children, but again the time was not conducive to a conversation because Schaefer was right in the middle of a class instruction. During that brief conversation, however Ziznewski mentioned having assessed one of her new students, A.O., twice in September at which time Ziznewski had determined that A.O. did not qualify for extra help. However, Schaefer was surprised because she did not recall the child ever being pulled from her class to be assessed and, as a result, she privately wondered how she had made her determination. The conversation ended when Ziznewski suggested that Schaefer send her the assessments that she had completed on her students but told her to keep in mind that the running records were still not truly valid assessments. She later told Young that she felt uncomfortable working alone with Ziznewski inasmuch as she did not like the tension generated by her or the need to be defensive when presenting her student assessments. She also did not appreciate the condescending matter by and Ziznewski's reaction to her question about the students program, which she viewed to be "unsettling" (P-15) as well as her overall sarcastic tone with her (P-17).

On October 16, 2007, Schaefer wrote to Young and indicated that she had recommended four new students for BSI based upon her own assessments in addition to the four she recommended based upon the prior year's teacher recommendations but that Ziznewski never took them for servicing. The new students were E.H., D.J., A.O., and E.P. (P-60). Although D.J. was in the first grade, she assessed him as only being at the kindergarten reading level (P-69). Ziznewski did not take D.J. for BSI but she not know why, so Schaefer provided him with her own instruction. Regarding A.O., although she was in the first grade in October, 2007, she was only at the "A" (Fountas and Pinnell) reading level or kindergarten level (P-68) but Ziznewski failed to take her even though Schaefer put a note in her mail box at the beginning of the year requesting the services. On October 5, 2007, Ziznewski refused to take A.O. because she told her that she would have had too many students in her class as a result. Schaefer helped the child in an extra group of instruction which she supplied herself along with the other

three students as a result and included that special group in her regular class day, thereby depriving other students of other instruction time.

E.P. was also at the "A" level and Ziznewski never taught her the initial requested BSI instruction even though the child was already having problems in that she lacked confidence as early as September, 2007 (P-99). And, although she did take her on later in the year she never shared any test results with Schaefer. Ziznewski was very negative and yelled at everyone or used sarcasm and condescending comments to her as well as others, in addition to the recited incident noted above. Schaefer even heard her yell at Young and other first grade teachers while children were present during school time as well as in after school settings where both parents and children still were about the building. She also refused to share test results. She never took the recommended child E.H. either, who was also at the bottom of the reading level along with the other three, but curiously and by contrast, Ziznewski did take children with higher reading levels, such as M. V., G.C., A.K., and R.U., all of whom had been on the original request list by Schaefer in addition to the above mentioned four students. Schaefer wrote to Young on January 17, 2008 (P-62) and expressed her observations about Ziznewski's selective determinations regarding whom she would teach.

In addition, she raised concerns about the inconsistencies in the BSI instruction that Ziznewski was giving since, even by that date in January, 2008, the students had not been receiving consistent instruction from her due to her either being absent, arriving late, or working on something else during the scheduled times. She also failed to provide any feedback regarding the students' progress. In that regard, Schaefer kept a running record of the absences and lateness of Ziznewski from the period of October 5, 2007 through January 18, 2008 (P-62 at page 154) on her own initiative and for her own personal records and peace of mind because she believed the services were needed for those children after the October 5 incident. In reviewing those records, she noted that she had calculated that Ziznewski was late 9 out of 37 sessions and was a "no show" 18 out of 37 sessions. She only provided ten full sessions of the 37 sessions. Ziznewski never approached her about making up either her lateness or no show sessions. Thereafter, starting in the January, 2008, Young told her to monitor Ziznewski's attendance thereafter. Although she found this to be uncomfortable, she

nonetheless followed orders. The formalized typed up list was given to Young by her in January, 2008 (P-62), but the follow-up orders were only contained on her "sticky notes", which were not provided until March.

On cross examination, she conceded that some of the absence days were satisfactory, where workshops or child testing diversions were acceptable excuses for non attendance by Ziznewski. Yet, she noted that if Ziznewski chose to test one child, the others were nonetheless deprived of services by her and she never offered any makeup to compensate for that, even though it was Schaefer's understanding that she should have done so. At the same time, she acknowledged that she was aware of no protocol which would provide for makeup sessions if the reading specialist was absent due to illness.

When further scrutinized regarding her summary of the attendance record of Ziznewski, Schaefer noted that even if she was five minutes late for a session, Schaefer gave her full credit for the session, even though Ziznewski never offered to make up any of those times. She recorded her arrivals by using the classroom clock. Further, even though she did challenge Young at the beginning of the year about there only being 40 minute sessions two days a week, which is in violation of the Program Content Policy of Edison (P.-181), Young only told her to document the actual attendance of Ziznewski and not to bother herself with the apparent conflict in the district policy and school's schedule of services.

The child G.C. was another problem which Schaefer encountered with Ziznewski. Two meetings of the I&RS Committee were convened regarding her on January 24 and March 20, 2008. G.C. had not been a good reader in the Schaefer class so they had attempted a number of interventions after the January meeting to assist her, including a suggestion that earphones with music be employed. That procedure was tried for three days but was discontinued at the request of the parent in accordance her meeting which Schaefer on February 7, 2008. However, Ziznewski always said the G.C. had no difficulty reading but she presented no evidence to that effect at the January meeting. Further, Ziznewski never discussed any progress with

Schaefer about the child. She acknowledged that, although it is okay for professionals to disagree at the I&RS Committee meetings, any disagreements should be backed up with appropriate documentation, none of which was ever supplied by Ziznewski despite her overt challenges to the team. In addition, it was her opinion that Ziznewski failed to provide any type of testing as late as March, 2008.

As a result, on January 28, 2008, Schaefer requested supplemental instruction for her (P-56) for even though she she had been assigned instruction from Ziznewski because there was still no progress noted in her by that point. She had been one of the four children for whom Ziznewski had failed to provide full services, pursuant to the running record of Ziznewski's abysmal attendance at her scheduled meetings, as noted hereinabove by Schaefer. As a result of that request, Jennifer Figueroa was assigned and commenced to provide after-school instruction for G.C. and collaborated with Schaefer in order to provide continuity for her, in marked contrast to the lack of such collaboration by Ziznewski up to that point.

After the I&RS Committee meeting in January, Schaefer scheduled a follow up meeting with the mother of G.C., which was held on February 7, 2008, which turned out to be an upsetting event for Schaefer. She was surprised and extremely uncomfortable that the mother surprisingly invited Ziznewski to attend, but Schaefer allowed the meeting to continue despite her discomfort and surprise. She felt ambushed by the manner in which Ziznewski verbally attacked her and questioned her about the use of the headphones in the presence of the parent, which, as noted above, was only attempted for three days before it was discontinued at the request of the parent. She was upset that Ziznewski, who was also a member of the I&RS Committee which had approved its use, failed to support the intervention recommendations of the committee. It was Ziznewski's "ambush" approach to challenging the use of the headphones with the parent present which particularly upset Schaefer. (P-57). Ziznewski was adamant about the use of the headphones, even though she had never brought up any problems with reference to the reading level of the child, never challenged the use of supplemental instructions or the use of the headphones at that committee meeting. Schaefer felt that the parent no longer trusted her as a result of that exchange. Later

that day, she wrote to Ziznewski and requested a copy of the notes which she had written during that parent meeting, but she never got a response from her. (P-57 at page 143).

The I&RS Committee conducted a follow-up meeting on March 20, 2008, with the parent and which Schaefer characterized as being extremely stressful, uncomfortable and embarrassing. Ziznewski constantly interrupted the presentation by Schaefer about the child having difficulty in reading. She heavily verbally attacked her in front of the parent even though Schaefer, as well as the other staff members present, including Figueroa and Hoffman, among others, had significant documentation to support the ongoing lack of reading concerns and lack of progress of the child, while Ziznewski produced absolutely nothing. Schaefer felt that Ziznewski was heavily responsible for influencing the parent's distrust of her. But at the same time, Ziznewski admitted that she did not have any DRA's because she had not administered the assessments even at that late date. All she produced was a paper with six words which she represented was a writing sample. And, although Zisnewski then promised to complete the DRA by the next Monday and share it with the committee, she never did. In her opinion, Ziznewski did not appear to understand what the running record was. In addition, Ziznewski appeared to deflect the parent by encouraging the parent to bring in books that G.C. could purportedly read at home and have them compared by Ziznewski to what the school authorized to be used on her behalf, which Schaefer saw as being negative and contrary to the mandate of the I&RS Committee, as well as Edison policy. As a result, Ziznewski undermined the teachers' ability to work well with the parent. Ziznewski then proceeded to leave the meeting and steal away to her classroom with the parent, as if they were in collusion. Ziznewski never shared any follow-up information with either Schaefer or any other team member about the progress of G.C. at any time thereafter. Later, in May, 2008, there was a third I&RS Committee meeting with the parent, who had with her a member of her community. Ziznewski was no longer in the district by that time. That meeting went much better at which time the parties all agreed that G.C. had made some progress but that some work still needed to be done to assist her.The meeting was calmer and professional, even though there were still some barriers with the parent who persisted in not believing that her child needed help

and who later strongly and negatively challenged the role of Schaefer in the process in a letter which she and her husband sent to Acting Superintendent DiMuzio on June 9, 2008 and which had been copied to Young (P-48). In response, Young sent his own letter to DiMuzio on June 11, 2008, in which he totally disagreed with the content of the parent letter and who suggested that Ziznewski had a personal vendetta against Schaefer and may have been involved in writing that extensive letter (P-49).

On cross examination, she admitted that, although her discomfort affected her ability to communicate with Ziznewski, she had no real fear for her own safety. Regarding the October 5, 2007 incident, she indicated that this was the only one to one confrontation she had with Ziznewski, but she indicated that she never engaged in any other meetings with her based upon her history, which went back to the one on one incident which occurred in 2004. Thus, she never discussed the needs of her children with her, although she contends that the needs of her students were never compromised by that failure to have any more direct one on one interaction with Ziznewski. Her focus continued to remain with them and she provided services for them in her class even though that caused an overload in her class in order to compensate for the lack of direct contact with Ziznewski. Although, on further cross-examination, she conceded that some of her total figures regarding the absences and tardiness of Ziznewski do not completely compute with the time that she jotted down at the time, she nonetheless felt that she was accurate in the recording of those times when Ziznewski failed to provide timely services to her students.

Kerry Peters

Kerry Peters is employed by Edison as a third grade teacher where she has been employed at the Marshall School since December, 2004, having first started there as a second grade teacher. Previous thereto, she had been a kindergarten through grade two teacher in the literacy enrichment program starting in September, 2003. She has been a third grade teacher since September, 2005. During the 2007-2008 school year, BSI was provided outside of her classroom by Ziznewski. However, although she had referred four additional students for BSI, including S.A., A.G., R.B., and Y.C., none

ever got any services provided by Ziznewski. During the course of her efforts to get the attention of Ziznewski to provide such services, Ziznewski encountered her during unscheduled visits in her classroom during instructional time, which caused sizable disruptions in the classroom, and all such conversations lead Peters to believe that Ziznewski was not open to taking her recommendations into consideration when deciding which students would receive services (P-25).

On October 22, 2007, Ziznewski entered the Peters classroom twice on an unscheduled basis and disrupted instruction again. During the second of those two encounters, Ziznewski became argumentative by raising her voice whenever Peters attempted to explain her recommendations about S.A. and then vigorously pointed to the scores in order to emphasize her points. Peters became very uncomfortable when Ziznewski raised her voice and continued to speak at her in a condescending tone during that conversation. Peters felt so uneasy that her pulse began to race and she became unnerved. Students could hear the confrontation, after which Peters had "knots" in her stomach and was highly embarrassed and humiliated. She nonetheless forced her way through the remaining class even though she felt like she would otherwise have cried with upset. She viewed this as a hostile and highly unprofessional exchange. Ziznewski never agreed to take S.A. and never offered to collaborate with her regarding any of the other students either.

Later, on November 13, 2007, she had her scheduled professional conference with supervisor Suzanne Capraro, who reviewed her assessments regarding the children and agreed that all of them met the criteria for BSI, despite the elevated test results having been registered by Ziznewski. For example, although Peters had tested S.A. as being at the second grade level, Ziznewski determined him to be at the third/fourth grade level (P-52). She tested A.G. at the first to second grade level, while Ziznewski tested him at grades three and four. As a result, S.A. never got services from Ziznewski in 2007-2008, even though the BSI instruction was supposed to start two weeks after the start of school. And, although she agreed on cross examination that the reading specialist's recommendation has a role in the process of a child getting BSI, that recommendation does not rise the same level as the recommendation of the

classroom teacher. She anticipated that any differences could be worked out, but she was unable to effectuate any such resolution with Ziznewski. Consequently, she was forced to approach Young in the last week in October, 2007 regarding S.A., at which time Young said that he would handle it. Yet, Peters heard nothing further from him and, as a result, Peters determined to give S.A. more services within her classroom. Similarly, after her meeting with Capraro, she had been assured by Capraro that she would also take her concerns "into consideration" about S.A. but she never received any follow-up from her either. She conceded that she never thought to follow up and contact Capraro further about it. When asked why she did not go back to Young at that point, she indicated that she felt that it would just put more fuel on the fire relative to the discord generated by Ziznewski since she had felt so unnerved by the prior conversation with her. That conversation had "rattled" her and had made her become fearful. That one incident was so significant as to cause her to not want any further confrontations with Ziznewski, who had caught her completely off guard by her verbal assault (P-22). She conceded that her own comfort level precluded her from approaching Ziznewski again even though she was aware that it was her obligation to get services for her children. That is why she resorted to her own in-class instruction for the child as a result at which time Peters continued to measure the progress of S.A. throughout 3rd grade. He did progress through her own efforts even though there was absolutely no way that S.A. was at the third and fourth grade reading level at the beginning of grade three or at the four to fifth grade levels by midyear, which had been so stated by Ziznewski. Once again, on cross examination, she noted that she had never been so confronted by any other colleague in her teaching experience. She acknowledged that she never got medical attention for her upset, however.

Suzanne Capraro

Suzanne Capraro is an elementary supervisor at Edison in the pre-K through fifth grade class levels in which capacity she is responsible for supervising the students in and among eleven different school buildings in the district. She also observes non-tenured teachers in certain schools, which includes the Marshall School. She received her Bachelor of Arts degree in English and a minor and secondary education from

Boston College and her Master of Arts degree as a teacher of English at the Teaching College of Columbia University. She also has earned fifteen credits beyond a Master's degree which includes twelve relative to her supervisor's certificate and three other general credits. She possesses certificates of teacher of English and supervisor. She started her employment in Edison 1993 and initially served as an English teacher, followed by an assignment as a staff development trainer. She became a supervisor in August, 2004. Her offices are located at the central Board of Education office along with fellow supervisor Lois Hagie. They jointly observe and plan in-service training days, oversee curriculum projects, and meet with literacy teachers, curriculum resource teachers and reading specialists in order to help them in their professional development. The role the reading specialist is to assist the classroom teachers relative to the reading needs of a child. In that regard, she would expect cooperation between the classroom teacher and a reading specialist in order to maintain an ongoing flow of information regarding the children. She was responsible for such programming for the 2006-2007 school year but was on maternity leave between January and April, 2008 during the ensuing 2007-2008 school year.

She has known Ziznewski for a period of time. During the 2006-2007 school year, Ziznewski came to her attention in her capacity as a supervisor of reading specialists when she received information from Dr. Traficante and Young about some students not having been seen or serviced by Ziznewski. Reading specialists are considered on the level of elementary school teachers, and they are teachers. As a result, on October 23, 2006 she and Hagie wrote to Ziznewski about the need for a meeting with her relative to children who had been identified for BSI by their classroom teachers and yet were not being serviced, which meeting was to take place on October 24, 2006 (P-4). At that time they requested certain documents to be produced at the meeting relative to BSI services since there were some issues about Ziznewski's teaching schedule not be completed timely by a certain date. That schedule is supposed to go to Deborah Bredahl who is responsible for funding the program. There was also a concern about the requirement to "push-in" versus "pull-out" children pursuant to the district guidelines regarding first graders and the need for pull out of second graders. They had been advised that Ziznewski had solely decided to pull out

the first graders in violation of those guidelines. She also noted that during the 2006-2007 and 2007-2008 school years, reading specialists were responsible to generate the DRA's. As a result, they also wanted to see her lesson plan book to ensure that instruction was being provided by her.

The meeting took place on October 24, 2006 (P-5) and it was conducted at the office of the Principal Young. Capraro began the meeting by discussing those concerns with Ziznewski. She reminded her that the start date for such services was supposed to be late September or early October. Ziznewski refused to answer anything verbally regarding the issues raised by her and only resorted to writing down comments on Post-It Notes which she passed through her representative, Diane Keane. Although Capraro was surprised to see that Ziznewski was taping the session, she was nonetheless not uncomfortable with it being so taped. Ziznewski did not comply with the request to supply three or four of her DRA's or her lesson plan. Through her notes and note passing, Ziznewski then asked what authority these supervisors had over her and she was told the answer. The entire meeting lasted fifteen minutes and Capraro felt that no progress had been made in order to get a resolution of the concerns regarding the children. The meeting was a waste of time. She and Hagie were frustrated after the meeting that they failed to generate any dialogue about the schedule or the children. There was no immediate agenda for further action identified at that time except there was a follow-up meeting initiated and scheduled by Young for November 28, which meeting did not take place until January 22, 2007, due to several scheduling delays on the part of Ziznewski.

At the outset of the January 22, 2007 meeting (P-10), Ziznewski once again challenged the validity of the supervisors overseeing her BSI program, which Dr. Traficante then clarified, even though it had been done so at the prior October meeting. Capraro was surprised that there was another challenge to her authority. No lesson plans were produced by her even though Young had written Ziznewski on November 22, 2006 (P-7) to produce them as well as four copies of her DRA's. In fact, she never produced them the entire school year despite the instructions to the contrary. At the same meeting, Ziznewski then challenged the need to complete the DRA's by reading

specialists, even though there already was a policy in place in the district that required that reading specialists were to use the DRA. She nonetheless still questioned the reliability of the DRA.

Thereafter, an instructional staff meeting was conducted on September 28, 2007 by Bredahl, Capraro and Hagie, which was attended by Ziznewski. The number two topic on that agenda was the issue of the DRA (P-11). Thereafter, Capraro and Hagie sent a memo to all reading specialists and literacy development teachers on October 3, 2007 (P-12) and advised them that they wanted the reporting of the DRA levels for all children who had been accepted to attend the 2007 Summer Literacy Academy for each marking period. The staff was specifically ordered to report the DRA levels for all children with whom they worked in the next reporting periods of January and June. She noted that if a supervisor requests to see the testing or the DRA levels, the reading specialist is expected to produce them. She also indicated that the leveling system which the district utilizes is accurate (P-53). The Edison running record was created based upon that leveling system which is a system of books created by Fountas and Pinnell and which had assigned a grading level to each of the books. Edison totally relies upon that system and additionally has created its own rating system itself, both of which systems have interfaced. Consequently, Edison expects teachers to use Fountas and Pinnell as one of the measures since the Edison had signed onto it along with other assessment tools.

On November 13, 2007, Capraro then met with the Marshall school teaching staff regarding BSI information and to clear up any confusion about the guidelines, which meeting had been suggested by Dr. Traficante since there was an apparent discrepancy between what the bulk of the teachers believed and what Ziznewski understood to be the impact of the DRA (P-25). She met with Ziznewski as part of her schedule with the staff at 9:15 AM on that date. She noted that the meeting had originally been meant for late October, 2007 after school but it was abruptly canceled when Young announced that he had been verbally attacked by Ziznewski earlier that day. Dr. Traficante then told Capraro not to stay in the building that day as a result. She rescheduled the meeting on the November 13 date accordingly during the regular

school day and conducted it in small group sessions. She utilized the BSI guidelines for each of the sessions (P-181). At the various meetings, some of the teachers asked what the criteria were to allow for BSI, at which time she advised them to check with their respective building principals and that the students were to be recommended by the classroom teachers. Ziznewski was the only reading specialist at Marshall. She was assigned grades one and two and if time allotted, she would be assigned additional students in grades three through five. However, there would be a limit to the number of students that she could handle and the building principal (Young) would be responsible to set a priority list for her. In addition, she planned to meet five to six times per year with the twelve reading specialists to whom she was assigned in the district at which time she would allocate approximately one and a half hours of consultation for each of them per each session. She has been Ziznewski's supervisor since August, 2004.

Capraro had no specific negative incidents with Ziznewski during the 2005-06 school year. However, there arose an initial conflict in October, 2006 regarding Ziznewski's scheduling problems, to which she testified hereinabove, and of which she only became aware through Young. As a result, the October 2006 meeting with her was most unusual in light of the lack of any prior such interactions and her surprise that Ziznewski totally refused to cooperate with them at that time. She never observed her in her classes, and nor did Lois Hagie. They rarely worked with observing tenured teachers. On a formalistic basis, the DRA was introduced during the 2006-07 school year for the first time. In each case, each instructor would be able to select a book for the individual needs of a child but it had to be based upon the instructional level of that child.

She acknowledged that she felt that she had had a good professional relationship with Ziznewski but nothing more since she was reluctant to inquire of her much more than that due to her having observed Ziznewski being argumentative to others on some occasions, including the October, 2006 meeting. As a result, she did not want to get into a one-on-one situation with her.

Martin Smith

Martin Smith is the supervisor of world languages and bilingual education at Edison, in which capacity he is in charge of the "English as a Second Language" program (ESL). He received his Bachelor of Arts dual degrees in psychology and human communications in 1978 from Rutgers College and subsequently obtained two other majors at Rutgers, including Spanish. He also received his M.Ed. degree in educational administration and supervision from Rutgers and a Bachelor of Arts degree from Rutgers in French and a Bachelor of Arts degree in speech communications, a Master of Arts degree in speech communications from Temple University and his Ph.D. ABD ("all but dissertation") in speech communications from Temple University. He received his teaching certification-alternate route program from The College of New Jersey in 1988 and his French major-teaching certification at Rutgers University and Universite' de Tours, France in 1996. He possesses certifications from the State of New Jersey in the areas of Spanish (K through 12), teacher of French (K through 12), supervisor, principal, and superintendent (chief school administrator). He has held the job as supervisor at Edison at its ESL program, world languages and bilingual education since September 30, 2000, after having been a supervisor of similar programming at the Princeton Regional High School between 1996 and 1999, after having previously served as a teacher of Spanish there between 1990-96 as well as Saint Joseph High School, Metuchen, between 1984-1999. Prior thereto he was a graduate assistant at Temple University where he taught undergraduate courses between 1978 to 1982. He was successfully recruited by Edison away from Princeton. He has served six years in the "chairs" as president-elect (two years), president (two years), and immediate past president (two years) of the Foreign Language Educators of New Jersey and is a member of the New Jersey Standards Revision Committee for World Language Revisions for the third time, among other state professional educators organizations. As a speaker, he is active in two national professional organizations and serves on two national board of directors, including the Northeast Conference on the Teaching of Foreign Languages and the National Association of District Supervisors of Foreign Languages and is a member of the executive board of the Joint National Committee for Languages and the National Council for Languages and International

Studies . He is the recipient of numerous grants and awards dating back to 1992. (P-183).

At Edison, his job as supervisor includes the oversight of the entire ESL program, the filling of positions, observations of staff, and oversight over and maintenance of the ESL and bilingual program requirements under the New Jersey Code. Both of those programs offer instruction in grades K through 12. There are several magnet schools for that purpose, including four out of the eleven elementary schools. In 2006-07, and 2007-08 the Madison Primary School, Madison Intermediate School, Washington School, and Woodbrook School served in that capacity. Each student receives two periods each day with a certified teacher five days per week in 40-45 minute blocks of instruction. It was his assessment that the children in that program benefit from ESL because they overcome the isolation which they would otherwise experience in the regular classroom without the benefit of that language instruction, it gets them more fully engaged, and propels them into engaging other subject areas. In order to effectively channel the children in need of such services, they must be identified within days of a student's entry into the school system. This process includes a screening at all grade levels at Edison. All students who speak other than English at home must be screened and the enrollment form indicates whether English is spoken at home or not.

The triggering screening document is called the Observation Rating Sheet (ORS). In the non-magnet schools, the reading specialist is responsible to undertake and complete the ORS, while in the magnet school, the ESL teacher does the ORS. The ORS is an initial screening conversational instrument which is meant to separate fluent English native speaking students from those who cannot engage in those skills. Data is important to determine English language proficiency. Three steps must be followed in order to identify students in need. The first step is to identify all students who speak a language other than English at home. The second step involves the tester developing an initial screening instrument (the ORS) to determine and separate those students who are fully reading proficient versus those who are not. Thirdly, if there is any doubt there are three state approved instruments which the district can rely upon

and utilize for further testing. Edison has chosen the Maculitis II ("MAC II") programming as that second level testing tool. Thus, the ORS is definitely not the final step in the process for any child that they cannot determine is fully proficient in English. He has provided training for reading specialists regarding ORS starting in 2001-02, at which time he and his office provided the training program to all district reading specialists, especially new specialists within the district. The specialized training program was repeated in the 2004-05 year.

The information which is obtained through the ORS testing is recorded on the screening form of Edison (P-65) and has to be completed by the reading specialist or ESL teacher, as appropriate. In 2006 and onward, Marshall School was not a magnet school, therefore Ziznewski was required to fill it out. She was always permitted and free to call him to ask questions about it. The form must be completed within 48 hours after registration by, as in the case of Marshall School, the reading specialist. In addition, there is the autumn ORS testing document but is only a summary sheet, which also must be completed by the reading specialist. In 2006-07, Ziznewski, as the reading specialist, was required to place the completed ORS in the cumulative student folder and the school secretary would then contact the magnet school to proceed to the next step, as appropriate. The bottom of the screening form indicates, in relevant part: "Note: Forward completed form to appropriate office (elementary)...for data recording and final disposition. One copy of this form is to be retained in the student's folder after recording program participation and standard score and NCE score in computer. Forward one copy to the ESL/BE supervisor for your school." (R-65, page EBOE00158). He further indicated that a sample of the ORS test which was used in 2006-2007 was illustrated at exhibit P-100,page EBOE00327. This was the same form that was in use when he arrived in 2000 and is and still is used by the district today. He also noted that, the third step in the MAC II process is administered by the ESL teacher only after step two is completed by the reading specialist. At the same time he noted that the actual ORS test sheet is not required be placed in the student folder, but the screening form (P-65) is the instrument the district then uses to pursue and process any further required activity on behalf of the child.

He first met Ziznewski when he conducted his first training session as supervisor in 2001. Thereafter, the September, 2006, during the third week of school, a teacher at Marshall stopped him in the hallway of the school and identified a student, A.G., whom she felt might be in need of ESL. As a result, he went to the Marshall School's main office to check on the status of A.G's form, where it should have been located. But he found no forms there at all. He asked Principal Young to check on the status of the form and have it placed in the folder. Young wrote him on September 26, 2006 (P-64) and indicated "After our conversation, I immediately went down to Mrs. Ziznewski and questioned why she had not placed an ORS in the second grader's folder as you had directed. She became enraged and said she is going to submit a grievance against you. I indicated this ORS must be completed, placed in the child's folder, and determine whether he needs further testing. Mrs. Ziznewski does not want any further testing. I questioned why no child in a school has been in need of further testing. She again indicated she had called the ETEA office, feeling she is being discriminated against by you. She also feels you should not be questioning her judgment."

Approximately one week later, in early October, 2006, he received a call from the literacy coach at Marshall with reference to several other children. At that time he also re-checked on the status of A.G. and discovered that there were still no forms there for him or the other children either. This was his first contact with Ziznewski since 2001. Then, on October 10, 2006, Young wrote to Ziznewski and identified 58 children into whose folders she was to place the ORS screening results after the screening process had been completed and as recommended at the Edison Enrollment Center. She failed to do the screening for all them or place them in the folders for one and a half weeks as of the end of September. She nonetheless claimed that she had done all the testing and found none of them to need services and, further, that it was not her job to put them in the folders (P-122). She failed to produce the ORS rating sheets (P-65) in any event. His office never saw them produced and had asked her for the screening forms. She nonetheless claimed that she had them and they should trust her in stating that the testing had been done and that all of the students had passed. They then ordered her to produce them but she failed to do so. As a result, he instructed Mrs. Randy Hook to perform the ESL MAC II testing on October 13, 2006, which resulted in nine students

found to need it. There were no ORS scores in the folders of eight of the first graders (P-116), even though it had been recommended at registration that they needed to be screened. In addition, A.G., in grade two, was found to need ESL. They were all kept at Marshall School because the year was already under way and Mrs. Pandit, who was in another school teaching those services, was pulled into Marshall and was paid for extra time as result of this extra assignment. At the end of 2006-2007, the Federal WIDA testing results regarding English language proficiency revealed that many of the students had had questionable transition results and, therefore, he concluded that Mrs. Hook had correctly diagnosed the group of students as having needed ESL services services in the prior October.

He noted that the child N.C. had been screened by Ziznewski, although she failed to provide evidence of having tested him. Mrs. Hook nonetheless determined that he had needed services after she had completed the MAC II testing of him and after Ziznewski had failed to produce any evidence of having done it (P-100). N.C. was administered the MAC II because his initial ORS scoring of 20 required it.

J.V. had received an ORS of 15 (P-101) which required him to undergo ESL instruction when the MAC II testing by Mrs. Hook demonstrated that need. He had no reason to doubt her scoring there. and, even by the end of 2007, he still needed further ELS based upon his score results (P-122). R.R. scored an ORS testing by Hook of 20 and was still not English proficient at the end of the year. Therefore, R.R. needed services (P-102). M.V. scored an ORS of 20 by Hook, which indicated that he was not English proficient, and had he not been provided these services in the year, he would not have even moved along as he did (P-103). M.K. was noted as requiring ESL testing based upon his enrollment form (P-104) and when that form was transmitted to Marshall, Ziznewski was required to do the initial testing. Yet, she never produced any evidence of a form having been completed by her or having been placed in the folder. Smith also noted that at the end of 2006-07, M.K. was still developing but he had needed services at the beginning of that year.

S.V. registered an ORS of 15 and was therefore eligible for ESL. He noted that Mrs. Pandit did the end of the year testing, although it was all scored by an outside agency. A.G. received an ORS of 16 on the retest by Mrs. Hook on October 14, 2006 (P-106 at Bates page EBOE00373), which qualified him for services, even though Ziznewski had previously tested him on September 7, 2006 and indicated an ORS of 23 (P-106 at at Bates page EBOE00379). The further follow up MAC II testing of A.G. on May 10, 2007 (P-106 at Bates page EBOE00381) revealed a standard score of 615 which, when contrasted with Hook's MAC II testing results of 501 of A.G. on October 13, 2006 (P-106 at Bates page EBOB00376) indicated that Ziznewski's result was questionable and its validity was wrong based upon that further testing and the data points during the year, which had shown that he had had need for services. He observed that A.G. was determined to need further ESL services during the 2006-07 school year based upon the ORS and MAC II test results. And based upon his review of the overall testing results by her, his conclusion was that Ziznewski appeared to be biased against placing any child in ESL which went counter to the district's position of preferring to provide services when there was any doubt about the success of a child. Although different teachers may experience some deviations in their ORS test results, it is nonetheless universally stressed in the district's teacher training that only fully proficient English speaking children are to be screened out. The results from the D.B. scores did not appear to comport with that approach at all. (It is noted procedurally that the testimony of Smith ended at 12:30 on this day of hearing, March 4, 2009, in order to allow Ziznewski to go to an eye doctor for an emergency appointment after she had complained of discomfort at the hearing. The matter resumed on the next scheduled day, March 5, 2009, accordingly.)

On November 13, 2006, Young wrote to Ziznewski about attending a meeting on November 21, 2006, in order to review the ESL screening program (P-120). She was asked to bring copies of the ORS testing results which had already been completed, despite the fact that there had been a wait of two months for the production of her ESL Bilingual screening forms. They were requested in order for them to confirm her compliance with the program and that she was to have placed all of the 58 screen forms in the appropriate folders. It was the responsibility of Ziznewski to ensure that

they were placed in those folders. In that regard, on October 10, 2006, Young had already written to Ziznewski and had told her that it was "imperative" that an ORS form be located in each of the 58 student folders and that it was her responsibility (P-119). This had yet to be done by her by the time of the November 20, 2006 meeting, however.

The meeting took place on November 22, 2006. In attendance were Dr. Traficante, Smith, Young, Ziznewski and her ETEA representative, union president Myron Fouratt. At that meeting, Smith clarified that the district had clear-cut procedures to conduct ORS screening, that it was the responsibility of Ziznewski to ensure compliance and that the children were to be identified appropriately based upon the data which had been developed in the district. He rejected Ziznewski's claim that they should trust her judgment and not respond to district policy in that regard. When she was asked by Young to produce the requested documents, Ziznewski told them that they were in the trunk of her car and that they should nonetheless trust her and not challenge her professional judgment. Young instructed her to provide them by December 1, 2006, and followed up with a letter to her on the same date in which he made the same demand (P-121). In addition, Smith was surprised that Ziznewski challenged his authority as being the ESL supervisor so the district leadership in attendance clarified the role of Smith. He observed that he was confused by her challenge since they had met many years before and it had never been a question about his authority at any point up until that meeting. Smith further advised her at that meeting (and Young stated in his follow-up letter to her) that the execution of any ESL parent waiver letter must only occur between the ESL supervisor and the child's parent and that Ziznewski should not put herself in the middle regarding whether children should be in the ESL process at all. He indicated that she nonetheless violated that mandate later on when several complaints came from the ESL teacher, Mrs. Pandit, about her interference there.

The matter involving student D.B. is a direct case in point, who was registered on March 21, 2007 as an incoming kindergarten student for the 2007-08 school year (P-112). The ORS test result for the child was 12 (test scores between 5 and 20 require

MAC II screening). It was administered by another teacher on May 16, 2007, after it was determined in April, 2007, that further incoming kindergartners would be better served by being tested by someone other than Ziznewski who had, notwithstanding the November 21, 2006 meeting, failed to test such children. Although Smith was not initially involved regarding D.B., he did so intercede when he received a letter from the father, C.B., who requested a waiver for services on May 5, 2006 (*sic*, more properly 2007) (P-124). Smith called the mother, who then agreed to have the services. But then the Spanish teacher, Mrs. Zazanis, called his office and advised that the family was confused about conflicting information with reference to the need for such ESL services. In the process, they determined that Ziznewski had contacted the family and advised them not to take the services. This was in direct contravention of the previous order from November 21, 2006 to her not to get involved. A letter from Ziznewski to Young, dated June 6, 2007 confirmed her acknowledgement of her involvement in that matter (P-124 at Bates page EBOE- 00452).

The meeting was held on June 15, 2007,with the same parties present from the previous November, 2006 meeting. This meeting was called by Dr.Traficante. At that meeting, they wanted to know why she had intervened. She continued to insist that the ESL services were not necessary for the child and acknowledged that she has spoken to the father. She continued to disparage the ESL program, that it was a waste of time and that children did not need it. She stated that she was simply acting in the best interest of the B. child and the family in order to keep the child in the same school with the other two children in the family (i.e., the other two children were already at the Marshall school but D.B. would have been otherwise placed at the Washington school for ESL services, where they generally took place as a magnet school). She then admitted that she had told the parents that their child did not need ESL. According to Smith, it was also evident that Ziznewski demonstrated a lack of understanding regarding the ESL program. She claimed that she was acting as a child advocate who only sought to assist a parent who wanted to keep his children together at Marshall. She was ordered to not communicate with the family any further.

Smith met with the father on June 18, 2007. Also present was Dr. Traficante and Dora Ramos, a Spanish translator and an attendance secretary in the district. He found that since the original letter request by the parent had come to him in English, Smith assumed that the father was fluent in English (P-124 at Bates page EBOE 00451). But it became readily apparent that he was not and that he needed the letter translated for him. At that point the father stated that Ziznewski had approached him in a restaurant and the told him not to have his child go into the ESL program. He then told Smith that Ziznewski wrote the several letters (P-124 at Bates pages EBOE00448, 450 and 451 and asked him to sign them). The father also told him that he had a voicemail message from Ziznewski in which she told him not to place the child in ESL and that Smith did not know what he was doing. They all proceeded to hear the voice mail, which was played at the meeting, and it was the voice of Ziznewski in English. As a result of that conference, the father agreed to place the child in ESL, which commenced in September, 2007.

On cross examination, Smith was asked about the subjective variables which can attach to ORS screening instruments. He responded by stating that in the ORS, the criteria or the rubric indicates how the child should be scored based on the criteria used. Each set has five options and, although there could be a subjective reaction by the teacher to what a child says, nonetheless, the tracers are clear. But evn if there is any doubt, the tester is told to rate the child lower on the scale. Further, the training which they perform reflects the uniformity they expect of each tester. Thus, there is a clear distinction between the scores of four and five, regardless of the tester, with only very slight variables even being allowed at that point. He also noted that, although during the 2006-07 school year the ORS basic form was changed, the ORS screening test was not. In any case, the MAC II, which is administered by people other than Ziznewski, is the instrument which is used to actually place a child and not the ORS. Instead, Ziznewski, just like the other reading specialists, was responsible to initially go through all the enrollments to see if ORS screening had to kick in the first place. Those enrollments usually came over to the reading specialist in batches or groups since they were based upon a blocked enrollment. Thereafter, ESL teachers would then work during the summer in order to intercept any late enrollees after the blocked dates. On

October 6, 2006, the Young ordered Ziznewski to provide him with a copy of all the students for whom she had done ORS testing since the beginning of school in September, 2006, and he expected that information by the end of work that day (P-117). Thereafter, on October 10, 2006, Young reminded Ziznewski that was her responsibility to have the ORS forms in each student folder (P-119). In an undated file memo Young noted that, although 48 kindergarten children were identified as needing ORS, none were put in their folders. Then, after Randy Hook retested them, nine of them were determined as requiring ESL. And, at that time, there were still no ORS forms in the folders of the children who had been screened by Ziznewski and, in any event, none at all were identified as requiring ESL with the exception of B. A.-V. (a kindergarten student).

He was not aware of any similar problems having occurred with Ziznewski prior to the 2006-07 school year. Yet, the failure by Ziznewski to produce the forms as requested and so ordered raised initial suspicions in her, which then led to further scrutiny regarding her management of her responsibilities in that area. And the result was that they discovered various specific discrepancies regarding her administration of the ORS. For example, as previously generally discussed hereinabove, on approximately September 15 or 20, 2006, a teacher had stopped Smith in the hallway at Marshall by popping out of a classroom at which time she raised a question regarding the reading status of A.G. He then checked and found that there was no form for A.G. from Ziznewski in the child's folder. He checked with Young, who then approached Ziznewski about the missing information. Young later reported that, as a result of that confrontations, Ziznewski threatened Smith with a grievance. He once again stated that he never saw any form regarding A.G., even by the end of December, 2006. In the interim, he saw Ziznewski several times between the last week in September through the time of the November 21 meeting when he was in the Marshall building, at which times she always told him to "trust" her even though he asked her to produce the results for all of the students three or four more times. She claimed that she had performed all the tests and they had all passed. She also told them that it was not her responsibility to put them in the folders. He disagreed with that assertion, even though he acknowledged that there is not a specific written policy by the district.

Instead, each school created its own protocol. Any minimum, it was his opinion that she was being obstreperous since there was, according to him, a "practice throughout the district" to ensure that they are put in the folders.

He conceded that he was not her supervisor. Young was. All he wished for was that she would follow the policies about the ORS testing and coordinate them with Young. Young specifically told her at the November 21 meeting that she might be sanctioned with subordination due to her failure to comply with the folder requirement. (In fact, according to Smith, ultimately she did get sanctioned with the withholding of her increment, although he acknowledged that he had no role in that discipline. Instead, it apparently arose after she meddled in the J.B. matter.) He also noted that, during that November meeting, Ziznewski persisted in questioning whether any students even needed ESL services. She also "fashioned herself" as being a parent advocate at that meeting and told them that she had been talking to parents which caused Smith to illustrate to everyone present a sample waiver letter to parents which indicated that such concerns be directed only to him. (This was also noted in the Young letter to Ziznewski on November 22, 2006, at P-121). They had previously come to the belief that Ziznewski was trying to circumvent the waiver process by talking directly to the parents and her admission about that was confirmed by her at the meeting. Thus she was put on notice about non-interference by her in the future at that time. Yet, she persisted in meddling in the D.B. matter in May-June, 2007, as indicated hereinabove. Smith noted that the father, with whom he met in June, 2007, told him that Ziznewski had told him that he should rewrite the letter and request a waiver (P-124 at Bates pages 448 and 450). And, despite every prior warning to the contrary, Ziznewski exhibited inappropriate actions when she discussed placement issues with the parent. She should not have approached the parent to say that the child should not have been placed into ESL, according to Smith.

The November 21, 2006, meeting also caused Smith great concern with the responses by Ziznewski. She gave hostile and combative answers to the production of the forms and this suggested to him that services would not be provided by her appropriately. In addition, she was also very directly hostile to Smith and even

expressed reservations as to what his role was in the process. She was generally resistant to following the procedures and she was advised in writing again to provide the completed ORS forms. He had never attended any meeting with anyone where a staff member was warned about facing consequences if the member did not comply. Ultimately, Ziznewski was relieved by Dr. Traficante of her ESL responsibilities in April/May, 2007, because of the continuing problems with her ability to service ESL.

On further cross-examination, he admitted that he was not aware until the examination of him at the due process hearing that A.G. got BSI in addition to ESL since during the first year of a child's entry into a school system, usually BSI and ESL are not concurrently administered. Instead, they may be ordinarily consecutively scheduled with the ESL process being presented to the student first. However, that exclusivity is not an absolute, as evidenced by what apparently happened to A.G.

Finally, he noted that at no time did Ziznewski ever advise that she actually had produced or even placed any folders in any student's file, despite her protestation that Smith should "trust" her. He never saw any results from Ziznewski regarding the ORS, but only from Mrs. Hook. Overall, She was always arguing about the need to provide any ESL services for any child. She screamed and yelled at Smith regarding his role over her as well as the instruments they used in order to screen the children.

Dr. Maryann Banks

Maryann Banks Ed.D., has been employed by Edison in the duel capacities as Assistant Superintendent and Principal of the John Adams Middle School since October 01, 2007. She possesses a Bachelor of Arts degree in English from Wooster College (1971), a Master of Arts degree in education administration with a principal/supervisor's certificate from Seton Hall University (1979), and her Doctorate in Education (Ed.D) in educational administration from the Rutgers Graduate School of Education (2000). She holds New Jersey educational certificates for principal/supervisor, school administrator, teacher-instructional with endorsement in English and teacher of grades K through 12.

She previously served as a teacher of English in the junior high school setting and then the senior high school component of the Elizabeth school district between 1971 and 1989, and a supervisor of English at the Freehold Regional High School District (at Howell High School) in 1989, before becoming employed by Edison, first as assistant principal at Edison High School starting in December, 1990, principal of the John Adams Middle School in 1994 and assistant superintendent for administration and technical operations at Edison between January, 2005 and October 2007, where her primary focus was personal matters, the handling of grievances, as Section 504 officer for the district and technical hardware, and especially Internet services. In her current job, her primary responsibility is that of principal at the Adams School with some superintendent responsibilities.

She has not known Ziznewski personally except in the current matter. In that capacity she is aware of the request for a doctor's note by Young from Ziznewski on October 30, 2006, regarding three consecutive days of absence in October when, by contract, she was supposed to submit such a note from October 11, 12 and 13, 2006 (P-143 at Bates page EBOE00483). She understood that Ziznewski had not yet submitted a note for three days by that time. Young issued a follow up request on November 20, 2006 (P-143 at Bates page EBOE00482) but she failed to comply. As a result, Young then wrote to Banks on November 29, 2006 regarding that failure to comply (P-143 at Bates page EBOE00481). Young then wrote to district superintendent, Mrs. C. Toth, on November 30, 2006, at which time he indicated that Zliznewski only eventually produced one note to him but that it only covered the absence for October 12, 2006. Further, it was dated November 6, 2006 and was not delivered until the end of November in any case (P-144). Young had also indicated that Ziznewski could not comprehend why the information regarding the absences was requested by him and the superintendent even though he had quoted the union contract language to her. Further, she never did provide absences for October 11 and 13, 2006, despite the instruction to do so. Banks believed that Ziznewski knew fully well about the absence reporting procedure and was deliberately stonewalling compliance even though (1) Young had reminded her about it twice,(2) all employees get a copy of the employment contract via the building union representatives, (3) and there was a

union representative available to alleviate any concerns or doubts she may had had about the requirement.

Banks also served as the Affirmative Action Officer which required her to ensure that building principals be required to carry out protections and safeguards for the benefit of everyone associated with the school environment in order to prohibit harassment, intimidation and bullying under the policy of the Board of Education in place at the time of the incidents involving Ziznewski (P-154). As part of her responsibilities she has also been required to undertake investigations herself in accordance with the policy. Her investigations would begin with her requesting a letter relative to the harassment, followed by a confidential interview with the "victim." A copy of the policy is distributed to the staff members individually each August, in addition to which there are two full copies in the library and the central office of each school.

On January 2, 2007, Young advised Banks in writing that he had acknowledged Ziznewski's birthday in a standard happy greeting "certificate" which he had circulated to her to commemorate the occasion, just like he had traditionally done with all other professional staff (P-147 at Bates page EBOE00488). Upon his return from the Christmas holiday break, he found it to be to be torn to pieces on his desk (P-147 at Bates page EBOE00489). In relevant part in his note he stated to Banks:" I'm getting concerned about her attitude toward me. It's not healthy to say the least."

Prior thereto, on December 12, 2006, Banks had written to Young and told him to give Ziznewski a notice to attend an Affirmative Action Investigation on December 20, 2006, and have her sign for it and to return it to the personnel department. He responded by advising Banks that Ziznewski refused to sign off on receipt of that notice (P-145). This is a standard procedure that Banks employed, which Ziznewski disregarded. A brief meeting was held on December 20, 2006 at the Education Center but it was cut short when Ziznewski advised that she felt uncomfortable proceeding without an attorney after being told about various complaints against her. Once having been told about the basic substance of the complaints, Ziznewski laughed as if it was ludicrous and commented "it's against me?" At that point, Banks stopped the meeting and told her to coordinate any efforts with her own attorney and an attorney, Mary

Smith of Wilentz, Goldman and Spitzer, on behalf of the district. Yet, even though Banks stopped the meeting at that point at her request, Ziznewski still wanted more details. As of January 4, 2007, however, Ziznewski had yet to advise of any attorney representation, even though Banks had advised her on December 21, 2006, to have an attorney contact Smith no later than December 29, 2006, in order to arrange a mutually convenient time for the parties to meet (P-146). Banks was forced to write her accordingly to remind her of that requirement at that time (P-148), which note she did sign for on January 8, 2007. Eventually, on March 8, 2007, Smith confirmed a meeting for March 20, 2007 (P-150) with Ziznewski's then attorney, Stephen Klausner, with Banks also confirming that meeting in writing with Ziznewski (which she did acknowledge receipt of) the various complaints which are the subject of that investigation.

In particular, Jennifer Figueroa had complained about not getting services for children from Ziznewski and that, in the process, she was subject to bullying tactics by her (P-155 at Bates pages 511 and-513). Ziznewski had, well into the school year, failed to set up the teaching schedule for BSI for the Figueroa children. Further, Ziznewski sparked the confrontation in Figueroa's classroom. She met Figueroa on just one occasion but came to the conclusions that (1) there could be a problem if children were not being serviced by her,(2) that when pressed, Ziznewski appeared to have become confrontational, and (3) that Banks was offended that Ziznewski had referred to her and Dr. Traficante as being "bitches". Banks indicated that she was hurt because she had always tried to be fair with people and this was an unfair characterization.

She also interviewed Sandra Pellicane who, as the Marshall building union representative, had been forced to intervene in an argument between Ziznewski and special education teacher Adrienne Sviderskis-Carroll regarding the preference of the latter to keep the door to the library classrooms closed in order to ensure privacy for her special education classes, while Ziznewski insisted upon keeping the door open because she claimed that she was claustrophobic. Pellicane also witnessed Ziznewski's intimidation of a new teacher, Mrs.Rokosz the year before and acknowledged that she was aware that students did not receive services from her. Pellicane also knew about

the confrontations she had had with Figueroa, felt that it was quiet building when Ziznewski was not there, and was aware that she refused to let other teachers use the school computer, which Ziznewski claimed was "her" computer (P-155 at Bates pages EBOE00513-514).

Diane Keane another teacher in the school and an ETEA representative at Marshall, was also interviewed by her, who told her that although she never personally witnessed any of the confrontations between Ziznewski and Sviderskis-Carroll, she was nonetheless aware of them and have heard about them, as well as how Ziznewski having had a confrontation with Figueroa. But Keane also indicated that she was very surprised when Ziznewski had refused to speak during a meeting that had been called by elementary supervisor Suzanne Capraro and instead of responding to the supervisor, Ziznewski wrote Post-it Notes and passed them to Mrs. Keane, who then addressed those comments to the supervisor.

Dr. Banks also interviewed Ami Hoffman, the curriculum resource teacher, who had an office in the library classroom areas which were jointly utilized by Ziznewski and Sviderskis-Carroll. She personally witnessed the ongoing battle over the status of the library door between them and told them both to "knock it off". At one point she actually saw Sviderskis-Carroll break down and cry when Ziznewski yelled at her in front of Svidserskis-Carroll's classroom of students. Hoffman described Ziznewski as having a "Jekyll and Hyde" personality and that she appeared "disturbed". She also hoarded the use of the library computer as if it was her own. Hoffman expressed concern about any retaliation from her. Later on, Banks was advised that Ziznewski had, in fact, approached and confronted Hoffman after the investigation (P-155 at Bates pages EBOE00516-517).

Principal Gerald Young complained in his interview that he had been very upset when the Ziznewski made inappropriate, derisive comments to him and his secretary regarding his religious life, in particular, that he was a "hypocrite" for having taken up the gifts to the altar during the Catholic mass at the same parish which they both attended. Young had previously written a letter to superintendent Carol Toth on

November 30, 2006, in which he cited Ziznewski with having made horrible comments about his spirituality which left him "devastated" (P-155 at Bates page EBOE 00538).

Spanish teacher Emily Zazanis filed a complaint against Ziznewski on January 10, 2007, and was interviewed eight days later by Banks. She shared library classroom space with Ziznewski, Hoffman, Zviderskis-Carroll and Donna Savell. She complained that Ziznewski created an unsavory climate and environment in the library to due to her negative attitudes with the other staff as well as her repeated loud, disrespectful and inappropriate language to Mr. Young. She often so talked loudly on the phone that Zazanis could overhear her conversations about having been the "victim" of other people's complaints. She was so upset at one point that she spoke to Ziznewski about it, who then "flipped" and claimed that Zazanis did know how she had been treated by the others. She also overheard Ami Hoffman remind Ziznewski to be more respectful to Young, but Ziznewski responded by saying that "he doesn't respect me." Although she tried to be diplomatic with Ziznewski, she was told bluntly by Ziznewski that Young had lied about her and to her. She also observed Ziznewski's emotions change quickly from being defensive (crying) to becoming angry. Further, Zazanis was upset with the way Ziznewski repeatedly spoke to Young. She almost appeared to "bark" at him. Zazanis reminded her that she had overheard Ziznewski yelling at Young and cautioned her about being careful of her own surroundings in the library (P-155 at Bates pages EBOE00 517-521).

Based upon all of the foregoing complaints, Ziznewski was ultimately interviewed by Mary Smith on behalf of the district and in the presence of her then attorney, Steven Klausner on March 20, 2007. At that time, she denied failing to provide educational services services, did not recall any confrontations with anyone (but maintained that she was attacked by others), denied having made the "bitch" comment or having derogatorily referred to Martin Smith as "Uncle Marty." In that last regard, she only defended that comment by stating that Martin Smith was apparently the uncle of some staff member in the district and that she had only expressed surprise when she found out that one of the other two chairs was his knees. Ziznewski also claimed that Sviderskis-Carroll was the catalyst of the problem the library and that Ziznewski primarily did not want the door closed because she does not want to be accused of

sexual misconduct (P-155 at Bates page EBOE00522). Banks found that comment to be odd and bizarre on its own merits but, in addition, it was an unbelievable, and since there are always other adults present in the environment anyway. She also denied hoarding the library computer. She also claimed that Young was the attacker and she denied making any disparaging spiritual comments about him.

Subsequently, on March 23, 2007, Ami Hoffman filed another complaint with Dr. Banks after Ziznewski confronted her a day after that meeting about confidential information which had been discussed during the prior interviews and even though the parties had been cautioned not to discuss this matter any further, except with their attorneys. Upon receipt of that complaint, Dr. Banks contacted Ziznewski to arrange to meet with her and an association representative immediately in order to discuss the matter but Ziznewski declined to participate in such a meeting without her attorney. Dr. Banks also warned her not to participate in any level of retaliation against anyone, this having occurred after Young had written to Dr. Banks on the same date and advised how Ami Hoffman had come to him very upset when Ziznewski confronted her in a hostile fashion (P-152) and how Ziznewski was then hostile with him when he attempted to discuss this matter with her and her union representative. She never did respond to Dr. Banks, either with or without an attorney.

Based upon all of the foregoing, Banks concluded that (1) Ziznewski did act in an intimidating manner with other staff members on numerous occasions, (2) she was disrespectful to Young and had yelled at other co-workers in the presence of schoolchildren, (3) had violated and disregarded administrative directives regarding keeping the library door open, failing to shut off her cell phone during her classes and failing to allow others to use the school computer. She was issued a Written Reprimand on April 24, 2007, regarding harassment, intimidation and bullying based on the complaints filed by the others (P-156), which she signed in the presence of Young but refused to either open or read, even though he indicated to her that she was to read the content of the letter in his presence and sign it. She told him that it should have been sent to her attorney instead.

Subsequently, on June13, 2007, Hope Blecher-Sass, a literacy coach in the school, wrote to Dr. Banks and complained about being confronted by Ziznewski relative to why she was now doing the screening of the ESL students in Marshall instead of Ziznewski (P-160). Dr. Banks met with her on June 15, 2007, due to her expressed fears about being forced to come forward in light of what she perceived as being a hostile work environment being perpetrated by Ziznewski at Marshall and who, in the process, was interfering with Blecher-Sass's initiation of services on behalf of students to the ESL program and well as in her own role on the I&RS Committee. Her concern was the Ziznewski was eroding morale there and this concern was shared with Dr. Banks as a result.

She also conducted a meeting with Diane Keane and Sandra Pellicane on June 15, 2007, after they both indicated that, as education association representatives, they were similarly concerned with eroding morale at Marshall because of the conduct by Ziznewski (P-162). As a result, Banks notified Ziznewski of another Affirmative Action meeting on June 19, 2007 (P-164), at which time it was her intention to discuss with her the complaints raised by Keane, Pellicane, Blecher-Sass, and Hoffman. Ziznewski refused to sign for the letter and did not accept it, according to Young, who had been ordered to have it personally delivered to her (P-163). It had to be sent by ordinary and certified mail to her at her home as a result. Thereafter, on June 20, 2007, Young wrote to Superintendent Toth once again and complained about Ziznewski's ongoing negative attitude to him and others at the school. He did not want her back in his building for the next year as a result (P-165). As a result, Dr. Banks wrote to Ziznewski on July 3, 2007, advised her about her persistent and ongoing negative impact upon the district, her disregard of Banks' prior directive to refrain from engaging in any inappropriate conduct in the workplace, and, as a result, indicated that she was making a recommendation to the Edison Board of Education through the superintendent to withhold her employment and adjustment increments for the 2007-08 school year (P-166).

On cross examination, she stated that even in her capacity as a building principal she would ask for an medical excuse notes from her staff if they were out for three days or more. It is the obligation of the teacher to certify that the absence resulted from

personal illness pursuant to N.J.S.A. 18 A: 30-4, although she acknowledged that there is no other written policy, other than the superintendent's policy, which dictates that requirement. It was her opinion, however, that Ziznewski disregarded the principal's directive to produce it which was the violation against her. And, she not only failed to comply with an order she also delayed in producing any documentation with reference to it or a portion of those absences in a timely fashion.

At the same time, she agreed that the birthday card incident which had been reported by Young was not actionable by the district as constituting a form of harassment under its harassment policy as it was so generally defined (P-154). Further, she conceded that Ziznewski's failure to sign the Affirmative Action Investigation appearance notice was not actionable by the district at that time (P-145), although in the future it could be considered insubordination.

But, she noted that references made by Ziznewski with reference to Martin Smith as being "Uncle Marty" was a sign of disrespect, and not one of affection, even though it was not actionable by the board at the time and on its own individual merits then. Regarding the dispute regarding the status of the doors to the library, although she knew of no Board policy regarding such matters, she viewed an open door as been distracting to classes inside, especially where there were special education classes under way, such as was the case here. Further, Young had written a memo which ordered that all doors be closed for the special education and physical education classes.

It also became apparent to her that virtually every Affirmative Action complaint filed with her in this matter had the common thread of Ziznewski not providing services to students. And when a teacher would ask to get services for one's students but would get screamed at by Ziznewski, that act would constitute harassment and bullying under affirmative action. She found that the interference by Ziznewski was the basis for these confrontations. In addition, Ziznewski breached the Affirmative Action program confidentiality requirements when she confronted Ami Hoffman after the round of interviews conducted by Dr. Banks in March, 2007. Hoffman was so upset by any

further anticipated confrontations by her that she was forced to hide at the end of the day.

AMI HOFFMAN

Ami Hoffman is employed by Edison as a curriculum resource teacher ("CRT"). She received her Bachelor of Arts degree in sociology from William Paterson College in 1995 and her Master of Arts degree in early childhood and curriculum from Kean University in 1999. She possesses New Jersey Department of Education certificates for supervisor, elementary education (K through eight) and learning development teacher consultant (LDTC). All of her employment has been at Edison commencing in 1996, when she started as a long-term substitute at the James Madison Elementary School followed by seven years as a fourth grade teacher at the Lindeneau School and continuing on as a CRT at the Marshall School since September, 2004. Upon her assignment at Marshall, she met Ziznewski who, as a reading specialist there, did the development reading assessments (DRA's) for the students. During the 2006-07 school year they were assigned to share the library for their respective programs due to space limitations within the building. Hoffman had an office within the library. It was while they were there that Ziznewski verbally held the announced belief that running records were not valid and also complained to Young about the volume of her DRA's. As a result, Young asked Hoffman to help her with them. She frequently heard Ziznewski argue with Adrienne Sviderskis-Carroll (who also shared teaching space in the library) about keeping the doors open verses shut. Since Sviderskis-Carroll was teaching special education, she wanted the doors closed in order to allow her children to concentrate. Ziznewski opposed having the doors kept closed and, as result, the dispute continued. Hoffman tried to avoid as much contact within the library as possible (even though she have her office there) due to the constant arguments between the two of them, although it was her personal opinion that the doors should have been kept shut in order to avoid distractions to the special education students. Hoffman did discuss the door problem with Young and Dr. Banks, the latter of whom interviewed her on November 15, 2006, as part of an Affirmative Action Investigation (P-155 at Bates page EBOE00516). Hoffman described the interactions between the two teachers as being a "battle." She

was aware that Young had issued a memo which required that the doors be kept closed. At one point, she observed that Sviderskis-Carroll was in tears when Ziznewski yelled at her in front of her students. She described Ziznewski as being "like Jekyll and Hyde" in that she would take out her aggressions on every one if she was having a bad day.On one particular occasion, she also observed Ziznewski yell at Young in the library. Hoffman was so upset by it that she later complained to Ziznewski about being uncomfortable with her actions. Anyone there could have overheard the yelling by her.

Ziznewski's declared nonbelief in the running records as a concept caused many of the teachers to ask Hoffman do every single second running record in order to validate children's admission into the Summer Literacy Academy. When she would attempt to discuss these concerns with her, Ziznewski would tell her that she did not believe in them even though it was still Edison district policy to honor and give credence to the running records.

In that regard, she knew the student A.G. as being a new student at Marshall who was in the second grade class of Mrs.Malloy. Hoffman did a second running record and agreed that he needed help since, in January, 2007, she scored him only at the grade one level even though Ziznewski had scored him as being at the DRA score 28, which was equivalent to the grade two-three equivalent level. She maintained that there was no way that A.G. was at Ziznewski's recorded level.

In mid school year (January) 2007, student A.P. had a running record of K,1, while his DRA was "E". Yet by the end of the year, the Ziznewski DRA testing placed him at the end of second grade, which was also not possible. In mid school year 2007, the running record for S.A. was first grade, although Ziznewski's DRA recorded him at the two to three grade level, which was also not possible, according to Hoffman, since by the end of 2007 he was still only at the first to second grade level versus the third to fourth grade level which was then recorded by Ziznewski. The midyear running record for another child identified also as A.P. placed this child at the first grade versus the Ziznewski DRA which placed the child at two to third grade level. Her opinion was that A.P. could not read at the higher level. The running record for K.V. in 2007 placed the

child at the one to two grade level but Ziznewski's DRA placed the child at the two to three grade level. The child L.A. recorded a mid year 2007 running record of first grade while Ziznewski's DRA recorded her at the two to three grade level. By May, 2007, the running record scored her at the one to two grade level while the DRA had her at the third to fourth grade level. Hoffman noted that L.A. was an ESL student in her estimation even though Ziznewski had determined that she was not appropriate for ESL. She also noted that she had personally observed some of the students in Mrs. Gerber's class even though Ziznewski has scored them out of ESL. She was aware that Young had ordered a second ORS screening by another teacher from another school and all those students were determined to be ESL eligible. At some point in 2006-2007, Ziznewski wanted to know why Hoffman was doing the same job as she. Hoffman felt that Ziznewski was upset that she was reassessing her assigned students by using the running records. She also became aware the fact that at some point Ziznewski had told a second grade teacher, Toni-Ann Hooker, to not go to Hoffman.

Hoffman also felt that Ziznewski treated the computer in the library as if it were her own. She complained to people about using it even though it was in a common, open area and accessible for their use, in contrast to Hoffman's computer, which was behind a door and for which people asked her permission to use. She actually heard Ziznewski yell at others about using it and, as a result, Hoffman believed that every one "felt afraid" to use the common computer. She recalled one particular incident in which Ziznewski complained in her presence about the band director having used the computer in her area when she found a printout of a band schedule there.

In addition, Hoffman felt that the teachers' morale was low because of the actions of Ziznewski. They had to "tiptoe" around her to avoid her and feared recommending their children for BSI. Hoffman also felt it necessary to engage in such avoidance tactics herself because she did not like confrontation or the need to justify herself with Ziznewski, whose tone was often one of yelling, in a raised tone, and confrontational. Teachers also did not like to bring their children's issues up to the I& RS committee for fear of being berrated by Ziznewski who would often challenge the recommendations but failed to offer any realistic, relevant proofs in contradiction.

Overall, she felt that Ziznewski was "disturbed" because she was uneven in her responses from day to day. It would then translate into it being either a good day or a bad day accordingly for all concerned. She reported her concerns to Dr. Banks in November, 2006 as well as during the course of an interview regarding an Affirmative Action Investigation in March, 2007.

On March 23, 2007, at 2:00 PM, Hoffman approached Young and was upset that Ziznewski "demanded" to meet with her that day in order to discuss the results of her interview with Dr. Banks from the previous November. Hoffman was so upset that she hid in the office bathroom as the office secretary announced the arrival of Ziznewski there. She did not want to argue with her. Hoffman felt upset, humiliated and distraught, mostly due to the raised voice by Ziznewski, which bothered her immensely. Ziznewski's calling for her into the office to the secretaries embarrassed her and she was concerned for her own safety and was uncomfortable with her work environment as a result. She cried and called her husband. A second complaint by her and a follow-up investigation investigation was generated by the office of Dr. Banks on March 26, 2007, even though Hoffman had briefly met with Ziznewski in the interim and agreed to be cordial with her. On cross examination, she estimated that during 2006-07, there were between five and ten times when she felt intimidated by Ziznewski.

However, the problems persisted into the 2007-08 school year even though by that point the library was reconfigured and restored to its former self and Ziznewski was reassigned to a separate room in the building, room 106. Finally, on February 14, 2008, Hoffman and other teachers met to discuss the ongoing problems regarding Ziznewski, including concerns that students were still not being serviced by her and that teachers were still being embarrassed by her at the I&RS meetings, these comments being made by principally by Figueroa and Pellicane who had concerns of about A.P. and how they had had Hoffman re-assess him, the results of which were in contrast to Ziznewski's results. Generally, at the I&RS meetings, Ziznewski persisted in berating the teachers, although she "did not knock down" the children themselves. However, she repeatedly and routinely insisted that the children had tested out too high and therefore did not warrant BSI instruction. Hoffman contended that her actions in testing

out the students so high represented a rejection by her of appropriate services for them and that Ziznewski was not supporting the teachers regarding the needs of each child. She also stated it was the manner in which Ziznewski voiced her objections that was very objectionable.

On cross examination, she acknowledged that she had had no problems with Ziznewski in either the 2004-05 school year or the 2005-06 school year. But, she became aware of problems when teachers began to approach her about the need for BSI and Ziznewski's refusal to help provide such services. This started in approximately October or November, 2006. She recalled having been asked to do retesting of approximately ten to fifteen students from the Summer Literacy Academy program whose results were at variance with the Ziznewski results. Her results were more consistent with those running records of the others than with the DRA's done by Ziznewski.

She acknowledged that she knows of no district policy regarding an open/closed door policy in the library. No one ever complained to her about the need to open the hard-pulling, noisy doors to the library. But, she witnessed one to two heated discussions between Ziznewski and Zviderskis-Carroll about the door dispute. She also acknowledged that she did not find the open door to be disruptive to her, although she conceded that she was not teaching children herself, which could otherwise reasonably account for the concerns raised by the special education teacher. At the same time, however, the slamming of the door banging itself was disruptive. She also did read the memo from Young which said that the doors should remain shut when student teaching was under way.

JOSEPH DREW

Joseph Drew has served as an administrative substitute at Edison since February, 2008, where he was asked to do oversight in their guidance department. At that time he was asked to conduct a meeting with Figueroa, Pellicane, Hoffman and Susan Stoltenberg on February 14, 2008 relative to concerns pertaining to Ziznewski

(P-178). During the 2007-08 school year, he had been principal/ administrator of an Edison middle school from which he retired in June, 2008. He received his Bachelor of Arts degree in business from Trenton State College in 1973 and his Master of Arts degree in administration supervision from Rutgers University in 1976. He possesses New Jersey Department of Education certifications as teacher-business and marketing education (K through 12), guidance counselor and principal. He was previously employed as a teacher in Plainfield between 1973 and 1974, before becoming employed by Edison as a teacher coordinator of marketing and distributive education between 1974 and 1992, a guidance counselor in a middle school and high school between 1992 and 2001, and as principal of the Thomas Jefferson Middle School between 2001 and 2008.

The meeting which he conducted on February 14, 2008 was called at the behest of acting superintendent John DiMuzio since some teachers had had some complaints as indicated hereinabove. He indicated that he was only the scribner of their of their concerns and that he merely forwarded that report back to DiMuzio. The complaints which they raised against Ziznewski included:

1. Students were not being properly serviced by her. She picked and chose them based upon her teacher relationships and her own ideology.
2. Her belief system took precedence to the district initiatives such as ESL.
3. She disregarded district policy regarding latenesses.
4. She berated, discredited and embarrassed others in front of parents, students and peers.
5. Staff members were fearful of her due to her irrational outbreaks, emotional Swayze behavior and erratic behaviors that resulted in the teachers feeling uncomfortable around her and going out of their way to avoid her.
6. These teachers felt that the district had not followed through on solving the problem regarding her and had been led to believe that Ziznewski would not return to their building in September, 2007.
7. Her membership and service on the I&RS Committee was seen as being negative and detrimental to the school.

8. They were concerned that the complaints and concerns which had been raised by various staff personnel were not held in confidence the previous year. As a result, she targeted those who did come forward and others were now were fearful about saying anything because of the backlash from her.

JOHN DIMUZIO

John DiMuzio has served as the acting superintendent of schools for Edison since November, 2007. He received his Bachelor of Arts degree in health and physical education from Missouri Valley College in 1967, his Master of Arts degree in administration and supervision from Kean University in 1972 and a Master of Arts degree in health and physical education from Montclair State College in 1984. He possesses New Jersey Department of Education certificates as principal, supervisor, chief school administrator, teacher of physical education, health and drivers education (K through 12). He began his employment at Edison in 1969 as a teacher of physical education at the J.P. Stevens High School, served as the chair of the Department of Physical Education at that high school between 1972 and 1984, was supervisor of health and physical education for the District between 19841988 as well as its director of that department between 1988 through 1997, was principal of the Herbert Hoover Middle School between 1997 and 1998 and director of personnel for the District between 1998 and 2007, before assuming his current post with the District. As acting superintendent he works with teachers, supervisors, staff, and handles such areas as budget issues, bonds, and concerns of the entire Board of Education for the 14,300 students within the District. He oversees approximately 2000 employees currently.

He first got to know about Ziznewski after receiving various complaint letters about his in his capacity as district director of personnel starting in approximately September and October, 2007. He did not know her before then. Upon receipt of the various complaints from the staff members, he interviewed them through October, 2007, and recorded their concerns, which are reflected in his report regarding an Affirmative Action Investigation all of which occurred after Gerald Young had gotten a letter dated October 7, 2007, from teacher Kathleen Sica who claimed that she had

been verbally harassed by Ziznewski during the weeks of September 21 and 28 as well as October 8, 2007. Based upon his investigation, he concluded that Ziznewski had acted inappropriately on six occasions.

The first complaint was by Sica and related to Ziznewski being negative with her about taking three children for BSI instruction and being verbally harassed by her in the process, which she characterized as being abrasive, hostile responses by her (P-176 at Bates page EBOE00580 and "Exhibit A"-EBOE0588-591).

Complaint number 2 was by Mary Schaefer in her letter dated October 10, 2007, in which she reported an "unpleasant incident" which had occurred on October 5, 2007, at which time Ziznewski became irritated and raised her voice in speaking to Schaefer in front of her students. Ziznewski then re-appeared twenty minutes later to engage in a further discussion in the presence of students, which timing Schaefer also found to be inappropriate, patronizing, unprofessional and her physical presence was "unsettling" ("Exhibit C"-EBOE00592). DiMuzio began to see a pattern emerging about BSI children not getting required instructions from Ziznewski and, further, that the teacher was being once again harassed by her as Ziznewski refused to take seven of Schaefer's students for BSI. Ziznewski's response was that it was too much work for her.

The third complaint was by Diane Keane which was received on October 18, 2007, in which she complained that she observed Ziznewski screaming at a "meeting" in the building, which she subsequently was advised was not actually a meeting but a session which Ziznewski held with two first grade teachers. She was shocked with a display by Ziznewski and that she had heard no responses from the other the teachers during that exchange, but just Ziznewski's loud voice.("Exhibit D"-EBOE00593).

A fourth complaint came from Jennifer Figueroa, dated October 29, 2007, who indicated that she had been very upset about the hostile work environment and the fact that services were not still being provided to her BSI students by Ziznewski, as well as her indication that the harassment against her by Ziznewski had continued from the previous year dating back to October, 2006 ("Exhibit E"-EBOE00594-597).

The fifth complaint was by Toni-Ann Hooker in her letter dated November 1, 2007, who was extremely upset with remarks made by Ziznewski directed to her in which she accused Hooker of having "jumped on the bandwagon" against her and her announcement that Ziznewski threatened a lawsuit against her in retaliation. ("Exhibit G"-EBOE00601).

The six complaint was a second complaint by Diane Keane, dated November 2, 2007, who was extremely upset when she observed Ziznewski yell at Hooker in the presence of her children at her classroom at 8:55 AM. This made Keane upset for the rest of the day (P-176 at Bates page EBOE 00584).

In addition, Gerald Young filed complaints regarding his upset with her in which she had humiliated him on October 16, 2007, in the hallway of the school and which was done in the presence of parents, students and staff in the area ("Exhibit I"-EBOE00603).

He interviewed Ziznewski on November 15, 2007, and a follow-up interview was conducted by Board attorney Mary Smith on January 4, 2008, in the presence of her then attorney Mark Lawrence, who had gotten ill early during the first meeting. Ziznewski "basically" denied every accusation even in the face of all of the individual complaints by the various teachers. She failed to acknowledge any responsibility for her conduct. After reviewing all of the complaints and considering all of the concerns of the parties, he concluded that she was guilty of misconduct. He found that all the complaints were credible and all of the complainants appeared to be genuinely upset with the hostile environment which she generated as well as the failure to get services for their children from her. He further concluded that there was an ongoing problem in that school. He also was concerned that Young was upset that this type of an attitude was going on in his school and that it was detrimental to the children's education. In the process, he discounted the replies by Ziznewski since so many complaints had come forward and all of those complainants appeared to be genuinely upset. Further, her demeanor when he discussed it with her was one of total belligerency regarding all the teachers and what they had said about her.

On cross-examination, he noted that some of the complaint letters came directly to him while some had been sent to Young, who then had them forwarded to him. It also did not strike him as being strange that virtually all of those complaints were generated within a three week period. Regarding the Keane complaints, although she was not confronted directly by Ziznewski, he found that Ziznewski's actions witnessed by Keane were nonetheless hostile to the general environment, which had resulted in and caused Keane significant upset. He had no idea if the superintendent of schools did anything in response to his Affirmative Action report because it was not yet his job as of October, 2007. But then another teacher complaint was filed in either January or February, 2008 which he then turned over to Joseph Drew to act upon. He never determined which students did receive BSI. That was the job of Dr. Traficante. Martin Smith also did an investigation regarding the ESL problems.

However, by April, 2008, he had another role when he preferred new charges against Ziznewski because he concluded that children were not receiving appropriate services based upon the information being supplied by his professional staff at the time. In addition, Ziznewski had previously received a halt to her increment, which can be viewed as a first step in such discipline. He also noted that on July 3, 2007, Dr. Banks had written to Ziznewski about her misconducts up to that point and put her on notice about her actions. This constituted counseling regarding her actions as a prelude to tenure charges (P-166).

DiMuzio also discussed the Harassment Policy of the Edison Board of Education, which had been adopted on September 26, 1986 and revised on January 21, 2003 (P-154). It was his opinion that Ziznewski had violated proper school conduct by her harassment and intimidation over fellow staff members at the school. In relevant part, the policy states "Harassment, intimidation, or bullying, like other disruptive or violent behaviors, is conduct that disrupt both a student's ability to learn and a school's ability to educate students in a safe environment. Since students learn by example, employees, staff members, vendors or the visitors and students themselves must demonstrate appropriate behavior, treat others with civility and respect, and refuse to tolerate harassment, intimidation or bullying." (Bates page at EBOE00505). In that

regard he felt that the mental stresses which the fellow teachers were experiencing constituted harassment. Educationally, he felt that the Marshall School would be better without her there as a result. Thus, her inefficiency in providing services was not just the only issue against her. The whole school environment was deteriorating and was not conducive to learning. That is why he initially suspended her with pay, effective April 15, 2008, after which he filed the tenure charges.

Toni-Ann Hooker

Toni-Ann Hooker has been a second grade teacher at Edison since the 1996-97 school year, after having served as a substitute teacher/paraprofessional handicapped preschool teacher between September, 1995 and 1996. She received her Bachelor of Arts degree in elementary education from Keane College in 1995 and possesses a certification as a teacher of elementary education, grades K through 5. She started as a first grade teacher at Marshall in the 1996-97 school year and has been assigned to the second grade there since then.

She got to know Ziznewski, who came to Marshall as a reading specialist, whose function was to pull out students for more concentrated work based on their individual needs. Over time she felt hesitant to discuss children's issues with her and felt intimidated in the way Ziznewski spoke to her. On November 1, 2007, she wrote a letter "To whom it may concern" regarding Ziznewski's treatment of her (P-176 at Bates page EBOE00601). In that letter she noted how, at 8:55 AM on that date, as she attempted to greet her children at the school, Ziznewski approached her from the library area and stated that she felt that Hooker had "jumped on the bandwagon against her." She also threatened to sue her, as Ziznewski told her to hire a lawyer. She found it extremely difficult to compose herself in order to teach that morning, her heart continued to pound and her hands would not stop trembling. She felt panicked, threatened and vulnerable.

The incident occurred as she had stood outside of her classroom (P-185) and as they both stood approximately only 5 feet away from each other, which she characterized as "conversational" distance. Children were passing by her and entering

their classroom at the time. She noted that all of this activity occurred in the middle wing of the school which is where the first and second grade classes are clustered. Although Ziznewski's conversational tone started out satisfactorily, it increased in volume and got so loud so that it caught the attention of the children, some of whom later asked her "Is Mrs. Z. mad at you?" and "Are you OK?" She noted that she said nothing in reply to the challenges by Ziznewski. She was not only upset for her children being exposed to those actions but she felt upset for being yelled that after having been threatened by Ziznewski.

Then, later, at approximately 10:45 AM, as Hooker walked her children to the library to pick out books, Ziznewski approached her again, this time with her students behind her and began yelling again. Hooker got her children to the library, had them seated and then she turned them over to a resource room teacher so that she could get to the main office. At that point Ziznewski told her not to go to that office and "complain about me." She was forced to recompose herself in order to make it through the rest of the day and reported her concerns immediately thereafter. In the process, she had seriously contemplating taking a half day off because of her upset, but she drew upon her professionalism to make it through the rest of the day.

Prior thereto, in October, 2007, she heard a lot of yelling in the building, after which Diane Keane came out from Room 102 and asked if she had heard the commotion which was going on inside the room. Hooker said she had thought it was Ziznewski on the phone but was told by Keane that two other teachers (first grade teachers Sica and Garabotto) were in Ziznewski's classroom and were being yelled at by her. Ziznewski had an aggressive tone to her voice and her volume was extremely loud. They both then packed up and left the building, but in the process, she asked the head custodian to make sure that everyone got out of the building. She later found out that there had been a dispute between Ziznewski and the two teachers about BSI services regarding some of their children. She documented the event to Mr. Young after Kathleen Sica asked her to do so. Young then wrote to Superintendent Toth on November 12, 2007, and memorialized the concerns raised by Hooker and Keane as well as their meeting with DiMuzio relative thereto (P-175). She knew that her "To whom

it may concern" letter would go to Young and then be passed on elsewhere based upon her knowledge that Jennifer Figueroa had told her that she had done the same.

In addition, Ziznewski did not service all of Hooker's children consistently due to her periodic latenesses and nonappearances. This was done so much that the children only received one half of their expected scheduled services from Ziznewski. But she was fearful to challenge Ziznewski as a result of the history they had between them as well as the constant rumors about Ziznewski's confronting of fellow colleagues. It was the frequency of Ziznewski's non-participation in servicing the students that was the problem. Most of the time she received notice about the "no shows" by Ziznewski through the Young, who announced on the P. A. system that there would be no general instruction to all of her children by their reading specialist for the day. But then there are also times when she just did not show up so Hooker took it upon herself to absorb the children into her daily schedule.

She acknowledged on cross examination that, prior to the October incident, she had had no personal problems with Ziznewski, although that she did have prior concerns at I&RS committee meetings where she could not get BSi services for her children due to the resistance by Ziznewski, who consistently reported DRA levels three to four times higher than her own. There was also raised voice verbal resistance by Ziznewski at those meetings when she disputed Hooker's findings. And, although she never asked to see Ziznewski's DRA's, Hooker did have her own proofs to support her position at those meetings. She noted that she wrote the November 1, 2007, memo because she had felt threatened by the lawsuit threat and she did not believe that she had done anything wrong to deserve the threat. She and numerous of her other colleagues also found it necessary to sidestep Ziznewski's room by going other ways throughout the school or keeping their own doors closed in order to avoid contact with her. In fact, during the 2007-08 school year, Hooker would even detour through the new construction area at the school in order to avoid her.

SANDRA PELLICANE

Sandra Pellicane is a special education teacher at Edison, where she has been employed since 1986. Although she previously serviced all grade levels at Marshall, she has most recently been assigned to just the second grade level. In 2006-07, she conducted the pull out resource room for math and language arts and in 2007-08 she was the in-class special education teacher with the classroom of Jennifer Figueroa. She obtained her Bachelor of Arts degree from (then) Trenton State College in 1967 in the area of deaf and hearing impaired for grades K through 12, and thereafter taught for three years at the Katzenbach School for the Deaf, followed by part time teaching thereafter for a period of time as she raised her family. She had received her Teacher of the Deaf and Hearing Impaired certificate 1967 and her Teacher of the Handicapped certificate in 1985. As indicated hereinabove, she returned to full time teaching in 1986 when she joined the Marshall School staff.

The overly crowded nature of Marshall caused her room assignment in the 2004-05 and 2005-06 school years to be a "station" in the school library, which was divided into three sections, with Ziznewski having almost one half of the total area and where she and another teacher, Mrs. Rohan, a special education teacher, split the remaining portion of the room. She had first met Ziznewski in approximately 1990 at which time Ziznewski was a part time reading specialist. But she had no real involvement with her until Ziznewski returned to Marshall in approximately 2004 or 2005, at which time the shared room arrangement took place for two years. Bookcases divided the individual "rooms" with the one between her and Ziznewski being approximately 5 feet tall are the others being only 4 feet tall between her and Rohan.

Pellicane would start her day there at 9:10 AM, which was the same class room start time as Ziznewski. Pellicane would frequently arrived at 8:35 AM before commencing her official classroom duties. It was not a quiet space since all three teachers teach at five to six children there and might be teaching all at the same time, depending upon their respective prep periods. It was her understanding that all of three teachers would be expected to attempt to cooperate due to the noise levels. However,

notwithstanding that understanding, Ziznewski would frequently use her cell phone during the class day. It was not unusual for her phone to ring four to five times per day. Pellicane found that practice to be very annoying and disturbing to her as well as for her children, who would themselves call out and say that Ziznewski's phone was ringing. She would tell them to just ignore it. She finally felt compelled to ask Ziznewski to tone it down and to change her distinctive ring. Although she did change the ring, she nonetheless persisted in using the phone on a daily basis. Pellicane felt that her actions were very unprofessional. In addition, the persistent daily use loudness of Ziznewski on those phone calls made Pellicane almost feel like she was forced to "eavesdrop" since she was able to hear a large amount of the discussions during those calls, which included matters involving the mother of Ziznewski, as well as her students at Middlesex County College (where Ziznewski apparently worked part time) as well as her own children. Thus, when her request for cooperation failed, Pellicane, who was also a union representative at the Marshall School building, went to Mr. Young and asked him to re-issue the cell phone policy, which he did do by circulating a paper copy policy and then announcing it over the public address system. But that failed to get any positive results and Ziznewski continued to use the cell phone, which continued to be disruptive to her and her class. On cross examination she indicated that, by contrast, Rohan's phone rang only rarely and those instances only occurred on her prep periods or during lunch, so none of it interfered with or disturbed Pellicane or her class. She also noted that it was the persistent ringing of Ziznewski's phone and her constant talking on the phone about private matters which disturbed Pellicane. It was clear that she was not talking about student business. Rather, she talked to lawyers and others, including her family, on issues relating to the illness of her mother leading up to her mother's eventual death.

In June, 2007, Pellicane and another teacher, fellow union representative Diane Keane, complained to Young about Ziznewski having "bullied" another teacher, Melissa Smith-Zeichner after she had come to them in their union capacity and was upset about having been screamed at by Ziznewski (P-162). Smith-Zeichner is a niece of Martin Smith, the Edison World Language (ESL) supervisor. Ziznewski had blamed her for having "ratted" on her to Martin Smith about not having provided ESL services.

Pellicane noted that, although Ziznewski never challenged her directly, other teachers at Marshall had been so compromised by Ziznewski and they complained to her and Diane Keane, who were the union representatives assigned to that building at the time. She felt that Young should handle the complaint situations since the problems were above their job descriptions, so they filed an Affirmative Action complaint on June 15, 2007 (P-162). They were just attempting to keep the building calm under the circumstances. It was her opinion the Ziznewski's challenges were inappropriate. She was always yelling at people and the union representatives just wanted to keep the building together. Ziznewski was, as she wrote it, " eroding the morale in the building." (P-162 at Bates page 561).

Further, she was concerned that children were not being properly serviced by her. Ziznewski also had a negative impact upon the faculty and school environment because she would show up late for class approximately two to three times per week, at which point student schedules would be pushed up and around, which further upset the faculty. Some latenesses would occur during the afternoon classes at which time the children would have been assembled there in her part of the room (P-187) and would be fooling around in the absence of Ziznewski. As a result, she would send the children back to the regular classes at which point Ziznewski would get angry that her children were not in her class. This practice occurred approximately twice a week for a month. After Rohan and Pellicane broached the subject with Ziznewski, however, her afternoon tardinesses did end.

Although she never had any direct confrontation with Ziznewski, she recalled an incident which occurred sometime in approximately May or June, 2007 at a time when Pellicane was outside of the office of Young at approximately 4:15 to 4:20 PM. All of a sudden she heard Ziznewski "screaming" from inside the office of Young although she could not recall the exact words that she stated. She heard no response at all from Young. The tirade lasted for approximately five minutes. She was concerned whether she should call for help from someone, which she then determined not to do at the moment. Instead, she later spoke to Diane Keane about it and did later speak to Young to make sure that he was okay. She did not speak to Ziznewski about it.

On July 11, 2007, Pellicane and Keane received an e-mail from Ziznewski in which she expressed concerns about purported harassments by them or their daughters-in-law before Dr. Banks (P-168). Pellicane did nothing in response to this e-mail except to give it to Dr. Banks. This e-mail upset her because she had understood that her concerns in her Affirmative Action complaint, which she had previously filed with the administration on June 15, 2007, were to be confidential. She noted that she and Keane stopped being union representatives in the 2007-08 school year because they had felt too much pressure by Ziznewski as well as the complaints by the other teachers which took them out of the classrooms too much and took them away from the responsibility over their children. (Pellicane is now a representative again but her union job issues are only very "soft" [presumably meaning that they are less intense] since Ziznewski is no longer there.)

On January 17, 2008, Pellicane participated in a conference regarding the child A.P. since she was the inclusion special education teacher in the classroom with Jennifer Figueroa. A.P. was a struggling reader, even though Ziznewski felt that he was not eligible for BSI. Pellicane disagreed and felt that he struggled. In addition, he had been recommended by Mrs. Schaefer from the first grade the year before. The meeting on January 17, 2008, was embarrassing. Ziznewski contradicted Figueroa in front of the parent. Pellicane felt that it was wrong to disagree with another professional in front of a parent. Pellicane also felt that A.P. needed the extra help and concurred with Figueroa but neither Figueroa nor Pellicane chose to argue back at Ziznewski in front of the parent. They were both embarrassed by her actions there. Then, late sometime later on, Ziznewski brought in a tape recording sampling of A.P.'s reading which she presented to the members at an unscheduled time at an I&RS meeting even though A.P. was not even on the agenda schedule for that meeting. Pellicane felt that it was inappropriate to do so. Young asked Ziznewski to stop the tape, to which she then complied.

She later participated in a special meeting with various teachers on February 14, 2008, at which time eight listed comments regarding the inappropriate actions by

Ziznewski were discussed (P-178). She felt that Ziznewski was involved in backlashing and bullying other teachers.

Adrienne Sviderskis-Carroll

Adrienne Sviderskis-Carroll is a special education teacher at Marshall where she has been employed since August, 2003. She initially started as a second grade special education teacher but moved on to the fourth grade commencing in 2004. She has been on personal leave since June, 2007. She obtained her Bachelor of Science degree from William Patterson University in 2003 in the area of teacher of the handicapped. She possesses certificates as a teacher of the handicapped and elementary education, grades K through 5. During the 2006-07 school year she was a fourth grade resource room and in-class support teacher for part of the year. In February, 2007, she was assigned to the resource center in the library where she taught math and language arts. The library was divided up into class centers that were separated only by book stack dividers which were no more than 5 feet tall. She was assigned three children who were very easily distractible, both visually and hearing-wise. In September, she was assigned the front area of the library by "default" after she found that Ziznewski had already claimed the middle zone upon her arrival prior to the commencement of the school year. She had originally offered to have Ziznewski have the front area since Ziznewski claimed to her that she was claustrophobic. Gerald Young had also told her about the claustrophobia. Ziznewski nonetheless chose the middle area instead and set up her classroom there. The distractible nature of the front area caused Sviderskis-Carroll to complain to Young who told her to "wing it" without partitions at the beginning of the school year, which ultimately arrived by the end of September, 2006.

Eventually, she felt compelled to close the hallway door in order to also help with the noise, since that was also disturbing to her children. Everyone agreed to her preference in that regard except for Ziznewski, who persisted in reopening the door and keeping it open, which was based upon her continued explanation that she was claustrophobic. Sviderskis-Carroll had offered to exchange the areas early on but

Ziznewski had rejected that offer. She also recalled that on several occasions Ziznewski would stand outside the rear door of the area and talk on the cell phone, which she understood was in violation of school policy. And her cell phone would ring sometimes even before Ziznewski got to that location. Those incidents occurred "way more than ten times". Ziznewski talked while her children were present and distracted them. She would frequently get a barrage of comments from her children who stated that "the phone's ringing. The phone's ringing." As a result, their ability to concentrate and learn was greatly impacted.

Regarding the ongoing door problem, every time she closed the library door, Ziznewski would get up and open it. She would also begin humming, making loud noises and tell her that the door was to remain open, all this occurring in the presence of her children, who would ask her why Ziznewski was "yelling" at her. Ziznewski also referred to her students as "those kids" in front of her students, which she connected as being derogatorily done by her.

On October 20, 2006, as Sviderskis-Carroll was talking privately to Ami Hoffman, Ziznewski approached, listened in and then "leered" at her. She viewed this as a "final straw." She was very upset and was forced to leave the area in order recover her composure. Upon her return, however, the door opening problem began again and the unrelenting cell phone ringing started up once more. On cross examination, she indicated that she felt that Ziznewski was trying to intimidate her in order to have her "back down" regarding her expressed concerns regarding the door and cell phone usage. Her perception was that Ziznewski was trying to bully her so that she could continue to do what she wanted to do.

Her supervisor also spoke to Ziznewski about it and Mr. Young sent a memo on October 26, 2006 to her, Ziznewski and the physical education teachers, in which he indicated that: "Due to the distractability of the special education students in the library, it is necessary to keep the library and gym doors closed at all times throughout the entire day..." (P-136). However, Ziznewski persisted in keeping the door open, which practice continued throughout the entire year. This also occurred even though she was

aware that, on November 3, 2006, Young wrote to Ziznewski and warned her that cell phone usage by teachers was prohibited when students were present and had ordered her to discontinue the practice immediately. In addition, he reminded her that he had previously advised her in a memo on October 26, 2006, regarding the necessity to keep the library door closed and that her failure to keep the outside door to the library closed could be a basis for her insubordination (P-139). In addition, she knew that virtually every day, Mr. Young would make the morning announcements over the loudspeaker system at which time he remind teachers about not using cell phones during the day. On cross examination, she acknowledged that the library doors pushed outward, were very heavy, and made typical disturbing noises.

She was interviewed as part of an Affirmative Action Investigation on November 2, 2006, at which time she recited her ongoing concerns regarding the persistent door problem and cell phone usage by Ziznewski (P-155 at pages 514-516). In that interview she had indicated that on more than one occasion, Ziznewski had "gotten in her face, screaming at her" in front of her children and that even her students were intimidated by Ziznewski. She also indicated that she was teaching under a great deal of stress and that the blatant disregard of administrative directives by Ziznewski was very frustrating.

On October 23, 2006, Ziznewski had also made an issue about the fact that one of the computers in the library was for her exclusive use. Ziznewski also referenced the students of Sviderskis-Carroll as being "those kids" in a condescending manner once again in her discussion about her exclusive use of the computer with the library paraprofessional. Further, on November 1, 2006, Ziznewski's cell phone rang four separate times after she had placed it in Hoffman's office while Hoffman was away for the day. She definitely recognized the phone ring as belonging to Ziznewski. But she was baffled about the fact that the phone was there since Hoffman had previously told her that she was not aware that Ziznewski was placing her phone in her office in her absence. She personally recognized and saw the "stuff" belonging to Ziznewski in the Hoffman office on that date.

On further cross-examination, she indicated that, although she had started registering complaints to Young about Ziznewski in September, 2006, she none the less stopped publicly citing any of her complaints after Christmas. She felt it was futile and draining upon her and her ability to service her students. At the time she thought that there was a lack of enforcement from her perspective as a teacher, even though Ziznewski appeared to violate rules of the school which she personally followed. As a result, she felt that the disregard of those rules by Ziznewski represented a huge breakdown in the system and caused a morale problem to persist.

Gerald Young

Gerald Young is employed by Edison as an elementary school principal and he has been assigned to the Marshall School since 1992.He possesses a Master of Arts degree as a supervisor and administrator which he received from Rutgers University in 1962 after receiving his Bachelor of Arts degree in history, German and elementary education (K. through 8) from Rutgers College in 1955. He also possesses 30 credits from the Graduate School of Education there. He additionally has certifications in grades K. through 8 as a teacher as well as administrator and supervisor, with a principal's endorsement. He has been employed by Edison since 1957. Marshall is a K through 5 school and contains approximately 525 to 540 children. The grades are segregated into various wings.

He has known Ziznewski as being a veteran of the Edison school system, as well as being a fellow church member as well as a neighbor in the adjacent community of Metuchen. She arrived in his school during the 2004-05 school year and assumed the role of a reading specialist there.She was the only reading specialist at the time along with approximately 25 other teachers. She taken over from another reading specialist who had family problems which had forced that specialist into a part time position. However, since Marshall needed a fulltime reading specialist, Ziznewski was reassigned to Marshall. It is such an important job that they must have one on site during the entire school day.

He noted that there is a strong need for BSI, whose students are pulled out to receive specialized help by the reading specialist in such areas as coding of words, comprehension as well as fluid reading in order to help give support to the classroom teachers. Reading specialists are required to work primarily with grades 1 and 2. He feels that he generally has a harmonious school of staff members, although this was not always the case. The arrival of Ziznewski caused a significant amount of tension to escalate over time starting with her arrival of 2004. Her increased shouting and yelling became "bombastic" especially for the children and especially if she did not want any certain child in her room. After awhile, many of the teachers became afraid to get involved with her and the tension became "horrific", especially after 2007, at which time harassment issues were brought up and the district's Affirmative Action Officer had to get involved. Ziznewski would run up to Young and yell at him when something did not go her way. She also did not believe that she had two supervisors and only insisted that Deborah Bredahl was her supervisor. Sandra Pellicane could not take it. Some of the teachers were even forced to take off in the afternoon when it got so out of hand with the tensions generated by Ziznewski. Since he had developed a personal pride in the atmosphere and success of Marshall over time, he even personally went home "in tears" many nights as he saw his "building collapse."

The first part of the year of 2004-05 as Ziznewski was reassigned there was a pretty "calm" year initially but then things went down hill later on in the year as Ziznewski started to present negative attitudes there. The next school year became horrible, heated, argumentative and a "travesty" and it got so bad that Young indicated it was difficult to describe the extent of it. Young said that he had tried to give Ziznewski a chance to acclimate and he was sensitive to the need to adjust. Therefore, he tried to give her some initial slack in order to make the transition into the environment. He had taken her at his school at the specific request of the superintendent who had told him that it would be a "fresh start" for her there.

However, during the 2005-06 school year, problems arose rather quickly. A major problem was that communications by her with others began to break down. In addition, she began to have problems coming to work on time and providing some

services pursuant to her authorized schedule. He became aware of a problem which occurred between Ziznewski and Mary Schaefer in 2004 regarding the failure of Ziznewski to provide BSI services for six of the Schaefer children. In particular, Schaefer had demonstrated to him that the test results registered by Ziznewski appeared to be excessively high in contrast to the prior tests scores administered by other teachers. Young was especially "shocked" about the student L.O., who had just been exited from the BSI program by Ziznewski. Other students also had problems in the same realm such as AM and V.Q. (P-1). Schaefer had told him that of the six students, three and had made progress but Schaefer wanted to continue BSI services until the end of the year in order to ensure a secure foundation and to increase their confidence levels in the areas of reading, writing and class participation, which concerns she had shared with Ziznewski. As a result, he talked to Ziznewski during the year about some students not having been serviced from BSI.

The school year of 2006-07 began with additional problems regarding Ziznewski, which involved her failure to timely meet with her assigned students by the middle of October, and which concern developed after he had received complaints from teachers six weeks into the year about their respective children not getting such services from her. They were supposed to start getting such services from Ziznewski within two to three weeks of the start of the year. Yet, he was forced to write to the assistant superintendent, Dr. Banks, on October 18, 2006, at which time he expressed his concerns about those delayed services (P-3). This occurred after he had spoken to Ziznewski about getting the program started, at which time she had responded that it was "complicated". He did not understand that answer since he knew that in past years it always been worked out much earlier. Further, the Ziznewski schedule should not have been a problem at all. This represented the longest delay he had ever witnessed in his entire time as an educator. He sent the memo to Dr. Banks because her inaction was beyond acceptable limits at any time.

Further, it was supposed to be a push-in program, but Ziznewski wanted a pull-out program there, even though he had told her that it was a push-in program and that it was part of Board policy. Accordingly, he directed her to push in those students, at

which point she then said that she could not do it due to a sore back. He offered her an accommodation (i.e., a special chair) which she rejected. He recalled that he only relented after she brought in the medical note. Besides, the teachers did not like her ongoing "belligerency" in their classes anyway so it was just as well that she pulled out the students. He wanted to maintain harmony in the school. But he nonetheless told her that he still wanted her to aim to get back into a push-in setting.

Problems also began to arise in 2006 regarding the failure of Ziznewski to recognize the role and authority of her supervisors, Suzanne Capraro and Joan Hagie. Capraro and Hagie were elementary school supervisors over Ziznewski and, in that capacity, they represented both Young and the assistant superintendent, Dr. Traficante. He indicated that the supervisors have always overseen the reading specialists as well as the rest of the teaching staff and, as a result, any failure to respond to their supervision would be insubordination and a violation of school policy. Although Ziznewski persisted in insisting that Deborah Bredahl was her supervisor, Young indicated that Bredahl is only a tester and color and coordinator of titled/funded programs and merely sets up program guidelines for such areas as BSI. Further, Bredahl could not be considered any one's supervisor because she does not have the authority to observe, which authority, by contrast, both Capraro and Hagie possess, among other responsibilities.

Young participated at the October 24, 2006, meeting with Ziznewski at which time she appeared quite upset during the whole meeting. It was not productive because Ziznewski refused to participate in any conversations with either of her supervisors. There was no positive exchange of ideas. Ziznewski failed to respond to any of the questions which were proposed by the supervisors and she also refused to comply with the request to produce samples of her assessments and her lesson plan books. She persisted in utilizing Post-It Notes and hand them to her union representative, Mrs. Keane to verbalize for her. She was very hostile. The meeting did not go well.

On November 22, 2006, he wrote to Ziznewski in an effort to set up a follow-up meeting regarding the conference topics which had been articulated by the supervisors

(P-7). He indicated that the follow-up meeting was necessary because various teachers had complained to him that their students were not being pulled out on time, the schedule by Ziznewski was not being followed, and she was not even coming in on some days in order to service the children. In that memo he ordered her to bring her lesson plan book and four copies of the DRA's which she had administered. As of December 11, 2006, however, Young wrote to Dr. Traficante that they had had two cancellations of the second meeting by Ziznewski, although as of that date, at least, the BSI program was finally "functioning." (P-9). In that memo he further stated "I would like you to consider rescheduling the next meeting after the holiday break. Mrs. Ziznewski will only present us with a litany of lies and place blame on the teachers and me..." He also noted that, at least as of that point, it was not so much as believing anyone else versus Ziznewski, but, when so many others had complained about her, this appeared to be a pattern of not providing BSI services as well as teachers not being able to talk to Ziznewski. He also found it necessary to file his own Affirmative Action complaint against her after she announced publicly in the Marshall School main office that he was a hypocrite about taking up gifts at their mutual Catholic Church even though at the same time he was going after her and against her professionally. This pronouncement by her upset him greatly.

The second meeting was finally conducted on January 22, 2007, at which time Ziznewski was very hostile once again and proceeded again to wants again challenge the authority of the supervisors. She did not feel that she had to show the lesson plans to the supervisors. Nor did she provide the requested documents again. He viewed this as being a violation of an order from him.

During the rest of the year teachers kept coming in to him on a regular basis and frequently crying and expressing physically sickness about the conduct of Ziznewski against them. This included teachers such as Figueroa, Schaefer, Sica (who on one such occasion wanted to go home from school but then elected to stay), Keane (who got upset over hearing Ziznewski screaming at another teacher in the hallway), Hooker, Zazanis (who had overheard Ziznewski yelling at Young), and Peters.

The 2007-08 school year also involved increased tensions and disruptions by Ziznewski. On October 5, 2007, Young wrote to Bredahl that Ziznewski was not working closely with the teachers from grades 1, 2 and 3 regarding their BSI requirements and that she did not plan to take additional students from Sica (P-13). In the process, Ziznewski had become antagonistic and had come into Young's office screaming about Sica. During the early part of the year Sica had spoken to and written to Young many times about the "irrational nature" of Ziznewski (P-15). Then, on October 16, 2007, Young called a meeting with Figueroa about her concerns for students her not being serviced. At that time, Figueroa advised that she was upset with Ziznewski and about not getting anything done by her. His intention was to meet with them both in order to get some answers regarding the complaints by Figueroa. He had also seen Ziznewski raise her voice against Figueroa and Schaefer at times but they never raised theirs in return. He set the meeting with Figueroa, Ziznewski and himself for October 26, 2006, which he had directed her to attend, but she told him that she did not want to go, and, as a result, it never took place. As a consequence, he wrote to the superintendent, Ms. Carol Toth, on October 29, 2007, and advised her of the failure of Ziznewski to appear and respond to his order in that regard (P-23). He then set up another meeting for the next Thursday, which Figueroa was willing to attend in order to get her children serviced. However, Ziznewski failed to meet again. This was insubordination. Then, on October 30, 2007, Ziznewski burst into Young's office and implied and yelled at him about having been picked on by other people. She stormed out of his office after a 30 minute angry tirade at him (P-174).

He also discussed Schaefer's problems with Ziznewski and her BSI children numerous times (P-60). He also encouraged Capraro to come to the school to discuss any questions with all the staff on November 13, 2007, since he had felt the need to have her meet with everyone (P-25). In the process he wanted to have answers given to all their problems in their respective prep periods. But problems persisted. On January 17, 2008, Schaefer wrote to Young about the lack of services for several of her children to date, in which a number of them had not been receiving consistent services from Ziznewski. Schaefer reported that Ziznewski was supposed to be in at 8:45 AM, but was arriving late, even though her assigned "duty" was between 8:45 and 9:00 AM.

By district policy, the reading specialist was to be available to discuss unique problems during that time. Thus, all of the teachers knew that Ziznewski was supposed to be there. But she failed to consistently follow that requirement at least for the period of the middle of October through the end of October, 2007, during which time teachers complained that she was coming in late at approximately 9:15 to 9:30 AM. Young noted that there was no record of her timely attendance during that period and she never gave any explanation for her non-swiping of her access card for that period of time, even though he had sent her a memo on November 14, 2006 in which she reminded her that she did not swipe her card in any of the mornings as required by the superintendent (P-141), and notwithstanding the collective bargaining agreement which only referenced afternoon swiping. He did note that she had upon occasion called in that she would be late. He admitted that he encouraged Sica to keep a record of the absences and latenesses of Ziznewski. On January 17, 2008, he wrote to Dr. Traficante about Ziznewski not carrying out her schedule. There were also times when he would stop by to see her at her class, but she would not be there. When he later would ask her about it she would say that she had been out "visiting teachers" about their students during those times. However, he indicated that any such visitations should have happened in the morning during her 8:45 AM duty.

On numerous occasions, he heard Ziznewski announce that she did not believe in the DRA's. The mid year report was due in February but in March, 2008, Hagie wrote to Ziznewski and advised her that she had failed to report her midyear DRA levels in a timely fashion (P-37). The supervisors relied upon the need to have the DRA reports filed timely. He felt there was no reason why she could not have completed them on time since she had had many years of experience to meet these needs. When he asked her about her lack of compliance she shut him off by turning away from him. As a result, on March 6, 2008, Dr. Traficante wrote to Young and directed him to put Ziznewski on notice regarding her obligations to service BSI students and still complete her assessments at the same time (P-38). Further, included in this directive would be a notification to her that any attempt on her part to refuse to do her job would be reported immediately to the Acting Superintendent for further action. He sent that notice to her accordingly on March 7, 2008 (P-40). He then reported to Acting Superintendent

DiMuzio that, after having given her that notice personally, she became quite angry and questioned how this could be done. She also announced to him that Hagie was not her boss and that Young was going to be in a lot of trouble because she intended to report "this situation" to the Commissioner of Education. He viewed that reaction by her as being presented to him in an intimidating matter. He then noted that, as late as March 10, 2008, Ziznewski made it clear that she still did not view Hagie as being her boss (P-42). On March 10, 2008, Hagie reported that Ziznewski refused to speak to her so he wrote her to indicate that the assessments had to be submitted to Hagie before March 17, 2008 (P-44). He further advised and recommended that she should take off three specific dates and release time to complete the task. Then he wrote her a second memo on the same case in which he further ordered that he wanted six sample DRA's from first grade and six samples from second grade which were to be forwarded to Hagie along with her assessments (P-45). He felt forced to write another letter to her on March 18, 2008, in order to explain the reason for the conference, which was scheduled with her for March 19, 2008, even though he previously had written her of the purpose of the meeting on March 13, 2008, which was that Hagie would then be present to discuss her DRA assessment procedures and answer any questions she had (P-47). He felt that she was being obstinate even at that stage in refusing to acknowledge the status and authority of Hagie.

At the meeting held on March 19, 2008, there was a discussion about the DRA's and her failure to follow the district procedures about the timeliness of following them. Some of the DRA's were still not completed, even though Ziznewski professed that she still had did not have enough time to complete the DRA's and despite the fact that, district-wide, others had completed their deadlines and, further, despite the fact that he had even provided her with three additional days in order to complete them. In addition, she had received help from Ami Hoffman in order to complete them at that point. Even at that stage, however, Ziznewski still challenged the use of DRA's and running records, even though these were well established district programs. Dr. Traficante once again raised the great concern that her inflated assessment results deterred supplemental instruction which was to be provided by her as a reading specialist (P-51).

The situation involving cell phone usage by staff members was also addressed by him in his testimony. He indicated he copied all staff members on the use of all phones and a prohibition of it during instruction time in light of the fact that a teacher had reported the Ziznewski was using it during instructional time. He also sent notices to parents as well as to staff and announced it periodically over the public address system. Yet, Ziznewski persisted in violating that policy, which was based upon the renewed complaints from other teachers who were affected by and offended by her flagrant disregard of the policy. In particular, on November 3, 2006, he specifically noticed Ziznewski not to use her cell phone when children were in class.

Young knew the child identified as A.P., who had been referred to Ziznewski for a period of time but who had insisted that he had better reading levels than others had tested him at (P-63). Jennifer Figueroa was particularly concerned about the status of that child and, as a result, on January 16, 2008, Young told Ziznewski that A.P. was in need of BSI and that his parents were concerned. He instructed her to begin BSI with A.P. immediately (emphasis added) and that he would be monitoring it (P-26). He noted that Ziznewski had already dropped him in September, 2007 and had denied him services since then. The meeting regarding A.P. was held with Ziznewski on January 17, 2008, which Young described as being "one of the most embarrassing parent-teacher conferences in my 53 years in education." (P-28). Ziznewski openly contradicted both Figueroa and Sandra Pellicane in the presence of the mother of A.P. even though both of them had indicated that A.P. did not read fluently and needed BSI. He felt that Ziznewski acted in a highly unprofessional manner. The other two teachers did not respond in kind and kept their professional bearing. The parent was confused after hearing her comments which, according to Figueroa, were misleading. She then indicated she intended to bring up the case of A.P. to the I&RS committee. Young was concerned that she would continue to bash Figueroa. At no time did Ziznewski indicate that she would work cooperatively with the classroom teacher.

He then wrote a memo to Dr. Traficante on January 29, 2008 (P-31), which he described as a "tough" letter by him since he had to mention how insulting Ziznewski had been to him when she popped into his office in an agitated state at one point and

called him a "liar." He characterized her presentation as being a "tirade." Once again, she indicated to him that she was going to the Commissioner of Education. He noted that his office is not a sound insulated room and is accessible to earshot of lots of people, including parents and visitors. This merely added to the embarrassment of the moment. Figueroa wrote him on January 13, 2008, and once again recited the concerns about Ziznewski still failing to provide BSI services for him (P-59). He viewed this as being insubordination since she had disregarded his order to provide BSI for A.P.

He was also aware of the need for services for the sisters A.N. and A.N., grades two and one, respectively, for whom he had to ask for emergency supplemental instruction from Dr. Traficante on March 11, 2008, after Ziznewski had failed to provide BSI for them and even though their respective teachers had asked for this service (P-46). He had advised Ziznewski to provide for them in March but they still needed immediate after-school instruction. The approval for the extra help was authorized on March 13, 2008 (P-58). Ziznewski did not want to provide BSI for them but wanted to put them into the I&RS Committee first. She did relent, however, when Young told her to implement BSI and when he sought the supplemental instruction.

The problem regarding the ORS scores represented another extreme difficulty with Ziznewski. On September 26, 2006, Young wrote to Martin Smith and advised that after he had gone down to see Ziznewski and questioned her why she had not placed an ORS form in a second grader's folder as Smith had directed, she became "enraged" and told Young that she was going to submit a grievance against Smith because she felt that she was being discriminated against by Smith and that he should not be questioning her judgment. Young told her that the ORS must be completed, placed in the child's folder and to determine whether he needed further testing. However, Ziznewski did not want any further testing. Then, October 3, 2006, Young wrote to Ziznewski and asked her to forward to him on that same date all the ORS assessments she had completed on the new students for that year. He further indicated that those assessments should correspond to the request for an ORS assessment provided to the school upon each student's registration (P-66). All ORS folders must be in the files in the health office. He wrote her again on October 6, 2006, and indicated that he had to

have from her a copy of all the students for whom she had done ORS since school began and he expected that information to be submitted to him before she left the building that day (P-117). He indicated she never complied with his directive to produce them at any time. He confirmed her noncompliance on October 10, 2006 (P-118). He thereafter ordered her again on November 22, 2006, to produce those results by December 1, 2006 (P-121), which she similarly failed to do.

He also ordered her on November 13, 2006, to attend a meeting on November 21, 2006, in order to address concerns pertaining to ESL screening, ESL program procedures for parent contact and for her to bring the ORS testing results which she had already completed (P-120). At that meeting, Ziznewski was once again extremely abusive and generated highly unprofessional conduct against primarily Martin Smith, who, by contrast, maintained a professional level of response. It was determined at that meeting that a number of students should have had ESL but the testing by Ziznewski failed to provide proper screening for them. She was invited to get her reports out of her car but she failed to do so and never produced them to Young at any time, despite his directive in that regard. At the same meeting, Young also reiterated the fact that Smith is the ESL program supervisor for all students in the school. Smith then indicated that the ESL parent waiver letter discussion must occur only between him and the child's parent.

This parent waiver letter issue emerged involving the student D.B. And it also created significant problems. Ziznewski had given D.B. the ORS and then told the father that D.B. should stay in the Marshall School and not go to Washington School, to which he had been previously assigned by the district. She admitted that she had told the parent of D.B. that the child should stay in Marshall and then, after Young told her not to do so, she persisted in pursuing that by saying that she would continue to talk to the parent and express her views if he approached her.

On June 15, 2007, another meeting was held with Ziznewski at which time it was brought up that she had in fact interacted with the parents of D.B., despite the prior November orders of Young to the contrary. Further, it was determined that, even though

Ziznewski had conducted an original ORS which did not indicate the need for further assessment, the second screening, which was conducted by another teacher, indicated that the student did in fact need further screening. The father of D.B. had expressed confusion about what was going on based upon his ongoing interaction with Ziznewski, who, at that June meeting, also announced her self-appointed role as a child advocate. Young viewed her self pronouncements as being interference and an indicator of poor judgment. Further, her determination to continue discussion with the parent was an act insubordination as a result of their prior November conference. Accordingly, Young indicated that he would request the superintendent to make a recommendation to the Edison Board of Education to withhold and her employment and adjustment increments for the 2007-08 school year (P-125).

He also viewed her as being insubordinate regarding her failure to provide doctors' notes for three consecutive days for October 11, 12, and 13, 2006, pursuant to Article XX, page 44, item 5, of the Collective Bargaining Agreement of the teachers union (P-138), which he asked her to produce on October 30, 2006. He has to remind her again to produce the doctor's notes on November 20, 2006 (P-142) but she then only produced a note for the date of October 12, 2006, and not for the other two days. She never did produce doctors' notes for those other two days, in violation of policy and a direct order from him.

He also cited her with failure to swipe in with the use of her entry card for the period between October 16 through 30, 2006, pursuant to the requirements set forth by the superintendent of schools (P-141 and P-190), as indicated hereinabove. He periodically checked her required usage of that swipe card after October as well and she still rarely used the procedure. He also noted that she refused to sign for an Affirmative Action Investigation appearance envelope when he was asked to deliver it to her in December, 2006 (P-145), as well as his intent to deliver another confidential letter to her from Dr. Banks, dated June 19, 2007 (P-163). He felt that her actions in this regard were unprofessional. When he attempted to deliver the June letter and delivery receipt, she was abusive with him. He acknowledged that, although he may have made a mistake in attempting to present that letter to her in the library at the end of the school

day since it was in the presence of others (which could have been a source of embarrassment), upon reflection, he thought perhaps that he could have done better by delivery of that notice to her in his office, except that the environment there was not any much less private.

He also felt that she exhibited highly inappropriate conduct when, on November 30, 2006, Ziznewski went to Young's secretary and indicated her that Young was a "hypocrite" for bringing up the communion gifts to the priest in their local Catholic church. Both he and his wife were "outraged" that someone would question his spirituality and he filed a complaint with Superintendent Carol Toth because of their upset and requested that some action be taken against Ziznewski for making those comments in school regarding his religious life. He then stated "I have been devastated by these remarks." (P-155 at page EBOE 00538). He also noted that Emily Zazanis, the Spanish teacher at Marshall School, also complained to Dr. Banks, assistant superintendent at the time, on January 10, 2007, for the manner in which Ziznewski had verbally abused Young on December 21 and December 22, 2006, at the school. She had indicated she was very upset by the conduct of Ziznewski against Young.

Young further made reference to an incident about the conduct by Ziznewski, which shocked him about his presentation to her of a routine birthday card/certificate, which he gave out to all of his staff members on a regular basis. Upon his return from Christmas vacation, he found his birthday greetings to Ziznewski ripped up and torn into pieces (P-147).

On March 23, 2007, he wrote to Dr. Banks and reported an incident regarding extreme upset expressed by Ami Hoffman, who had just had a confrontation with Ziznewski at approximately 2:00 PM on that date. Then Ziznewski was hostile with Young after school in her brief meeting with him as he attempted to present a letter from Dr. Banks to her, which she blamed upon Hoffman. Her body language was very threatening and she threatened to call Superintendent Toth about Young. He felt this was not good behavior by her after she had caused significant upset to another teacher earlier that day, which was a form of harassment. He then wrote again to

Superintendent Toth on June 20, 2007, and complained once again about her intimidating outbursts of anger at individual teachers as well as his upset in having Ziznewski return to his school for the next year since the morale of the staff had been so damaged by her (P-165). But she was reassigned to him for the next year anyway, and her negative attitudes persisted. He admitted that he was still upset with her presence at Marshall in the 2007-08 school year since her attitude was eroding his school. Teachers were fearful to be in the same environment with her. Toni-Ann Hooker complained on November 1, 2007, that Ziznewski had threatened her with a lawsuit. Diane Keane was similarly verbally assaulted and threatened by her on the same day. Further, Young was then personally badgered by Ziznewski in his office about the incident. He reported this to Superintendent Toth on that same day (P-172) and on November 12, 2007 (P-176).

As a result of all of the above, Ziznewski was ultimately suspended from her teaching duties by March/April, 2008. At some point she called the school to inquire about her personal belongings having been shipped to a central warehouse. She had been told not to go back to the Marshall building, but at 7:00 PM she showed up anyway and waited to allow for her entry by anyone exiting or entering the building. As a result, she was nonetheless able to gain access to the building. He did not cite her with trespass even though she had screamed to him that he should "go rot."

On cross examination he indicated that there is nothing in writing to state the limit of the number of students who can be handled by any reading specialist. However, it is a practical issue. He supposed that she might have approximately 35 to 40 students in any given week. The issue involving Ziznewski not servicing the Schaefer children timely in 2004 could not involve him initially questioning the findings by Ziznewski, except that he was concerned that the scores appeared to be high even at that point (P-1). But he initially allowed Schaefer to take care of the problem herself and he did not recall if he even ever broached the subject with Ziznewski that year. However, after September, 2005, he claimed that he periodically did mention complaints to her about her not coordinating with teachers generally, and in particular, Figueroa. He tried to mediate meetings in order to address those concerns, but those

attempts would frequently fail when Ziznewski would fail to show up and/or cooperate at those meetings. Then teachers would not even want to meet because of their fears of hostility from her. As a result, the problems began to build in the 2005-06 school year as a result of those teacher concerns. Ziznewski would get agitated and defensive I have when specific children were mentioned to her. Young contended that he did get involved and told Ziznewski to meet with those teachers to work out the servicing schedules and he also did tell her that he wanted certain children to be put into her program and to get started with programs as soon as possible. He primarily wanted the first and second graders serviced first, in accordance with district guidelines for push-in versus pull-out requirements. Yet, he did try to accommodate her by giving her the option for pull- out right from the first year that she was there because of her claimed back problems even though he indicated that he was not aware of any Americans with Disabilities Act request by her, as so contended and challenged of him on cross examination. He also noted that when he saw even her first tentative schedule, he was concerned that she should take more children and he told her to go back to the teachers in order to accommodate more children in the program.

In any event, Ziznewski did not have the right to refuse to produce the DRA results when the she was ordered by her supervisors no matter what her personal belief may have been about the viability of the DRA's or not. He did tell her to get certain children back in BSI, but she persisted that their test results were too high and that she stated that she was in charge of that program. She resisted him. As a result, the after-school academy helped facilitate the needs and servicing of children who needed help starting in 2006-07, despite the failure on the part of Ziznewski to provide regular class services for them.

Ultimately, he did recommend a withholding of her increment after he had been denied getting her transferred out of his school because of the devastation she was causing there from a staff morale standpoint. She did not fit into his school's "climate" and, as a result, he thought it might not be the best interest of and the best mix to have her continue there in 2007-08. Thus, when she stayed and there was no improvement in her working with other teachers, he felt that the withholding of the increment was a

necessary next step or progression since she was not acting professionally. And, when the withholding of the increment failed to get her attention to improve, he did not disagree to prefer new charges or that it would be necessary since so many teachers have complained about her. Her failure to cooperate on a routine basis was a huge negative factor at the school. Thus, although he tried to reason with her on numerous occasions, she became increasingly defensive, angry, and hostile with him too.

Regarding her latenesses issues, he indicated that ultimately he could 'dock" a person for coming in late. However, he never did that with Ziznewski although he did discuss it with her. Even the upper grade teachers complained that she was getting away with latenesses. He also was concerned that she was periodically not available and on station even during many of her established scheduled periods and was thereby denying children their rights to receive their education during their assigned periods. Regarding the complaints by others about her failure to properly and timely attend her classes, he contended that the majority of the time in 2006-07, she did not start her classes on time (P-3). Sometimes she would call in that she was stuck in traffic. On other times, he was advised that she had slipped in the back door.

He was also aware through the "grapevine" that Ziznewski attempted to prep T. C., the parent of the G.C., in an effort to attack Mary Schaefer, even though he viewed Schaefer as being a "master teacher" (his term), who possessed an excellent track record, was very caring and embraced all of her students' needs. He also felt that Ziznewski was quite downright abusive to Schaefer, and Ziznewski appeared to have a vendetta relative to the BSI program. The main issue involving C.s child involved the continued matriculation of G.C. in BSI versus the parent's demand for the child to receive tutoring instead. The parent had heard glowing reports from Ziznewski about the progress of the child, even though in the classroom Schaefer had found the child to be faltering. Ziznewski got the parent riled again Schaefer so that she would ultimately claim that the Schaefer was incompetent. Further, Ziznewski kept getting involved with the parent in order to push that agenda and he felt that Ziznewski was very involved in the letter which T.C. wrote to Acting Superintendent DiMuzio on June 9, 2008 (P-48).

On further cross-examination, he acknowledged that in the staff performance assessment for Ziznewski for the period ending on May, 2007, he did recommend an increment for the period of 2006-07 (P-159). However, at the same time, he did express concern regarding her ESL and ORS screening and for better communications by her. And then, by October, 2007, he nonetheless felt compelled to advise Superintendent Toth about her escalating hostile and negative attitudes (P-171). He took no other action other than to attempt to persuade and plead with Ziznewski to use better decorum, and he discussed with her his great concerns about her attitude to him and his staff. He had told her that she should reform her attitude during the year. Thus, in order to avoid any further confrontation with her, he had an after-school academy created to supplement the services for students who were the subject of conflict between Ziznewski and the other teachers. This was further meant to defuse the increasing hostility which she was generating against them and keep them apart from her. Although he did order her to provide direct services to some students (such as A.G., whom she nonetheless failed to eventually service), and, although he could have ordered Ziznewski to service all of them, he instead chose to take the lesser course and, unfortunately, spend money at additional taxpayers' expense in the process in order to assist each and every one of the children who was affected. As a result of those additional efforts and redirection, A.P. was an example of a student who did not get needed services from Ziznewski but only got them through the after school academy.

On further cross-examination, he estimated that he had approximately ten to fifteen confrontations with Ziznewski in each school year. She would belittle and demean him. He did speak to his supervisors about her and he did file a harassment complaint against her accordingly. Nothing came out of that complaint other than Ziznewski being called in to address it. He did not believe that any discipline was ever meted out against her as a result of his complaint and upset.

T. C.

T.C. testified on behalf of Ziznewski. Her children go to Marshall School. In the 2007-08 year, her daughter G.C. was in BSI with Ziznewski. On January 16, 2008, Mary Schaefer met with her at a pre conference before a scheduled I&RS meeting regarding G.C. A week later, Schaefer called her at her employment at Lord and Taylor about concerns she had regarding G.C. in reading. Schaefer was her first grade teacher at the time and G.C. had been in BSI since approximately October, 2007. Her first language is Greek, although both Greek and English are spoken at home. She had never been in ESL and no one had ever recommended it. She contends that G.C. is proficient in reading English.

The meeting was held on January 24, 2008, and included several teachers, including Ziznewski, the school nurse, and Schaefer (who came in later), among others. Since Schaefer had previously said she had referred her to the I&RS committee, T.C. arrived with documentation about her daughter and how she was an individual. Schaefer brought a list of G.C's behaviors but nothing about her reading (P-29 at the EBOE00051 and 52). Prior to this, T.C. was not aware of any behavior problems with her daughter other than that she was slow to complete class work. It was an intimidating meeting. She was "shocked" by the Schaefer list and it created anxiety in her household because she never had had any prior information about it. There was no closure after that meeting, although they did agree to the use of ear phones and to have Schaefer work more closely with her at that time. She was so focused on the paper that she did not recall any Ziznewski comments, except that Ziznewski was a little in favor of G.C. and her belief that that her daughter's comprehension was up to speed. It was not a confrontational meeting, however, although she felt it necessary to speak again to the guidance counselor, Mrs. Stultenberg, the next morning since there was no real closure. As she dropped her child off at school on that day, she wanted to discuss the lack of closure so Stoltenberg brought in Ami Hoffman and later called in Young, which meeting took one-half hour. There was no real closure again, but just empathy expressed at that time.

A second meeting was held with Schaefer on February 8, 2008, between approximately 8:30 and 9:00 AM (and she did write to Schaefer immediately thereafter on the same date.)(P-35). She also enlisted Ziznewski's presence when she saw was in the hall upon her arrival, but Schaefer got confrontational with her. T.C. was upset about the use of the earphones and G.C. having cried when she was forced to wear them. T.C. was very "livid" that Schaefer did not respect her daughter's upset of having to wear the earphones or their "Greekness." The meeting lasted approximately fifteen to twenty minutes and she did not recall Ziznewski saying anything during it. However, Schaefer showed body language that demonstrated that she did not want Ziznewski there.

A parent/conference was then held on February 26, 2008, at which time her husband was also present along with Young and Schaefer . The subject of ESL came up but nothing came of it. Ziznewski was not at that meeting. She did not recall that meeting as being confrontational. But she was aware that Ziznewski, as a reading specialist, did not subscribe to Schaefer's assessment's of the G.C's reading ability. Rather, she viewed Ziznewski as her advocate.

A second I&RS meeting was held on March 20, 2008, which included Ziznewski, Stoltenberg, Hoffman, Schaefer, Figueroa, Young, some special education people, and a doctor "Shondra". They were the same players from the prior I&RS meeting.

She then wrote to acting superintendent, John DiMuzio, on June 9, 2008, about her frustrations with Schaefer and what was going on with her daughter at Marshall (P-48). She felt that Schaefer was unprofessional, never gave her facts, harassed her daughter with the earphones and channeled her efforts regarding her behaviors but not her reading. She observed that Ziznewski felt the G.C. was in a higher reading level than Det Schaefer. She personally concluded that Ziznewski was more correct after outsourcing her research to others about running records, reading levels and "stuff like that." Overall, she felt that her daughter was not challenged enough so she wanted to advocate for her herself. She believes that Ziznewski challenged Schaefer's results at the meetings but never got confrontational with her.

On cross examination, she indicated that her one major frustration stems back from G.C.'s typical act of answering a question with repetition, which she attributes to her Greek culture and which Schaefer seemed to fail to understand. She acknowledged that G.C. did work with Figueroa in accordance with a suggestion from Young during 2007-08 to help her with reading and math, this being in order to get a different teaching perspective. Most of that additional help occurred after school and lasted for approximately an eight week period of time. As a tutor, Figueroa was good, but she was not her child's advocate, although she noted that by the end of the school year, G.C. was a different (i.e., better) child from what she had been in the beginning of that school year. Figueroa now has G.C. in her class and she has been doing very well.

She also claimed that she had a private expert, Elaine Thomas, perform a DRA on G.C. and it was in direct conflict with Schaefer's running record on the child. She understood from the school meetings that Ziznewski had performed a DRA on her daughter but it was never produced, even though she had asked for it (which she later admitted on direct examination only occurred when she sent her June 9, 2008 letter to Di Muzio. But she never wrote a second letter to the school superintendent or to the Board of Education in order to get that information). She based her understanding about the status of a Ziznewski-generated DRA upon the fact that Ziznewski had said in a parent/teacher conference at the end of that year that she had performed the testing and she took it on good faith that Ziznewski had performed such a test. At the same time, she does not "remember" and "doesn't recall" if she ever had any conversations with Ziznewski about Schaefer. Further, at the January 24, 2008, I&RS meeting, Schaefer did present one view regarding G.C.'s reading achievement and Ziznewski presented another view. But T.C. was not concerned about the contradictions between the two of them.

She did ask Ziznewski to attend the meeting with Schaefer on February 8, 2008. The whole meeting was very upsetting to her. She admitted that she briefly talked to Ziznewski at the conclusion of the meeting relative to her concerns and she left after the bell rang. She did most of the talking up to the entrance to Ziznewski's classroom. They continued to talk at the location and she "vented" before she left. She then

stopped at the office of Sandra Edwards to "vent some more" about the use of the ear phones.

On re- cross examination, she admitted that G.C. needed confidence in reading and not that she had a specific need. Figueroa provided that confidence in order to build her reading ability. She also admitted that G.C. had also had a difficult reading experience with Mrs. Gerba in kindergarten. She went along with the help that Edison claimed it would provide her at the time. But, instead, she got upset at the I&RS meeting when the focus shifted to a discussion of G.C.'s distractions and behaviors that had not come up before. She feels that Schaefer never challenged her daughter enough. T.C. is still working on her confidence in reading skills and she is slowly developing, despite the district's claims to the contrary. Ziznewski was more of an advocate and was pro-active, although she was only a small part of the entire equation regarding G.C. She admitted that either Hoffman or Stoltenberg recommended G.C. for BSI for the 2008-09 school year.

Donald Tarr

Donald Tarr is a field representative for the New Jersey Education Association (NJEA). The Edison Township Education Association (ETEA) is a local unit of the NJEA. He is familiar with the collective bargaining agreement between Edison and the ETEA, particularly the sections regarding absences and the striking of swipe cards (R-9). There is no requirement for personnel to swipe in at the beginning of the day and, if Edison had wanted to do that, they would have had to negotiate it. They did not do that, however, and he knew of no negotiations or discussions to change the printed swiping language as contained in an agreement.

Yet, on cross examination, he was shown a memo from Dr. Capraro to all principals in Edison, dated March 25, 2004 (P-190), which stated, in relevant part: "Please remind your teachers that they are to swipe in and swipe out whenever they leave or return to the building." That memo was copied to Myron Fouratt, president of the ETEA. Tarr indicated that he never saw it, was never aware of any discussions

about it, and is not aware of any grievance ever having been filed by Fouratt with reference to it. Fouratt never discussed it with him either.

On March 19, 2008, he attended the meeting regarding a discussion of Ziznewski with Young, Hagie and Dr. Traficante regarding DRA's, at which time they also discussed "outstanding" tests which had not been purportedly turned in by Ziznewski. He was asked by the new local president Amel Ferlicchi to represent Ziznewski since he had not able to attend himself and he needed someone with some knowledge to attend. This request came approximately a couple of days before the meeting. He only knew that his role was to be there and that was all, although he admitted that there had been some memo sent to Ziznewski before hand which alluded to some testing problems.

At the meeting he raised a question regarding whether the DRA, as an instrument, had been adopted as Board of Education policy. He never got an answer to it directly. Instead, the answer was that assessment (Emphasis added) is a Board policy. There was no direct mention about the DRA, however. Ziznewski did not provide and nor did she offer to provide any DRA assessments to them at that time, even though there had been some discussion about her failure to turn in some DRA results. It only involved a discussion about discrepancies for eight students for whom she had turned in DRA scores only, consistent with the memo from Dr. Traficante to Ziznewski, dated April 2, 2008 (P-51), which he had previously seen. Ziznewski challenged why they were using DRA's and not some other instrument as well as whether it is even research based or not, this challenge occurring after Dr. Traficante brought up the subject. Hagie then re-emphasized that it was research based. He acknowledged that Hagie has some partial responsibility over reading specialists as a supervisor, this occurring during the course of a discussion as to what the supervisors did and him subsequently finding out that both Hagie and Dr. Traficante were Ziznewski's supervisors. Although he was shown the Pearson Learning Group DRA literature (P-14) and it being represented by the district's counsel that the information had been distributed at that meeting, he never recalled having seen it there.

There was also a discussion about certain students and whose test results were accurate, as well as why Ziznewski's test results were not. At that time there were some "figures" thrown around which indicated there was a discrepancy in assessments scores. He recalled no discussion about how they would be resolved. There was also a discussion about running records and how long they had been in effect, as well as the validity of the running records. He admitted that the DRA is for the use by reading specialists but he does not know who uses running records. There was also some mention that some test results had not been submitted by Ziznewski, who was given some additional time to complete them and then submit them to Hagie for her assessment. The district believed the test results of the other teachers, but not Ziznewski, based upon the fact that other teachers got different test results.

Tatiana Charapova

Tatiana Charapova was employed by Edison between 2001 and 2005, at which time she was the subject of a reduction in force (RIF). She worked with Ziznewski for one year at Madison Intermediate School in 2002-03, where she taught ESL and science/ social studies for ESL students. During that year, they shared a room, where they had many discussions regarding ESL and U.S. education. Ziznewski had a special library to help Charapova's pupils with different reading levels. She had no conflict with her that year. Rather, they worked well together.

Charapova is a teacher of foreign language. She received her Bachelor of Arts degree in 1975 from Kalmyk State University, Russia, in the areas of foreign language and world literature, as well as her Master of Arts degree from the same institution, as well as some administrative degree. She came to the United States in 1993, at which time she sent her education documents to the World Education Association for evaluation, as a result of which she received a temporary teaching registration for noncitizens in 2001. She then commenced her teaching instruction at Edison. Subsequently, she received her standard education certification from New Jersey in 2006. She became a United States citizen in either of 2007 or 2008.

She recalled an incident which happened with a teacher named Dahlia (?)and Ziznewski, the former of whom screamed at Ziznewski in the presence of her children. Charapova was uneasy with that confrontation. She was generally isolated from the mainstream school and did not have much contact with other teachers, so she does not know how Ziznewski got along with them. On cross examination, she acknowledged that the incident with Dahlia happened most likely in the beginning of the 2003-04 school year and that she probably actually started in October, 2002, not 2001, and she previously testified. She then conceded that the name of the teacher was Dahlia Mirrione, who worked with mainstream children as a curriculum resource teacher (CRT) only during the 2003-04 school year at James Madison.

The incident occurred at approximately 10:00 AM. Charapova "assumed" that it was about a reading schedule. She did not hear the actual initial quiet conversation between Ziznewski and Mirrione, but the outcome was that Mirrione stood up ("jumped with such attitude") and was so angry that she screamed: "You are the number one in the list that I hate!" Mirrione then looked at Charapova in leaving the area. She did not hear anything from Ziznewski.

Prior to her RIF, Charapova got involved in a dispute with her school principal, Mrs. Fox, who, on September 25, 2004, threw all of her educational materials in the garbage can, along with the library materials supplied by Ziznewski, at which time Fox told her that she had no money for such things. Charapove asked Ziznewski to help her get replacement materials accordingly.

In May, 2005, when she was about to be laid off due to her impending RIF, Ziznewski told her to speak to Mrs. Toth, Dr. Traficante, and Mrs. Fox, and then she and others recommended her to Donald Tarr, who gave her more tips to get a resolution regarding the employment situation. Ziznewski then decided to go speak on behalf of Charapova to Tarr herself in order to allow for a meeting with the Board of Education, but it never took place. Ziznewski then contacted other people who also worked in the district to help Charapova and to contact an NJEA attorney. She did get a response from Dr. Banks, who was the district's Affirmative Action Officer at the time.

She was sent to the office of an NJEA. attorney after which Fox "blew [her] off." After a two week break, Ziznewski then helped her write a letter to the Division on Civil Rights. But her removal took place in any event. After her departure, she visited Ziznewski at Marshall School more than ten times (as many as fifteen), starting with the summer after her removal and then going into the school year. Principal Gerald Young was very nice with her and was very nice with Ziznewski too while she visited. Ziznewski invited her to visit with her at her school since "Mr. Young was so nice." When school was in session, Ziznewski would also call her after meetings or after school to tell her when she was available. She would meet her after 5:00 PM on those occasions, and either Young or his secretary or Ziznewski would let her into the school. Ziznewski also helped to write a letter to Myron Fouratt, first in handwriting and then drafting it and then typing it on Charapova's computer. Ziznewski also collaborated with a couple of other teachers regarding her problems until approximately 6:30 PM when the custodial would want to clean out the building.

Carol Ziznewski

Carol Ziznewski has been employed by Edison since 1973. She received her Associate of Arts degree from Middlesex County College in 1968, her Bachelor of Arts degree in elementary education (K-8) from Kean College in approximately (as she could best recall it when she testified) 1972 (despite the joint stipulation entered in this matter which stipulated that date as being in 1973), her Master of Arts degree as a reading specialist from Kean College in 1975 and her Master of Arts degree in public administration from Kean College in approximately 1996 (and despite the joint stipulation of facts which stipulated those dates as being 1976 and 1994, respectively.). She is presently starting her Doctoral program in educational leadership in urban studies from Kean University. She has attended various conferences, participated in the State Academy for Teachers, and the Academy for Advanced Professional Development. She possesses New Jersey Department of Education certificates for elementary education (K-8), reading specialist (K-adult), supervisor, and principal.

Her employment history with Edison is as follows (this being based upon her varying and sometimes confusing and/or contradictory extensive testimony at two separate hearing dates as well as the submission of her revised resume on May 5, 2009 at hearing (R-10B), and notwithstanding the joint stipulation of facts which had previously been submitted in this matter at the commencement of the hearing.)(J-1). The parties persisted in examining her employment background at length for reasons never fully explained to this tribunal, although, presumably from the standpoint of the Board, it was to demonstrate that she did not even have an accurate grasp of her own background information. She was an elementary school teacher at the Martin Luther King Elementary School (grades 4-6) between 1973 and December, 1989; and thereafter a reading specialist at the Lincoln School (K-5) and James Madison Primary between January, 1990 and June, 1990; Marshall School (1990-91); James Monroe (full responsibility) and the Franklin School (assisted) between 1991-92; third grade teacher at the Monroe School (1992-93); reading specialist at Washington School (1994-96); chief reading specialist at Monroe School and assisting reading specialist at Franklin School(1996-97); primary reading specialist at Lindeneau School and assistant as reading specialist at Lincoln School (1997-98); reading specialist at Lincoln School and Marshall school (K-5) (1998-2000); reading specialist at Madison primary (2001-02); reading specialist at Madison Intermediate School (3-5) between 2002 and 2004; and reading specialist at Marshall (2004-08).

She has also been an adjunct professor at Middlesex County College where she has taught the fundamentals of education, abnormalities (disabilities and gifted), student practicum teachers as well as observing students looking to become teachers, as well as lower track reading curriculum. She also had prior teaching experience at Saint Mary's School, South Amboy, before coming to Edison.

Starting in 2004, she indicated that Superintendent, Dr. John Capraro, wanted an experienced reading specialist at Marshall which was a Title I school (i.e., federally funded needy children program) and she was the most senior reading specialist to go there. She had previously worked for Young as a reading specialist. Upon her arrival in 2004, Young told her that the first grades had already worked out their schedule and

that she would identify fourth and fifth graders for BSI only. She did not service grade two that year.She serviced approximately 6 to 7 children for each of the four first grade classes, the three fourth grade classes, and the three fifth grade classes.

She wrote her memo to Schaefer on November 19, 2004, in which she expressed her concerns regarding the status of the Schaefer children since she had had nothing to look at when she arrived there (P-1). The teachers had already identified the needy children. She felt that these children were all good readers and only three had bad test results, so they were the only ones to get BSI. They were the children identified as C.S., A.M., and V.Q.. But Schaefer resisted her opinions. She did not want to take out the top three from the program but Schaefer offered her no documentation to support it even though Young agreed to take those three out. Ziznewski felt that she had a grueling schedule. She was supposed to teach six periods plus lunch and prep periods. The morning sessions were 30 minute periods, during which time she saw the children five times per week. But her schedule did not coincide with the other teachers' schedules. She claimed that 9:10 AM was her official start time and that she was there as scheduled. During 2004-05, only Schaefer questioned the test results which she had administered. And, during 2005-06, she did not recall any students' testing profiles being questioned. However, in 2006-07, she received a note from Young in her box before school started in September relative to her assignments. She indicated she had reviewed all the children's folders in August to intercept problems regarding incoming students to see if any of them needed BSI or not.

She also maintained at her initial testimony that she never had any problems with Sandy Pellicane ever (Emphasis added). Later, however, in her testimony on August 18, 2009 (day 31) she expanded and modified that prior statement as follows. Her relationship with Pellicane was initially cordial starting in 2004-05, during which time they would chat, be personable, and be cordial. Pellicane would even borrow her cell phone if hers did not work. In 2006-07, Ziznewski even offered to help her set up her "room" in the library classroom which several of them shared. Yet, during the same 2006-07 school year, Pellicane, along with Diane Keane, had filed an Affirmative Action Investigation complaint regarding Ziznewski and the way she had treated Melissa

Smith-Zeichner on June 15, 2007, when they allegedly observed Ziznewski scream at her to get out of her room because she had business to take care of. In addition, she indicated that Pellicane complained about the generally negative attitudes of Ziznewski throughout the school and throughout the school year, including the way she still screamed at Young. When confronted with that information, Ziznewski indicated that she had not been aware of that complaint (P-162) and that she failed to understand how Pellicane could have understood the status of the school because she was not much in school that year and could not know much about the environment then as a result.

During the 2006-07 school year, she started in the library with Pellicane, Mrs. Hickey, Mrs. Williams, Mrs. Zazanis, and Mrs. Sviderskis-Carroll. Her job was to identify the needs of the children. Young gave her a note to take the first and fourth grade classes` and, as result, she reviewed all the grade test results in order to evaluate the needs of those children, even though she only got limited grade assignments. This occurred because she was responsible to identify all children who needed BSI. During the year, current teachers might also recommend children on an ongoing basis and nine of ten times the children would go into the program. She indicated that she did nothing at variance with the classroom teachers that year. Problems did the not occur until the end of the 2006-07 year. During the beginning of this school year she structured her first schedule on September 23, 2006, but it was not completed because at some point Young told her that she would not be doing the upper grade (fourth grade) and that her instruction would be limited to the first grades and perhaps some second grade classes too. Accordingly, her instruction began in September with group lessons in the classrooms where she saw the students and teachers. Official remediation did not begin until October 5 with the first and second graders. In that regard, she disagreed with the letter which Young sent to Dr. Banks on October 18, 2006 (P-3), in which he indicated that she had not yet met with reading groups as of October 18, 2006. However, she offered no proof to contradict that assertion.

When she reviewed the notice of a conference issued by Suzanne Capraro and Joan Hagie, dated October 23, 2006 (P-4), she indicated that she could not "swear" that

this was the memo that she got regarding the proposed October 24 conference since she never got any prior memos from either Capraro or Hagie, it being her understanding that the coordinator for basic skills was Deborah Bredahl for several years and that she was the only person who had worked with her in that regard up to that point. She only admitted that she knew that Capraro and Hagie were elementary supervisors, but they were only supervisors over classroom teachers and not reading specialists.

Her review of that October 24 conference report (P-5) was that it was not an accurate recitation of that meeting. Her contention was that she used a "portfolio assessment document", and not a traditional lesson plan booklet, which has been reviewed periodically in prior years. She did not know if she brought any portfolios with her at the time and does not know why not. She had no explanation for it. She admitted that she did not bring the DRA's and she understood they were not even yet due. She thought that they were only due sometime late in the first marking period but she did not really know the date when they were otherwise due. She also indicated that she was "confused" about the need for the meeting and taped it because she was concerned that she had been warned to bring an ETEA representative. At the meeting, in any event, she did not wish to respond to any of the questions because her union president, Myron Fouratt wasn't there and his substitute, union representative Diane Keane, had told her that she was uncomfortable being placed in a position of trying to determine why there was sudden attention being placed upon her. She only recalled having used one Post-it Note during that session and not more than one as so indicated in that report summary. She did not recall either Hagie or Capraro saying anything about being her supervisors at that time. She also did not recall Young ever saying that teachers were concerned about her teaching did not start until October 16. In any event that was not correct. As far as she was concerned everything was fine in her building.

She sent a memo to Young on November 22, 2006 (P-8) in which she challenged what had happened at the October 24 meeting, as well as memos generated therewith much of which she viewed as forms of harassment and intimidation. She also indicated that she was "confused" as to why Young was

requesting her DRA's since he did not involve her in the administration of the DRA for the Summer Literacy Academy program identification. Regarding kindergarten registration procedures and the administration of the ORS, in the spring prior to any given school year, the Central Office would call to advise who was to get the ORS. She started doing that procedure in 1990 but was never questioned about her testing until 2006. Her usual procedure was that she would screen incoming kindergarten children by talking to them upon entry and then making an evaluation about their eligibility for ESL. She admitted that perhaps maybe "one or two" only slipped by her in 2006-07. Her "intention" was to use these test results to help the kindergarten teachers in September. She admitted that she had no role in the MAC II testing.

By December 11, 2006, Young was complaining to Dr. Traficante about her in a memo (P-9) which stated that Ziznewski was presenting a "litany of lies" in which she was reportedly placing the blame on the teachers and him, which she said was incorrect. She claims that she had no warning of any problems with him up to that point and contended that she was designated by him as the "school teacher in charge of the building." She was relieved of that job in October, 2006.

Regarding Young's Affirmative Action complaint, she was interviewed about it in March, 2007, and nothing seemed to have happened as result of it. Instead, she and Young often talked about religion and several topics relating to it. However, she recalls that Young claimed that she had offended him and his wife about bringing up the gifts to communion. However, during a "discussion" in his office, she contends that it was not confrontational and she does not know that she said anything to offend him. She denied yelling at him and she did not raise her voice. In addition, she contends that her program was functioning properly from the beginning of the school year and that Young was wrong that it was only finally functioning by December 11, 2006.

She attended the conference on January 22, 2007, which included Fouratt, Young, Hagie, Capraro, and Traficante. She did not recall being told to bring anything to that meeting (P-10). She did everything that she was supposed to do but she did admit questioning the reliability of the DRA's at that meeting. She denied ever stating that she

was being verbally attacked on "all fronts" since she maintained that was not her type of language. Instead, she viewed this meeting by Dr. Traficante as being "apologetic" for past abuses of her.

Regarding the September 28, 2007 meeting (P-11), it was run, as such meetings had always had been run, by Deborah Bredahl and no one else. She also maintained that October 15 is the last date to submit BSI data for Federal funding purposes, as noted at bullet number 5 in that document, which reads "reading spec assignment (Oct.15 data)."

Regarding the DRA reporting levels memo, dated October 3, 2007 (P-12), she did not start handing in the DRA levels in January, 2007 because she was given an extended period to hand them in because she merely "forgot" to get them in timely. She also admitted receiving excused time but does not know why it was given to her under the circumstances.

She also reviewed the letter from Young to Bredahl, dated October 5, 2007 (P-13), in which she admitted that he claimed that she was having trouble with Sica but only with her for part of the year, as well as with Schaefer. She felt that Young wrote this letter memo to Bredahl because Bredahl was the only one in charge of the program at the time.

Ziznewski believed that the trouble with Sica was that Sica felt that every child deserves "help" even though Sica had a lot of help already in her class and despite the fact that she had just a couple of children in need there versus other teachers who were alone with many more children in need. She serviced three Sica children. Ziznewski went by the recommendations of the kindergarten teacher from the year before. But Sica did not want to talk about the children but only about the program itself. She then stated that sometime during the 2007-08 school year she started to take children into her program, although she doesn't recall when that occurred specifically. She did not become aware of the Affirmative Action Investigation relative to Sica until December, 2007 (P-176). But she noted that in 2006-07, Ziznewski did have dealings with Sica

although she did not know that any complaints had been made by Sica initially. It was during the 2007-08 school year that Ziznewski did have discussions with her about some children could be referred by first grade teachers. Sica recommended none when Ziznewski presented her list in September. However, some time at the end of September or the beginning of October, Sica presented a list of five children for BSI and they did meet to discuss them, which meeting occurred right before Ziznewski was scheduled to go to a three day conference. Ziznewski reviewed the kindergarten running records, the paperwork from the other schools, and other documents. She then got the list the same day of that meeting, which occurred after a faculty meeting. She noted that she had already pre-reviewed their records that she did with all incoming students. She denied being argumentative and loud at that meeting, however, as alleged by Sica. She indicated that all five children were discussed a little bit at that time. In addition, Ziznewski was going to investigate A.G. a little more since he had not been in either ESL or BSI in his prior school in New Brunswick and there was a form in his record from there with which she was not familiar. Ultimately three to four children went into the BSI program, plus some "little girl" who had been previously recommended for special education and E. L., whom Ziznewski was surprised had not been recommended by Sica. Further, Young had previously told Ziznewski not to provide E.L. with services in his kindergarten year.

Ziznewski further indicated that Sica would shout out names of children in her class (in violation of privacy requirements) and that Ziznewski felt harassed by Sica as a result. She found it odd and disconcerting that Sica failed to recommend some children in favor of others who really needed it. Ziznewski claimed that Sica also sent out children to her at her classroom when she was not yet ready for them, which she viewed as another form of harassment by Sica. She also claimed that all of her discussions with Sica on September 21 and 28 and October 8, 2007, were civil. She also denied the allegation that she ever announced or declared to anyone that she had any document which allowed her to refuse to take children and which indicated that, it even though a teacher recommends a child into BSI, Ziznewski does not have to take them if all other criteria point to non need.

Regarding bullet number three of the same Affirmative Action Investigation (P-176), which asserted that three children had not been serviced by Ziznewski as of October 15, 2007, she felt that it was more "inaccurate" than "accurate," in that she "did start" such services, although she presented no proof in support of it. She volunteered that it may have depended upon how many holidays and staff "diversions" affected her start time. In any event, she was not aware of any directive which mandated when such services were to begin.

On or about December 22, 2007, Ziznewski was given a notice to attend the meeting regarding the Affirmative Action Investigation, although she still did not know that complaints had been filed against her at the time. She figured that was about her own ongoing complaints about others, but when she raised that to Dr. Banks, Banks said "No." It was about her and Ziznewski was surprised. Banks gave her the choice to either speak then or to get an attorney. It was not until her attorney, Mr. Feintuch, gave her the report of that Affirmative Action Investigation (P-176) that she ever even knew the specifics of the Sica complaints, and even despite her prior attorneys' involvements before she had hired Mr. Feintuch to represent her.

She also commented upon the letter from Schaefer to Young, dated October 8, 2007 (P-15), regarding an incident which occurred between them on October 5, 2007, which she never saw before the litigation commenced in this matter as well as the portion of the Affirmative Action Investigation (P-176) which involved the Schaefer complaints against her. Her opinion was that Schaefer mischaracterized what had happened in the classroom. Schaefer yelled at her, and not the reverse. Schaefer "yelled" out the child's name instead of her. She also denied that she ever returned to Schaefer's class later that day. She maintained that Schaefer "lied" in writing to Young. Similarly, she reviewed the memo which Schaefer also prepared regarding the October 5, 2007 incident (P-17), which is a narrative version of the encounter on that day. Ziznewski only recalled "parts" of the recitation by Schaefer contained in that memo, then admitted to this tribunal that the second incident/encounter did occur, but then continued to deny it once again. She reinforced that second denial by saying that she never recalled ever being in the presence of Schaefer twice in one day ever. At that

point, she referred to pages four and five of her personal diary and copies were made available by this tribunal at the time. No other proofs were shown by her with reference to that incident.

She denied that she refused to take 7 of the Schaefer children, as alleged in the Affirmative Action complaint by Schaefer (P-176 at 581). Instead, she did take approximately four children who had been recommended by their kindergarten teacher. She admitted that Schaefer did give her a list on approximately October 2, 2007, with her own list of students also. She also admitted that she did not take some of children whom Schaefer did recommend, including one "Spanish child." But she denied ever refusing to take the 7 children because there were too many students in her program already.

The meeting which Young attempted to set up with her for October 17, 2007, regarding her BSI programming and complaints by Figueroa, was never held because Ziznewski was at a workshop on that date (P-18 and 19). In addition, the meeting which was reset for October 26 (P-21) was also not held because she did not think it would be productive. By that date, she admitted that Figueroa was all over her with complaints about her handling of BSI. (This admission was so indicated and corroborated in the letter from Young to Toth on October 29, 2007.) (P-23). Instead, Ziznewski wrote to Young about A.P. and another student and advised him that they were not eligible for BSI because they were very bright.

It is noted that in her testimony on May 5, 2009, Ziznewski then expanded her prior response regarding the meeting which was never held with Figueroa, which she now contended had been set for October 16, 2007, and not October 17, and despite the fact that she had previously indicated that she was at a workshop at the time. She did not attend the session because she had attempted to resolve the issues with Figueroa alone via a letter exchange. The Figueroa letter had been circulated to various levels of the school administration. Ziznewski was thus "perplexed" by this "barrage" by Figueroa. Figueroa never responded to her request to resolve it. And somehow Mrs. Garaboto got involved and tried to resolve it but she does not know if she or Figueroa

had gotten Garaboto involved in the first place. The letters which she got appeared to suggest that Figueroa had wanted a meeting, but Ziznewski did not understand why the meeting was necessary. Several dates were set up but a three day workshop was in the middle of the attempted scheduling. She contended that the meeting had been reset for October 17, 2007, but Garaboto had instead asked for documents regarding these children. The meeting was changed to October 26 by Young and she acknowledged that she received a memo from Young which set up that meeting. She also admitted that she did not attend that meeting because she thought that Figueroa now had a different agenda and she wrote to Young to explain that. She then noted that she was never written up by Young about her refusal to attend that meeting. She also indicated that she was never advised about any rescheduled meeting after the October 26 meeting even though Young told Toth on October 29, 2007 (P-23) that he had so advised her. She contended that she never received any such notice about any such meeting.

Regarding Incident Number 1 on September 28, 2006, which was cited by Figueroa in the Affirmative Action complaint report (P-176 at EBOE 00597), Ziznewski denied the way it was explained by Figueroa. She denied ever calling for Mrs. Normant to leave the Figueroa classroom. Instead, Normant had been at the doorway but went back into the classroom. Ziznewski only directed a brief question while she was there and then Normant came out voluntarily. Figueroa angrily closed the door. Later, Figueroa approached her in the library angrily and loudly and Figueroa "went crazy." It was her opinion that Figueroa's "problems" have been projected onto her. She recalled that Young never got involved as as result of that incident.

She also commented upon a letter written by Kerry Peters, the third grade teacher, to Young on October 26, 2007 (P-22) regarding an incident which occurred between Peters and Ziznewski on October 22, 2007. She recalled visiting Peters' room to see if Peters was feeling satisfactory after having had an illness, at which time Ziznewski also asked how certain students were doing. Peters contends in her letter that Ziznewski got very hostile with her and argumentative. Ziznewski denied any such encounter or raising her voice at all and she further contended that she did not have

any discussions approximately a week later as so represented in the Peters letter. She then denied visiting with Peters on October 22 other than to discuss her health. She then admitted going back a second time on that same day but only with the permission of Peters. On the next Monday, she only recalled going to the Peters classroom, possibly at 9:05 AM, which was the only one time that she was there at that point although she then admitted probably also going back after lunch and giving her the recommended students Terranova test scores. However, she denied raising her voice and/or getting hostile with Peters at any time, even though she admitted that she and Peters did discuss the test score results. She was very much aware of the fact that there were children in the hallway. She then recalled that Young had told her that Peters had written a letter and was complaining about her, but she claimed that she just wanted to get together to clear things up. She never saw the letter and had no idea why it would be copied to Superintendent Toth, Hagie, Capraro or DiMuzio. She then volunteered at the hearing that running records are not good because they are too subjective and that they take away from too much instructional time. Instead, she prefers to expose children to a wide variety of literature.

She then supplemented her prior testimony at the May 5, 2009 hearing in this area by indicating that she had already taken Peters' student, A.P., for services, although other child, S. was not to be taken. The child R.B. was another matter. She explained that R.B.'s parents and R.B. himself did not know why he was in the special group so she not see the need for him to be in the program. He also had exited BSI at the end of second grade so she told Peters that he did not need it. Peters complained about the disruptive nature of Ziznewski's purported interruptions in her classroom to discuss R.B.'s placement in an unscheduled visit. Once again she denied that she ever raised her voice. Instead, she merely directed Peters' attention to the test results. Further, this conversation only took a few minutes and Peters did not appear to be upset at the time. Peters only observed that his writing was not good. Therefore, Ziznewski did not see this as being an incident at all. There was no disruption since the classes were changing at the time anyway. She indicated that she tries to grab people at such times and does not try to be disruptive with anyone. In addition, Peters did not complain to her about being upset at the time.

Ziznewski attended the Capraro meeting which was held on November 13, 2007 (P-25), at which time Ziznewski discussed: (1) how there were a lot of problems with BSI; (2) that she wanted to know why Bredahl wasn't there, to which Capraro told her that Dr. Traficante wanted her to meet with her instead; (3) Ziznewski said that she had offered to have the individual students referred to her if any teachers had any problems or concerns about them, but Capraro turned away from the subject and; (4) Ziznewski told her that she would want any input in order to make the program better for everyone. She indicated the only thing that changed was the addition of the "Read 180" program (which is a total pull-out replacement program whose names were taken from the BSI list), but that only affected grades 4 and 5 in any event. Ziznewski had no fourth or fifth grade classes in 2006-07. In 2007-08, she serviced three fifth grades at one time and then it was reduced to only two. As to the fourth grade classes during the year, she had perhaps five or six students from there. However, she does not recall any of their names. The Read 180 program took her para-professional from her and it also added more students to her roster. She asked Young what he wanted to do, so he checked with Bredahl and then told her to reduce her first grade time allotments in order to fit in the third and fourth grades.

Ziznewski further indicated that she had no problems with the BSI program prior to 2006. If there was a difference of opinion between her and a classroom teacher, for the most part she would take the child and then show them the difference by showing the data to Young, who could then act upon it. She recalled that in 2007-08, there was some discussion as to how many children should be in BSI. Sica had only one child, A. G., whom she wanted in the program. He was not placed, however. Instead, Sica was going to bring him to the I&RS Committee. Ziznewski had batch tested him. B.O. was another child there, but he did go. G.S. was also tested by her. However, since she did so well in the summer academy, they chose not to put her in BSI even though Ziznewski mentioned that she should go.

Schaefer had only one child, A.C., but she did not go into BSI. Figueroa had two students in her second grade class, A.P. and P.(?). She knew they had been both recommended by first grade teachers but their June DRA's were high and above grade

level. In the prior year 2006-07, Figueroa had a child named J.P., for whom Figueroa wanted basic skills, but then she stopped sending him for it. She contended that there were only a total of eight students in need over a two year period.

At this point, Ziznewski admitted that running records were accepted protocols for kindergarten and first grade students although she did not know when they were started for that use. On January 16, 2008, Young wrote to Traficante regarding a dispute relative to the Figueroa student, A.P. and his need for services (P-26). Ziznewski objected to him getting services since his records were to the contrary. She disputed the fact that Young ordered her on that date to begin BSI with A.P. or to even do it "immediately." But yet, she contended that she took him anyway. She also contended that Schaefer never recommended BSI for any students even though she indicated that others had claimed in their testimony that Schaefer had done so. By doing so, she maintained that they were mistaken and had "lied" about it.

She agreed that the meeting with the parent of A.P. on January 17, 2008 was an embarrassing meeting but it was because Figueroa was telling the mother that A.P. was the worst reader in her class and that Pellicane agreed with that. She felt that the blame for the embarrassment lay with them and not her. Instead, she was trying to be conciliatory with the parent about there possibly being some potential problems at home, such as hearing problems. Ziznewski listened to Figueroa's concerns and took notes. She felt that Young stopped the conference because Figueroa was attacking Ziznewski, particularly when Figueroa contended that A.P. could not read. Ziznewski was "shocked" by Figueroa's tesing results, which were at the same level as A.P.'s prior test results at the Summer Lieteracy Academy the preceding summer. She also indicated that at the end of grade 1, Schaefer did not recommend BSI for A.P. as an intervention, despite the representations to that effect in the letter from Young to Dr.Traficante, dated January 17, 2008 (P-28). She had no reason to believe that Young would criticize her by saying that he was concerned that Ziznewski would continue to "bash" Figueroa. She denied that she bashed Figueroa at the meeting, although she admitted that she did contradict the other teachers during the course of the discussion regarding the reading status of A.P. and that this occurred in the presence of the

parent. She denied ever stating that she would not working cooperatively with the classroom teacher.

She also commented upon the notes of the March 20, 2008 I&RS meeting regarding G.C., which were made by Schaefer, which also made reference to the prior meeting held regarding the child on January 24, 2008, at which time there had been a discussion regarding the use of ear phones for G.C. and how it was to be implemented. G.C. had been in the BSI program run by Ziznewski at the beginning of the 2007-08 school year. She agreed that, at that first meeting in January there had been discussion about G.C. having been in the BSI program, at which time Ziznewski said she was doing well, even though Schaefer had never related any problems to her prior to that January meeting.

At the February 7, 2008 meeting, Mrs. C. was upset that Schaefer was still insisting that G.C. use the headphones pursuant to the I&RS Committee recommendations. The mother was furious about Schaefer's insistence and told Ziznewski after the meeting that she was going to put an end to "this." Young discussed the issue with Ziznewski and she claimed that she was not even sure the G.C. had to use the headphones for one week, as alleged by Schaefer. She also insisted that the I&RS committee had only made a "suggestion" about the use of the headphones and not a mandate. Besides, if it was not working, Schaefer should have stopped it. She admitted that she injected herself into the dialogue regarding the use of the ear phones.

Ziznewski was also directed to the January 28, 2008 letter from Young to her in which Young advised her that he had received complaints from Sica and Schaefer that she was not consistently implementing the BSI program for their students and that, further, he would personally monitor her instruction time to guarantee that the BSI program was presented pursuant to her previously submitted schedule to Bredahl in October, 2007. He also made reference to the fact that, pursuant to the conference which he had held with her, Figueroa, Pellicane and the parent of A.P., the child A.P. was to receive BSI reading from her on a weekly basis with the other second grade students on her schedule (P-30). She did not recall that document and denied getting it;

however she commented that Young never questioned her about her absences in providing timely services to children at that time. She claimed that she needed the release from Young to allow for services to be provided for A.P. even though there was no protocol which required it. She then admitted that she would have "accepted" that January 28, 2008, letter as an authorized sign-off for that purpose if she had received it. Once again she denied getting receipt of it, yet she acknowledged that, at the prior meeting with the parties, including the parent of A.P., Ziznewski had understood that A.P. would receive such services.

She did admit having a meeting with Young on January 29, 2008, at which time he accused her of having canceled her classes in order to attend workshops, that she was not following her schedule and that she was supposed to be in her classroom instead. (see letter from Young to Dr.Traficante, dated January 29, 2008, P-31). She contended that she had gotten permission from Mrs. Hoffman to attend, however, and she denied that she went into a "tirade".

At this point, it is important to note that, at the testimony which she presented on May 6, 2009 (day 27 of the hearing) she admitted and stated that she did tell Young that she was going to the Commissioner of Education, this being based upon her belief that she would have the Commissioner evaluate the work that she had done. However, when she resumed her testimony on May 19, 2009, and after several intervening witnesses testified on her behalf (day 28 of the hearing), she then denied having told Young that she was going to the Commissioner of Education, which was directly contradictory to her prior statements at hearing.

She also admitted that she and Young did have an argument about her canceling a class the day before at which point Young had told her that she did not have his permission. She responded by saying: "that's a lie. I did have permission." She denied calling him a liar, however. She felt that Young's challenge was "bizarre" since she felt that he knew that she had been at the workshop.

She also denied having taped the A.P. conference, which was alleged in the Young letter, and claimed that she had verbally told Young at some point that she had not taped it. She did not indicate when and where she told him that, however. She also indicated that, notwithstanding Young's failure to provide the sign-off regarding A.P., she nonetheless unilaterally determined to provide those services herself in January, 2008 because that was her (her emphasis) authority as a reading specialist. Prior thereto, she had made another determination that A.P. had not needed services since he had not received a recommendation from his prior teacher (Schaefer). She then admitted that A.P. had been in the Summer Literacy Academy the previous summer, which would have pre qualified him for BSI services, but she did not know he had actually been in it at the time. She also noted that she had had A.P. during the 2006-07 school year for BSI and had exited him at the end of June, 2007, based upon his performances that year and his DRA results. She had no role in his placement in the summer literacy program. That recommendation traditionally comes from the classroom teacher and, secondarily, from Mrs. Hoffman. She is never aware of the attendees at the summer program until October of the next year.

Regarding her desire to order novels for her children in the BSI program, she indicated that it was within the parameters of the district's BSI program for her to do that. She had previously ordered novels and there had been no problems in that regard in the past. Yet, she was chastised in February, 2008, for resorting to ordering such novels even though she uses more advanced primers to scaffold children into higher levels of reading by using more advanced novels like she had done before.

It is noted that, when her direct testimony resumed on May 19, 2009 (after allowing the couple of witnesses to testify out of turn), Ziznewski immediately indicated that Hagie is not her supervisor and that authority is not contained in any document anywhere. Thus, she challenged the supervisory role of Hagie (and implicitly, Capraro) once again by stating that there is no specific curriculum for reading specialists so she creates her own book list based upon her understanding of the classroom environments. She denied that she was ever told that she exceeded her scaffolding role at any time, although she acknowledged that it was brought up to her by Hagie in a

memo dated February 7, 2008 (P-34). But she claims she never got any such instructions from her prior to that date. She also challenged Hagie's determination that her role was only to support the classroom teacher and disputed why Hagie would cite the use of "high quality children's literature in the regular classroom setting" in that memo. She was "shocked" by this approach since she feels that the district's goal relative to high quality literature should be across the board and not limited to merely the classroom.

Ziznewski also challenged the claims by Schaefer regarding the administration of services to a number of her students. On January 17, 2008, Schaefer wrote to Young (P-27) and claimed that it had been her request for Ziznewski to take four of her students, G.C., A.K., R.U., and M.V., but Ziznewski maintained that it had been the recommendation of the kindergarten teacher instead and, in fact, Schaefer did not want Ziznewski to even take R.U., even though she did. Ziznewski did admit that she chose not to take three other students listed in that letter whom Schaefer had wanted to receive BSI services, being D.J., E. P. and A.O. As to those three, she had reviewed their records and had batch-tested E.P. and A O. (this being probably in late October or early November according to her best recollection), as a result of which they did not qualify. After that there was no discussion about them. She denied that she failed to meet with Schaefer's children consistently and that she was either absent, arrived late or working on something else during her scheduled time, as alleged in the letter from Schaefer to Young. Instead, on certain dates, the children were not available to get the instructions because of changes in their class schedules or, in addition, Schaefer would not even know that Ziznewski had taken the children upon her return from lunch break. During her absences, her aides were in charge.

She acknowledged that, on March 4, 2008, Hagie sent an e-mail to Ziznewski in which she reminded her to send her DRA reports for all children who had attended the 2007 Summer Literacy academy as well as the recently assessed levels for her BSI students (P-34). She admitted that she may have "goofed" on a deadline to produce the DRA's, although she had no specific recollection as to when Hagie had wanted them in. She also noted that this was the first time that was required to be done 3 or 4 times for

the summer literacy children and indicated that she did some of the first set earlier in the year, although it was late because she had injured herself. She attributed the late submission of the March DRA's, however, to her secretary who was delayed in processing them, since they had been done prior two March 19, 2008 by her. They were all ultimately submitted during the week of March 12, 2008 and some later on. She had approximately 40 students to submit including some second graders and some third graders as well as possibly ten from the prior summer school. Ultimately, Young relented and allowed her some time in order to complete them (P-44), which were the days of March 12 through 14, 2008.

At the same time, although she admitted that she did meet with Young prior thereto on March 7, 2008 (P-40) regarding the issue of the servicing of the BSI students, she denied that she said that Hagie was not her boss or that she threatened to report the situation to the Commissioner of Education.

The meeting to discuss her handling of BSI was held with her on March 19, 2008, but she disputed the summary of Dr. Traficante with reference to it (P-51). She denied that her test scores were inflated and that she did not support the program of the students at their appropriate levels. She made connections with the children, who were not exposed to vocabulary beyond their reading levels. She also felt that either the teachers or she should be able to determine when to move the children up or not. She denied that she failed to adhere to district procedure for screening and assessing the student with whom she worked. At the same time, she contended that the first due date for reporting DRA's was either November 14 or December 3 but she had no recollection as to when she had submitted that batch. As for the January 30, 2008 submission date, she thought that perhaps the submission date was actually February 8 (see P-54, page EBOE00096). But they were not actually received until March 19, 2008.

An I&RS meeting was held on March 20, 2008 regarding G.C., which was attended by the parent, Mrs. C. and other staff members, a summary by Schaefer of which is contained at exhibit P-50. Ziznewski was not aware that Schaefer had had concerns about G.C. at all until her name appeared on an agenda list for that date. It is

that letter he stated: "Mrs. Ziznewski was instructed by me to begin BSI with [A.] immediately"

She also generally denied the accuracy of the entries made by Schaefer regarding Ziznewski's attendance in class for the period of October 5, 2007 through January 18, 2008 (P-62). In particular, she referenced the following:

Date	Her position
October 5, 2007	She denied only taking the children for twenty minutes and the "incident" so mentioned was Schaefer actually screaming her about the child R. G. She took the children the entire time.
October 8, 2007	The school's schedule had changed and the school day was shortened, thereby reducing her classes to 30 minutes. It was an early dismissal day and the children were at gym or music.
October 9, 2007	She knows that she had may have been a "little late" for class but she "probably" kept them a little bit later to make up for it.
October 12, 2007	She admits that she was a "no show" because she had to go to the Central Office regarding a second Affirmative Action Investigation.
October 15, 2007	She agrees that she attended that class from 1:10 to 1:50 PM.
October 16, 2007	She has no idea why she got to class at 9:20 AM, which is after its official start time.

October 22, 2007	She thinks that she may have arrived at 1:10 and not 1:15, so she disagreed with that entry.
October 23, 2007	She thinks that the children may have been late from their mornings setup in their home room.
October 30, 2007	She denied a "no show" although she may have been at testing, as noted in the Schaefer list.
November 2, 2007	She admits being absent but was at another Affirmative Action Investigation session at the Central Office.
November 12, 2007	She thought that she was there on time and denied being late.
November 17, 2007	She did not recall arriving at 1:45 PM but perhaps, if she did, it was due possibly due to a lot going on with music shows.
December 21, 2007	She has no knowledge why it was listed that she arrived at 9:50 AM except that there was a music assembly in the morning.
January 4, 2008	She admits a "no show" because she had to go back to the Central Office for another part of an Affirmativ Action Investigation.
January 14, 2008	She admits a "no show" due to being at a writing workshop.

She has no idea when or why Schaefer started or stopped her time list on her. But regarding any latenesses, she denied any impropriety. If she was delayed, she would call in. Latenesses to her means after 8:45 AM. However, in 2007, at times Young would let her come in late due to her injury and the need for physical therapy in

the morning. But it would not impact upon their classes. Further, she was not required to "strike in" with a slash card. Instead, the procedure was to sign in on a sheet with an initial upon one's entry during the start of the day as well as at the end of the day. She only used a strike card if the door was locked but there was no requirement to strike in. She did not know if there was even a requirement to strike out at the end of the day and claims it was no issue about it at the Marshall School. One only used the strike card when the door was locked on the way in. She then said that she did strike out anyway at the end of the day because Young wanted the custodians to know who was still in the building. She admitted that there were occasions when she came into school late, but she was never got disciplined or admonished by Young on those occasions. She never missed a class due to her lateness. The only time that she had a problem regarding coverages occurred when she had a physical therapy requirement for an injury during the 2005-06 school year. But if she did not meet her classes, she advised the main office and got approval. She acknowledged that she was supposed to be in school at 8:45 am but might have traffic delays.

Regarding Martin Smith, the ESL Supervisor, she first met him when Young asked her to call him back in September-October, 2006. It was unclear to her why Smith wanted to speak with her other than the fact that Smith had called and wanted to know about the second grader, A.G., who had been tested by her for ESL. So, she returned the phone call to Smith and explained that she had only been following procedures, that she had screened A.G. on the ORS, and that he was doing well. His family had just arrived from Serbia. As a reading specialist, her role was to screen children for ESL using the ORS, which is a district-wide assessment. She was not really a part of ESL. However, she would test children who the Central Office told her would need it as transfers or as incoming new students.

Regarding kindergarteners only, during 2004-05, she would test the incoming kindergartners in February prior to their subsequent matriculation in September for 1 day at the Education Center in accordance with a list prepared by others. Officially, that process did not change up to her departure in 2008. No complaints came until 2006-07 when she was directed to Smith who claimed that she had not filed parent waivers (i.e.,

those who did not want their children in ESL). Young used to handle them previously. She explained to Smith that A.G. did not even require a waiver since he had not scored well enough to qualify for it, since he has scored approximately 22. In September, 2006, she does not even recall how many children to whom she had administered ORS testing. After that Smith discussion, she felt that it was satisfactory and that Smith was otherwise satisfied with her claim that A.G. scored so high. But then Figueroa complained that she wanted him back in first grade or in ESL. Upon her return from an absence, Ziznewski was very confused regarding several messages from A.G's aunt in Florida about A.G. been very unhappy. She found out that, in her absence, Smith had had the child and other children pulled in for testing by other teachers who came up with lower scores. All of her score results were in the library computer and she did not believe that she had to put them in any Central Office or main Marshall office and never saw any procedure to require it.

She denied having any discussion or conversation with Young with reference to the ORS on September 26, 2006, even though Young wrote an e-mail memo to Smith about having had a heated conversation with Ziznewski (who became enraged and threatened to submit a grievance against Smith) immediately prior thereto (P-64). When shown a memo from Young to her dated October 3, 2006 (P-66), in which he asked her to submit to him that day all of the ORS assessments she had completed on new students for the year to date), she could not recall getting the memo. She claimed that there was never a time when Young ordered her to produce all of her ORS assessments although she then admitted that sometime in October or November she was told to produce ORS assessments and told to bring a representative with her, which meeting she thought occurred occurred sometime in October, 2006. (She was later corrected by her attorney when shown the summary of the meeting held on November 21, 2006 (P-121).

At that meeting, Dr.Traficante, Smith, Fouratt (her representative) and Young appeared at Young's office with her during her lunch/prep period. During that meeting they discussed policy procedure for conducting ORS and that she was not administering ORS to students. She said that she had all of her kindergarten ORS with

her in a wheeled carrier but no one asked her to produce them, even though she told them they were right there. Dr.Traficante kept referring to a "green sheet" with instructions, but Ziznewski had no idea what she was referring to. She was "admonished." They said that she had not conducted the ORS and Dr.Traficante kept insisting that the ORS forms did not belong in her personal possession. They belonged in the files. She was then told that they had retested her children.

She noted that this was the first time that she have ever met with Mr. Smith. She claimed that she did not know that Melissa Smith-Zeichner, a special education teacher, was the niece of Martin Smith. She admitted that she did refer to him as being "Uncle Marty," which she indicated was in response, perhaps, to him being her uncle after a guidance counselor indicated that they were in fact related. She denied that it was done in any derogatory sense in a conversation with Diane Keane.

She insisted that she gave ELS tests to every child who was recommended for it in 2006-07. She did not know if she then recommended any such children for the MAC II testing. However, she was aware before that meeting that she was being challenged about her test results. Prior to that year, none of her children were ever retested. Also, prior to that meeting, she was never told where to have the ORS test results placed. After the November meeting, she continued to test children without any further challenges until she was told to stop testing them completely at the end of April, 2007. Also, after November, 2006, she started to file copies of the ORS with the main office at Marshall. When she reviewed the ESL testing sheet which identified nine children in need of ESL (P-122), it was her opinion that the disparity of the test results between her and the other testers was based upon a very subjective test standard. Also, recommendations for ESL only came from the two inexperienced first year kindergarten teachers and not the two experienced ones.

She noted that she had written to Young with reference to the complaints by Sviderskis-Carroll and her use of her cell phone and the door policy in the library area which they shared, which letter was written on November 3, 2006 (P-140). This was in response to the letter which Young had sent to her on the same date (P-140). Although

she insisted in her testimony that her usage occurred during her lunch period, there is no reference to it in her responsive letter to Young. She initially claimed that she never used her cell phone during the day when she had children. But she then stated that, when she would be forced to answer the phone, she would use it almost anywhere, even if there were children in the area. She was not aware of any Board of Education policy about such usage although she admitted that Young did send her a memo at one point regarding her violation of that purported policy. She also indicated that she did use her cell phone after she got the Young memo but she did not then do so when students were present. And Sviderskis-Carroll would be mistaken if she said that she did use the phone in the presence of children.

Regarding the use of the library space with Sviderskis-Carroll and their respective defined areas there in 2006-2007, she said that the version testified to by Sviderskis-Carroll was inaccurate. Instead, Sviderskis-Carroll had already selected her area in advance of the arrival of Ziznewski back to school and both she and her husband and two children were already there at the time of her arrival. Or, she opined that perhaps Young may have already decided the space issue for her since Ziznewski's shelves and teacher's desk were in place when she arrived. She also disputed the various diagrams drawn by the various witnesses of the area in this matter and indicated that proportionately, she did not know even if her diagram was also correct (R-15). She indicated that the library usage also varied from morning to afternoon and there was a lot of coming and going between the morning and afternoon sessions. In the morning, only the Ziznewski children were routinely there, who were sometimes joined by the Sviderskis-Carroll children, although this did not occur all the time every day. Further, Sviderskis-Carroll was not there in the afternoon. As a result, the majority of the time the Ziznewski class was the primary "tenant." Ziznewski used her area virtually all day, including lunch periods and during her prep periods. Sviderskis-Carroll may have "flipped" her schedule to the afternoon upon occasion or in a class with a fourth grade teacher since Sviderskis-Carroll did English, reading and writing as a resource room as an adjunct to the inclusion students. She claimed that she never had any door problems with Sviderskis-Carroll. After stating that, however, she then admitted that in early September, 2006, she and Sviderskis-Carroll did have

an exchange about the positioning of the doors. Ziznewski raised the issue to keep the doors open due to the noise and heat but she did so discreetly in order to avoid confrontations. But, Sviderskis-Carroll said she needed quiet in order to teach and rejected the request. Young then told Ziznewski that Sviderskis-Carroll would be moved, but then he never did effectuate any move. Instead, he sent out a memo that the doors were to remain closed (P-136). Ziznewski asceded to that directive. However, after that, even if the others left the doors open, Sviderskis-Carroll blamed Ziznewski. Ziznewski also had to make accommodations by restricting her materials due to space limitations. During her instructional periods, Ziznewski would experience distractions, especially when everything was closed in. Thus, she wanted to mute out the closed noise by keeping the doors open. Opening the doors was a noisy proposition too, and she noted that in her own testimony, Ami Hoffman had agreed with that. Prior to 2006-07, she shared classroom with others but never had difficulties with them.

She also indicated she refused to sign her annual evaluation form for the period ending May, 2007 (P-159) or to confer about it because she disputed the requirement that she should have filed the ORS screening results, as was stated in that evaluation. But she noted that her evaluation was nonetheless satisfactory. Prior thereto, she got a favorable performance reports in 2005-06 (R-3), 2004-05 (R-5), 2003-04 (R-6), and 1989-2000 (R-7). There was no mention of interpersonal skills problems and she viewed this as a good evaluation. Except for 2007-08, she was never denied any increment. She was disciplined at the Lindeneau School, where she was transferred from James Monroe School as a fulltime reading specialist. The Lindeneau School principal, Mr Somalowitz, transferred her to a second grade teaching position from reading specialist and she viewed this as a "discipline." The Board of Education rescinded the action and she became a reading specialist again. This is the only one problem of which she was aware. Further, in June, 2007, Young prepared a staff reforms report for and a professional improvement plan for Ziznewski in which he noted that during 2006-07 she had worked closely with teachers in grades 1 and 2 (R-2). She was never advised that her job was in jeopardy from 2005 to 2008 and only became first aware of it in April or May, 2008. In that regard, she never saw the letter from

Young to Toth (P-171), dated October 8, 2007, which characterized her as being combative, until litigation began. She therefore had no prior knowledge of any problems until that memo or that Young wanted to have her transferred.

Regarding her work schedule, she created it and had it signed off by Young in 2006-07 and 2007-08. In only one instance in the 2006-07 school year, Young instructed her to stop giving instruction for E.L.. She never got any explanation from him about the stoppage but she complied immediately by picking up two other children. She also never refused to meet with any teachers. She never got any complaints from any parents and she always met with them as needed.

Regarding Mr. Drew, she had prior dealings with him in 1996-97 relative to her procurement of her Master's degree and then later when she was trying to locate her personnel file in approximately January, 2008 (she thinks), when he was then acting administrator at Edison for Personnel. She never had any dealings with him regarding discipline, however.

On January 4, 2008, she had a meeting with John DiMuzio, Acting Superintendent, regarding another Affirmative Action Investigation meeting, which meeting was actually conducted by Mary Smith, Esq, attorney on behalf of the Board of Education. She felt that Smith was very vague about what the "climate in the school was." She was not given any specifics as to the events or circumstances of her purported negativism or the allegations pertaining to it. Nothing was scheduled beyond that meeting and she was not admonished or disciplined as a result of that meeting. She never got specifics about any complaints but only surmised that there had been an allegation about a screaming match at some point after school with Sica, at which time she denied yelling at Sica whatsoever.

Between 2006-2008 she had many contacts with teachers on grade levels one through five, both of which were wholesome and positive. However, in 2006-07, she had conflicts and differences of opinion only with Figueroa. During 2007-08, she had conflicts with Sica and Schaefer (first grade), Figueroa (second grade) and Peters

(third grade). But as to Peters, any child problem she had with her were worked out. However, she then stated that after three months, Peters used did raise questions and had three incidents of having had experienced loud voices with Ziznewski. But she denied that there was any incidents of negativism as a result of those three events anyway. Regarding Toni-Ann Hooker, a second grade teacher, initially in 2006-07, she had no problems with her either. In 2007-08, Ziznewski indicated that there was an incident in which Hooker apparently overheard an argument between her and Sica within a classroom. Ziznewski claims that her voice was not offensive. She merely wanted to talk about children, and not the program documents.She denied intimidating Hooker, directly or indirectly although Zisnewski recalls reading about some allegations about intimidation in some paper somewhere. She also denied the version of events which Hooker reported in the Affirmative Action Investigation, which occurred on November 1, 2007 (P-176 at EBOE00584). Ziznewski denied that she ever told her that she had jumped on the bandwagon against her or that Ziznewski had told her that she should consider getting a lawyer because Ziznewski was threatening to file a lawsuit. She then opined what lawsuit could she file anyway.

She admitted that she refused to accept a memo from Dr. Maryann Banks to her, dated July 3, 2007 (P-166) but she did so by telling them that she wanted that letter to go to her attorney at the time instead. Regarding her refusal to accept the regular mail of this letter, she claimed that she never got it, this apparent communication being sent to her during the time of the death of her mother. Her mother died on May 3, 2007. She later did receive the certified letter in that regard, however. By July 7, 2007, she had read the letter from Dr. Banks and wrote an e-mail to Pellicane (as her union representative) expressing her upset about those complaints (P-168). She then called Fouratt and asked him what it was all about. She still contends that the allegations are unspecific even to this day in her mind and she has yet to receive an explanation regarding them.

In concluding her direct examination on August 18, 2009, she indicated that she believes that she was suspended as a result of the Board of Education meeting on April 15, 2008. She did not go to the public meeting on that date due to her humiliation and

she was never asked to surrender her swipe card, her keys to her personal file cabinet, the new file cabinets or her classroom key. She denied ever accessing the school after she was suspended on April 15, 2008.

On cross examination, she admitted that she did have a hallway conversation with Toni-Ann Hooker and Diane Keane on November 1, 2007, but she contended that it was cordial. She only admitted that she did raise a question to them about having written complaining letters about her at the time. She denied that she verbally assaulted them because they had previously met with DiMuzio and complained about her, even though Young wrote to Toth on November 12, 2007, regarding their complaint in that regard (P-175). She also denied having threatened them with a court suit at that time. Instead, she said that later that same day, as she went back to the library to pick up Hooker's students assigned to her, Hooker went "crazy" on her for no apparent reason.

When she was questioned regarding the letter from Young to Bredahl , dated October 5, 2007 (P-13), she admitted that only some of the letter was accurate. She did admit that she could take only a limited number of students from the Sica class because she did not know how many more students she would get from the teachers. Besides, she acknowledged that Sica had a special education teacher and an aide in her inclusion class. Although she never felt harassed by Sica, she once again indicated that she did go to Young to complain about Sica always calling out the names of children who needed help to her in her class.

During 2006-07, Ziznewski did have periodic exchanges with Schaefer and other teachers regarding the needs of their children. However, many times she would bring her assigned instruction children into their classes in order to "showcase them" to the classroom teachers.

Regarding the letter from the parent of J.B., dated June 7, 2007 (P-124 at EBOE00448), Ziznewski denied having anything to do with the composition of the letter from him to Young although she admitted that Mr. B. "begged" her to write the upper part of that page since she figured that he could not write in English. She also admitted

that she typed an instructional passage in which she wanted Young to be aware of all the facts regarding the father intending to come in to discuss the signing of a parent waiver (P-124 at EBOE00449). The father wanted her to be there when he arrived at the end of the school day and was adamant about signing a waiver. She then saw him there at 4:00 down the hall after Young had refused to let Mr. B. see her at the time. The father had asked her to help him in resolving the placement of his child at the Marshall School instead of the Washington School. She also claimed that the literacy coach apparently did the ORS incorrectly regarding J.B.

Ziznewski denied ever calling either Dr. Banks or Dr.Traficante "bitches" or saying it in the presence of either Maria Piparo or Figueroa. She would never use that language in school and stated that "I absolutely deny it." She admitted that she had a faculty position at the Middlesex County College while she was employed at Marshall but that it was an evening class. She denied ever leaving Marshall during the day to go to Middlesex, although she nonetheless noted that the lunch/prep periods (45 minutes each) are not restricted to one staying on campus. In addition, Young was always accommodating individual personal needs. Prior to being challenged by Mary Smith in that regard, no one even ever raised any issue with her about the use of her time.

She also challenged the complaints by Schaefer regarding her alleged latenesses. Schaefer never discussed anything with her about it. She denied being routinely late, as suggested by Schaefer or Sica. By contrast, there were "surprise occasions" where children were denied instruction because they were engaged in other activities, even though Ziznewski was not advised where they were at the time. In addition, there are some occasions when Ziznewski became tied up either doing the ORS screenings, participating in the kindergarten orientation in the fall, or the kindergarten registration in the spring. If she would not be available, Ziznewski would notify the office, send a note back with the children, or advise the affected teacher.

Her involvement regarding the ESL program was also examined. During the 2006-07 school year, she admitted that there were no ORS screening scores in 8 of the student folders, as indicated in the memo generated by Young (P-116), but she said

this is the first time that the testing was back in Marshall and not at the Education Testing Center. So she screened every child, even though she cannot tell who was on the appointment sheet. On the day of their arrival in the district, the families would show up. This represented a new set of confusions and procedures, which appeared to be very inconsistent, which event happened in the spring of the year. She screened over 100 children in the process but none of them qualified for the MAC II.

She conceded that all nine of the children indicated hereinabove were placed in ESL even though Ziznewski had determined they would would not need it. She denied that she ever misidentified the nine children. These scores were not put in the main office folders because she never knew she had to do it except when they required further testing (i.e., MAC II). She only kept those scores herself. Thus, she conceded that none were ever sent to Mrs. Piparo in 2005-06 or 2006-07 since every one of the students had passed her screening in both years.

Although she insisted that a "reading specialist is beyond a teacher" (i.e., beyond a teacher's status), she was not able to identify any different salary guide to distinguish between her status as a reading specialist and a teacher since they are both within the same education association and the collective bargaining unit. She admitted that her salary was geared the same way as similarly situated teachers.

In her prior dealings and other schools, she conceded that she had had personality problems with Mr Samolewicz at the Lindeneau School as well as Mrs. Fox who had been an elementary supervisor assigned to the Lindenau School. In the case of Principal Samolewicz, he had an issue with her regarding difficulties with her scheduling. He felt that she was taking too long to get from the Lincoln School to Lindeneau (this occurring during one of her periodic dual school assignments over her career) and for of her to cut down her lunch time accordingly. She also did not feel that Samolewicz appeared to understand how to implement the reading program there. Samolewicz would yell at her for picking up children from the other classes, which she would nonetheless do if the teacher forgot to send them to her. Samolewicz also disputed how the children were to be serviced or whether they were to be serviced at all

in her BSI program. He was harassing and vindictive with her. He would not allow her to attend PAC meetings, and he challenged her scheduling and travel requirements. He also nitpicked on her being late for classes by as little as three minutes and not providing her with appropriate passing time between classes, among other minor issues (P-132). Yet she maintained that Samolewicz had apparent confusion about the way her schedule was run. She claimed that he was difficult to work with and he even got to the point of ordering her not to deviate anymore in her schedule without clearing with him personally. Although she claimed that she had had no problem with Samolewicz regarding the submission of her lesson plans, she was nonetheless shown copies of letters, the first from him to her, dated January 7, 1998 (P-129), in which and he expressed concern that she had failed to reply to his order to leave him with her lesson plans and the second from her to him, dated January 21, 1998 (P-130), in which she referenced his request to review her lesson plans. It is noted that this appeared to suggest that there was in fact some problem in that area, not withstanding her contention to the contrary.

She also had issues with Regina Fox, who she contended was the girlfriend of a principal and which resulted in Fox becoming a supervisor without any credentials. As a result, Ziznewski was excluded from certain curriculum material which was being given to the first grade teachers by Fox. She wrote the note which objected to her being so excluded but never got a response from Fox, who was very hostile to her during the 1994-96 school year. This also resulted in Ziznewski being ignored by Fox and being left out of meetings, particularly those which she felt she should have been responsible to run herself. Fox would also order books for teachers which superseded the authority of Ziznewski, in her estimation. She never thought it was her place to question Fox at the time. Fox had made her opinion known that she did not even like Ziznewski as a person to other colleagues. But she never confronted Fox with those claims. She never had any confrontations with her in the past and there was therefore no reason for Fox not to like her.

By 1996, Ziznewski applied for the position of elementary supervisor herself for curriculum and development, at which time she expressed her displeasure with Fox's

credentials to Dr. Capraro. She thought that Fox was blatantly rude with her, in a manner similar to the actions of Samolewicz with her. Yet, for all these personality difficulties, she claimed that she did not have a problem with either one of them and that she did her work. Yet, she admitted that when she was later transferred from James Madison Intermediate School to Marshall in 2004, James Quinn said "it would be better" if she transferred because Fox was about to be the principal at Madison. He further stated that it "wasn't personal and it wasn't professional" either. Ziznewski felt it would "probably" be a problem if she was in the same school as Fox since it was her understanding that Fox did not want her there anyway.

She at first testified that she had had prior problems with principal Elsie Rebovich at the Monroe School, in 1996-97 where she was the only reading specialist at the building, much like her role in a number of her other assignments. While there, Rebovich had some concerns with her program performance but she did not think that Rebovich truly understood her program or how to identify children in need of reading services. She only previously served as a curriculum resource teacher at a middle school. It was her opinion that Rebovich had some "misunderstandings" as to the times that Ziznewski was supposed to be at her school. But Rebovich cited her with conduct unbecoming a teacher on December 9, 1996 (P-127) and claimed that the Ziznewski's "outbursts", which were always unpredictable, were affecting her ability to function as a reading specialist. Rebovich also noted that Ziznewski's treatment of staff members had bordered on harassment. Ziznewski denied the bulk of the allegations cited by Rebovich, however. She denied ever having gone into a "tirade", as alleged by Revobich. And, despite those allegations and despite her initial testimonial acknowledgement that she had had prior problems with Rebovich, she still contended that she had "no problem" at Monroe School. It was just a "misunderstanding." (Emphasis added). She also denied that Rebovich ever asked her to supply her with her final copy schedule even though the letter from Rebovich to her, dated January 7, 1997 (P-128), raised those issues too, along with her violation of her scheduled school hours.

The issue of lesson plans is also discussed. She did not recall ever being asked by Rebovich for her lesson plans and did not recall being told to put her lesson plans in the book either. She claimed that her "lesson plans", as such, consisted of a "record of [her] meetings," which included the notes of her meetings and what occurred at the meetings. Also, when she was told by Samolewicz in 1997-98 about supplying the lesson plans to him, she then described the lesson plans as being in her "portfolio", which also included how children respond pursuant to accepted teacher self directed evaluations. She believed that reading specialists are not required to create lesson plans. Thus, she created her own compendium and called it a "portfolio."

On further cross examination, she reiterated that she did not report to the supervisors of curriculum and instruction (Hagie and Capraro) and that they had no authority over reading specialists. She had previously applied for the job twice, once in 1996 and then in approximately 2004. Somewhere early on, she initially reviewed the job description for the job and recalled that the supervisors supervise "teachers." But she believe that a reading specialist is one step above the term "teacher." She did not recall Dr. Traficante ever telling her that the supervisors Hagie and/or Capraro were over her at any time or at any meeting. She then said that, at this point (i.e., the due process hearing), she cannot say that she denies it ever having been said by Dr. Traficante, however. But she nonetheless denied that the role the supervisors was so stated at the October 24, 2006 meeting, even though the memo from Hagie and Capraro to Young, Ziznewski, and Keane, dated October 25, 2006 (P-5) states that to be the case.

Then, at the following meeting held on January 23, 2007, she did not recall that Dr. Traficante ever state that all teachers and reading specialists are under the control of the supervisors. She also did not recall asking Myron Fouratt whether she had to show her lesson plans to those supervisors. She also specifically denied that the two supervisors then indicated that they can review the plans of all tenured and untenured teachers.

She then denied that there was any discussion about the role of the supervisors at the third meeting which was held on March 19, 2008, and which was summarized in the letter from Dr. Traficante to her dated April 2, 2008 (P-51). She indicated that Dr. Traficante was not being truthful about any such discussion in that memo.

Ziznewski then conceded that, prior to transfer to Marshall, she did have problems with some principals, but that started only with Daniel Donnelly, who was the principal at the Washington Elementary School where she was assigned between 1994-96. However, when she was asked about any problems she had had with principal Katherine Peterson at the James Madison Primary School in November, 2000, Ziznewski indicated that she did not recall any "discussion" with her about her schedule at the time. But she was then shown a letter from Peterson to her, dated November 29, 2000 (P.-134) and her response, dated November 30, 2000 (P.-135), which referenced problems involving her schedule even at that school. She did not know if she had complied with the deadlines set forth by Peterson by that time.

The examination emphasis then shifted to her role regarding testing of A.P. Ziznewski indicated at that point that that she had tested him in October, 2007 that he had tested out on his DRA at the time, after she had finally gotten the Summer Literacy Academy list which had been handed out to Ziznewski and all of the other staff on September 28, 2007. Ziznewski contended that she thought that she may have missed that meeting. She did not recall getting a copy that list then, even though it was attached to the memo to reading specialists, dated October 3, 2007, which included his name on it (P-12). She also did not recall at that point whether not Figueroa even ever asked her to take A.P. for BSI services. Counsel for the district then pointed out that Ziznewski did not test out A.P. in October but rather on December 11, 2007 (P-59) and that she had acknowledged that she never shared the test results with Figueroa at that time. Further, Ziznewski announced that December testing result date when she was part of the meeting with the parent of A.P. on January 16, 2008. Her response was that she does not now recall stating "December 11" to them at that meeting. She then indicated that she did not even know if she "had the opportunity" to give A.P's testing results to Figueroa any time. Figueroa was not even talking to her at the time, even

though Ziznewski claimed that she gave the results to Young and discussed those results with him.

The various results regarding A.P. were that Figueroa had found him to be at a grade one reading level in the fall of 2007, while Ziznewski found him to be at the second/third grade reading level, this having occurred after he had been in the Summer Literacy Academy during the summer of 2007 where he was was still found to be scored at a grade one level, even though a prior DRA by Ziznewski at the end of June, 2007 had already scored him at the second grade (full step) level. Thus, even with testing by the summer DRA tester (who was not Ziznewski), A.P. was still one full grade level apart. Even though A.P. had regressed by the end of that summer, Ziznewski nonetheless had scored him higher into the second/third grade level. Further, Ami Hoffman's running record for A.P. in April, 2008 (P-70 at EBOE00195) was close to the results generated by Figueroa which placed him at grade level "1,2" even at the end of April, 2008, despite the fact that Ziznewski had found him to be in the second/third grade level in the prior fall 2007. In addition, Young had advised Dr.Traficante on January 16, 2008 (P-26) that Figueroa had already been reporting A.P. as being "the poorest reader in her class." And this occurred even though Ziznewski had dropped as a good reader in June, 2007, based upon his DRA score by her at the time. When confronted with that information, Ziznewski could not explain how A.P. had gotten into the Summer Literacy Academy thereafter despite those recorded results other than to say that all of the other teachers, including the literacy academy teachers, Schaefer, Figueroa, and Hoffman were all wrong. She then claimed that in mid 2008 (January-February, 2008), Ziznewski's score for A.P. on that DRA placed him on a third/fourth grade equivalency by her testing, even though Hoffman later found him in April, 2008 to be still at the first/second grade level. She nonetheless does recall saying that A.P. was a good reader when the meeting was held regarding him on January 16, 2008.

Regarding the incident with the Young on January 29, 2008 (P-31), she denied calling him a liar or that she was agitated, as he alleged in that memo to Dr.Tarficante. She claimed that she was confused as to why she could not go to a staff writing workshop after he had told that she did not have permission to attend. She said "<u>that</u>

(her emphasis) is a lie." By that she meant to say that she did not call him a liar. She did admit that she stated to him at the time that she was in the process of going to the Commissioner of Education but said that was only because of her dissatisfaction with her increment denial, and not because of any threat to him. She also did not remember getting a letter from Young, dated January 28, 2008 (P-30) in which he cited complaints by Sica and Schaefer regarding her failure to implement the BSI program. She also denied being told by Young on January 16, 2008, to begin BSI instructions with A.P. immediately (P-26).

She also denied ever saying that she would not take any of the Sica children because Sica had too much professional help in her classroom already, and indicated that if Sica or Young stated that, they would both be "lying." She also indicated that Schaefer would be untruthful if she stated that in January, 2008, Ziznewski was not taking any of the Schaefer children since Schaefer never told her at any time before that time that she wanted some specific children in the BSI program.

Ziznewski admitted that she never provided BSI services for the Sica student, A.G., but denies being brought assessments of him by Sica. Besides, A.G. did not fit the eligibility criteria after Ziznewski had looked at the quality of his work in the batch testing, although she did not recall doing a DRA on him . She also denied ever yelling at Sica. As a result, Sica was not telling the truth when she so testified, according to Ziznewski. But she denied not taking children due to their eligibility and for the denied that she refused to take children because Sica had enough help. If Sica said that is what happened, she would be "lying." She also denied that Sica ever approached her "time after time" to take A.G. but that, contrary to what Sica reported, Sica had been met with hostility from Ziznewski. She also denied telling Sica that she does not believe in ESL and claimed that there was no ESL program at Marshall in 2006-07, despite the fact that counsel for the Board reminded her that Dr. Traficante had opened up such a class at Marshall during that period of time. She nonetheless still claimed that her determination regarding A.G. was based upon his educational needs and not the amount of personnel in the Sica class, even though she previously testified that she

considers both options, both teacher needs and student needs, when she is assessing the need for services.

She also denied ever declining to take children from the Peters third grade class too even though Peters had recommended S.A. and that she had found out indirectly that Peters had some concerns about him. And she denied that Peters ever pressed her to take the child S.A., even though he had been enrolled in the Summer Literacy Academy in the summer 2007. She then claimed that running records and DRA's regarding BSI eligibility are not correct assessment tools. She did the DRA on S.A. at the end of June, 2007, and found him to be at grades three/four even though at the subsequent DRA baseline which was done by another teacher it found him to be at the first/second grade levels (P-52), and, even at the end of the summer academy he was still only at the first/second grade level. Thus, she still contended that the two summer literacy academy teachers and Peters were both wrong in their assessments.

She also claimed that Peters would be "lying" if Peters said that she gone to Ziznewski to have her take the child A.G. because he was below grade level and needed help. Ziznewski took A.G. because he had just arrived came from Serbia as a result of an abrupt move. Although his parents reported that he had standard English there, Ziznewski claimed that she and Ami Hoffman had agreed to providing services anyway. Further, the father wanted A.G. to receive some other services other than ESL, based upon his own research. She denied failing to identify A.G. for ESL, and Hooker was incorrect in so requiring A.G. to get the MAC II accordingly.

Regarding the ORS screening forms (P-65), she kept the test results in her folders in a locked cabinet in her classroom. She admitted that she would take them out of the building in order to work on them at home since she did not have enough time to do the work in school and was otherwise preoccupied working directly with students. She denied disregarding the written directive in that form which require the ORS forms to be forwarded to the appropriate office (elementary) and claimed that she did supply the completed ORS forms to the school office. She denied that the form (P-65) was changed in November, 2006 to reflect that requirement, and even if Dr.Traficante and

Martin Smith had so testified, they both would have been "mistaken." Further, she indicated that Young would also be " lying" to say that he ever had a conversation with her at all in September, 2006, regarding her failure to place the ORS in a second grader's folder, as indicated in the memo from Young to Martin Smith on that date (P-64). She also did not recall getting any memo from Young on October 3, 2006, which ordered her to produce the ORS (P-66). But she did acknowledge that she did receive a memo from him on October 6, 2006 (P-117), and does recall a conversation earlier that day regarding it, although she denied that Young had then asked for copies of all students for whom she had done ORS testing since school had begun (even though the memo says precisely that).

Yet, regarding the requirement to produce the ORS test results, she then admitted that she did not transmit her ORS test results to the main office in the fall of 2006. At the same time, she did not recall getting a follow-up memo from Young on October 10, 2006 (P-118), in which he reminded her that he still did not receive from her all the completed student ORS forms by October 6, 2006. At that point she once again emphatically stated that she did not get any of these notices and denied that Young ever told her to produce the ORS forms, either verbally or in writing at any time whatsoever. Then, when directed to the letter from Young to her, dated October 10, 2006 (P-119), in which Young advised her that she had not placed any ORS forms in 58 student folders, she replied that she really didn't know if she ever even got this memo either.

However, she did acknowledge receiving the notice of a meeting from Young to her, dated November 13, 2006 (P-120). She attended the meeting accordingly but did not say much. She indicated that she did have all of the kindergarten registration forms with her but instead of allowing her the chance to present them, she once again stated that Dr.Traficante dwelled only on "green sheet" procedures and wanted the forms in the main school office, and not in her possession. In the process, she indicated she has spoken to all of the incoming children to get information from them.

At this point, she indicated that the father of D.B. (the sister of J.B.) did have a discussion with her about procuring a parent waiver for D.B., although she denied having a discussion with him about the child, which discussion occurred sometime after September, 2007. At that point, she went to Young and was "confused" about why D.B. was going to another school but she pointed to no specifics or details in that regard. She then admitted that she then called Mr. B., instead of Young or Smith, in order to further allay the confusion.

She also claimed that she offered the DRA's to Hagie in March, 2008, but Hagie did not want them. She never produced any lesson plans, but she claimed she had a "form of a lesson plan." She also admitted that even though she had been told to produce the lesson plans in January, 2007, she nonetheless questioned them in the first place because she felt that the DRA was not necessary and that the teachers were satisfied with her portfolio approach instead. She contended that she performed the DRA's on all assigned children from the Summer Literacy Academy and that they were always submitted in a timely fashion relative to the first and second quarters of the school year. However, she did not recall the dates of such submissions in 2007-08 and had no exhibits to prove that point. She then admitted there were none in either of the three exhibit books from either herself or the district presented at the hearing. She also indicated that she did respond to the Hagie memo but cannot recall what she said. Nor, could she recall speaking to anyone about it other than perhaps her attorney. She speculated that she may have spoken to Young about it also but offered no other information in that regard. She denied telling Young that Hagie was "not her boss" (i.e., basic skills supervisor) and denied saying that she did not believe in the DRA's. She also denied saying that she would only do as Young directed. She also denied being told consistently by Hagie or Young to produce her DRA's. And she claimed that she turned them all in before March 17, 2008, to Mrs. Piparo. She also indicated that Young and Hagie would be "lying" if they said that she failed to produce six sample DRA's from the first grade and six from the second grade, which had been ordered by Young to her in a letter dated March 10, 2008 (P-45). She also denied that she had refused to speak to Hagie, despite the letter from Young to her to that effect, dated March 10, 2008 (P-44). She also called that assertion by him as being a "lie."

She also denied that the DRA's were discussed at the March 19, 2008, meeting at the Education Center, even though the letter from Dr. Traficante to her, dated April 2, 2008 (P-51) states that fact beginning with the first paragraph of the two page letter. Instead, she maintains that Dr.Traficante only spoke spoke about ORS assessments not being done and that she then produced Hagie's charts of the students who had had different reporting levels. At that time they did discuss the comparison charts of children whose DRA results varied from hers, although she denied that her results denied the children appropriate services. She did not recall being told at the time that her results were inflated and contended that no one said they were inflated. She also insisted that Dr. Traficante was incorrect when she had noted in that letter that they had discussed her untimely reporting. Instead, she stated that they had acknowledged to her that they had incorrectly listed her results in the wrong columns. She denied that Dr Traficante had any discussion about the role of the elementary supervisors at that meeting and once again stated that she had never been told that at the meetings in either October, 2007, or January or March, 2008 that the elementary supervisors have a role in the BSI program.

The cross-examination of Ziznewski was scheduled to continue on September 23, 2009, but that date was adjourned out in the early morning hours when this tribunal was advised that Ms. Lordi was ill and unable to attend. This examination continued on October 5, 2009, accordingly. On that date, Ziznewski claimed that she did produce her lesson plans (i.e., her contention being the portfolio plus general comprehensive plans she has for grade levels) and did always produce them upon request from any school authority. However, she was then shown the letter from Samolewicz to her, dated January 7, 1998 (P-129), in which he stated that they were not timely produced. She also claimed that she prepared lesson plans on a daily basis but admitted that there could be a difference between lesson plans and a portfolio, which she claims is a more extensive and more accurate reflection of what a child's responses are in any given situation. She then admitted that the term "portfolio" does not appear anywhere in the policy of Edison at either Exhibits P-182 or P-192, but her contention was that she was not governed by teacher requirements, which is the intent of either and both of those policies.

At Marshall, she claimed that the elementary supervisors were not authorized to require her to produce lesson plans and that Dr. Traficante never told her that the elementary supervisors had the authority to ask her to produce lesson plans or that the supervisors ever told her what their role was over her. In the process, she denied that Hagie and Capraro's letter her, Young and Keane, dated October 25, 2006 (P-5) was inaccurate and incorrect. She then admitted that she did not bring her lesson plan books to the October 24, 2006 conference, even though she knew that she had been directed to do so, because she did not believe that they had the authority to demand them. She thought that she did bring her "lesson plans" to the January 2007, meeting but now denied that what she did bring constituted lesson plans which fit the definition as contains in exhibit P-182.

The confidentiality requirements of the Affirmative Action Investigation was also examined at this time. She admitted being told by Dr. Banks that the investigation was confidential and not discuss it with anyone. She then denied seeking out Hoffman afterwards and confronting her about what Hoffman had at her interview in that investigation. Therefore, it was her opinion that Hoffman was "lying" about any such confrontations even though Young stated that fact to Dr. Banks in his letter to her dated March 23, 2007 (P-152). She then admitted that she did receive the March 23, 2007, letter from Dr. Banks about that incident (P-153) and then stated that she did actually have discussions with Hoffman about it but only that she "answered her questions." However, she did not seek Hoffman out. In addition, she had gone to to Young's office herself and not that he called for her. She denied being hostile with him and, as a result, Young was "mistaken" by saying that. She also denied that Diane Keane was part of that meeting with Young.

At this point, she commented once again regarding her interview at the Affirmative Action Investigation, which interview with her took place on March 20, 2007. She once again indicated that she was interviewed by Mary Smith, counsel for the Board (P-155 at EBOE00523). At that time, she admitted that she and Young did frequently talk about church. She claimed, however, that Young was mistaken about her use of her statement at the time: "How do you look yourself in the mirror?" her

response was that they had been discussing his ability to face each day. Thus, she admits that the comment was made by her but that the context was wrong. She denied the Young ever talked to her about her ongoing tendency to be argumentative and uncooperative with the staff. He was mistaken. She also denied that she ever acted hostile to Young in the school setting and she never hollered or yelled at him there.

Regarding the letter from Dr. Banks to her on June 19, 2007,(P-164) regarding another Affirmative Action Investigation, she does not recall getting it or having any meeting thereafter about it. (It is noted that Dr, Banks wrote her again on July 3, 2007 (P-166) at which time she indicated that since Ziznewski never got back to her to discuss the matter and then refused to accept the certified mail noted above, Dr. Banks concluded her investigation and issued her findings without any further input from Ziznewski.) She only admits that she declined to take the letter from Young at which time she told them there were attorneys involved.

Regarding the letter from Young to Toth, dated June 20, 2007 (P-165), she denied speaking nastily to Mr. Smith except for one time, she denied that she spoke nastily to Smith whenever they had a meeting with him and she denied that she had ever spoken to a parent to refuse ESL services for his son.

On redirect, Ziznewski indicated that, prior to 2006, no one was ever assigned over her in a capacity of elementary supervisor and nor did she ever get observed by any elementary supervisor, which she contends supports her position that they were not her supervisors in fact. But she never discussed the any such lines of authority with any other reading specialists. She did acknowledge that there are elementary supervisors for physical education, health (nurse), art, music, ESL and the Spanish programs throughout the district.

It is noted that the next scheduled date of October 8, 2009, was adjourned in advance on October 6, 2009, due to the sudden and untimely death of the daughter of Mr. Feintuch. The scheduled days of October 8, 9 and 16, 2009, were adjourned

accordingly. Numerous additional hearing dates were offered in order to accommodate the personal needs of counsel.

The matter ultimately resumed on November 4, 2009. Ziznewski continued and noted that there were numerous delays and adjustments to the daily schedule which affected her ability to provide ongoing services for students, including such things as assemblies, shortened days, teacher workshops, repeated lost days, Halloween parade day, fire drills, and lock down practices, which occasionally took up part of the day. There was no requirement that she make up the time lost. But she would try to take up the slack by discussing it with the appropriate teachers without having the need to clear it with Young's office. She would look to see if a class that was more deficient would be in greater need than another since she was required to maintain "proof of service", as she described it, of the children she was responsible for, which she memorialized in her portfolio. She was never asked to generate a report of the attendances to the main office, however. It was merely meant to document services in accordance with State requirements. She was never required to give any annual report and nor was she ever State monitored. Yet, Sica kept a log on students who were not even in her class and she did not understand the purpose of that list maintained by Sica. This was to be distinguished from the Schaefer monitoring list of her personal attendance at school.

She then claimed that she was never disciplined or suspended at any time prior to 2006-07. However, she was then confronted with information at which time she was cited in her personnel file by Elsie Rebovich twice, the first being on December 4, 1996, for unauthorized leave/unprofessional behavior (P-126) and on December 9, 1996 for conduct unbecoming a teacher (P-127). But no action was taken by Rebovich at any time thereafter about these complaints and she understood the matters were put to rest. She also once again denied creating a tirade as alleged by Rebovich in the second compliant. She then denied the validity of a complaint by Rebovich against her on January 7, 1997,(P-128) regarding her purported violation of any of her scheduling requirements. She indicated that all of her required teaching time was accounted for in the three day per week schedule that she had been assigned at the Rebovich school. She also denied that she had engaged in additional PAC prep periods, as also alleged

by Rebovich, since she felt this was valid administrative time and free periods which she could legitimately utilize for her own purposes. As a result, Rebovich did not read her schedule correctly.

She then offered her various staff performance reports to demonstrate the positive ratings which she had received from the various principals going back to 1999-2000 (R-1 through R-7). And, during several of those years, Young and another principal, Michael Quinn had referenced her positive use of the portfolio methodology. And in none of them was there any reference for her need to use lesson plans as opposed to the portfolios. Over time, she had created the use of portfolios starting in the early 1990's. It was her way to keep track of every pupil she serviced and people were aware of it for years even before the adoption of the Teacher Self-director Evaluation program ("TSDE"). She then suggested that the Edison education authorities above her at a minimum acquiesced to her format since she was never told to stop using her portfolios in favor of lesson plans. Furthermore she contended that, even though Hagie and Capraro had told her to produce lesson plans, there was yet nothing to produce since it was too early in the year in any event. But, she failed to indicate why she failed to produce them in January, 2007 upon being so questioned at the hearing, since the January timeframe was more than well into the school year by then.

Ziznewski then once again contended and insisted that she was not aware of the supervisors' authority over her until January, 2007, during the course of some discussion at the meeting with Dr. Traficante. Yet, the Hagie/Capraro memo to the parties, including Ziznewski, dated October 25, 2006, sets forth the fact that Ziznewski had raised the issue about the supervisors at the October 24, 2006 meeting and that she had been so advised that they were her supervisors, not Deborah Bredahl (P-5).

Procedurally, it is noted that the next scheduled date of the November 13, 2009, was adjourned in advance on November 12, 2009, at the request of Mr. Feintuch due to the illness of Ziznewski. The matter was also scheduled to resume on November 17, 2009 as day 39 of the hearing, but it was adjourned the day before at the request of

counsel once again due to the continuing illness of Ziznewski. It continued to be heard on November 23, 2009 accordingly.

Prior to 2006-07, neither Hagie nor Capraro ever approached her about any problems with her program. Regarding the DRA's, they were only introduced into the system in 2006 and she feels that they were only to be used where there were problems with the running records. There were many teacher discussions regarding the running records issue and the use of DRA's over time. The first time she had to do the DRA's for an entire group was in May, 2007. She was then horrified by the disparity in the DRA and running record results, so, in December, 2007, she talked to Young because she had heard that there was a reading meeting scheduled to which she was not a party, although Hoffman and Blecher-Sass were included.

She claimed that she was "confused" in that she was being told to do the DRA's but that no one was looking at them. Children were still being put into summer school (such as S.A.), who were scoring in the eighties on her standardized tests. She even challenged Figueroa's preference to pull S.A. into the first grade or even into ESL even though she felt that he had been doing well and had even scored 87% on a standardized test administered by her. She had no idea what records Figueroa had relied upon and she saw nothing that indicated a problem. But S.A. stayed in second grade and Ziznewski nonetheless determined to pick him up for BSI in 2006-07. He exited the BSI program at the end of that year.

Ziznewski then once again returned to the issue of the January 22, 2007 meeting (P-10), at which time her BSI program was discussed. She admitted that she disagreed with administering to all BSI students, including the Summer Literacy Academy students, since she felt that administering to them was unnecessary. The running record was already being done. The question was, according to her: "When did the teachers have a chance to teach?" She further admitted that she did challenge that the DRA's were to be done by the reading specialists and she expected Myron Fouratt to check this out to see if it's use had been Board approved. Yet, she claimed that she did all she was required to do regarding the DRA work and did not deny any children,

notwithstanding her challenge regarding the policy and that requirement to do them. Further, principals can demand to see lesson plans, but Young, who knew that she utilized a portfolio style, never asked to see any lesson plans from her, although he did see her portfolios at the I&RS meetings as well as when he observed her in her classroom (at which time she offered them to him, even though he did not actually ask to see them). In addition, she does not know if she even used the term "lesson plan" even though she considers her portfolios to be the same thing, i.e., a "plan."

She also claimed that the Summer Literacy Academy teachers did not do DRA's on the children in that program. However, the evidence submitted showed that the analysis which was done by Hagie regarding ten children who participated in the Academy revealed that seven of them received DRA scores as a baseline as well as post testing (P-52), thereby contradicting her assertion in that regard. Her response was that those results are not DRA's but are only running record correlations, even though they are all listed as being DRA scores. She then couched and refined her prior response by saying that her "experience" was that most summer literacy teachers did not do DRA's.

Once again, she denied that Young ever ordered her on October 3, 2006, to forward to him all of her ORS assessments that she completed on her assigned children to date (P-66). She claimed that she never received or saw that letter. Further, she indicated that, in 2004-05, the ORS was done in Central Administration while in the following two years of 2005-06 and 2006-07, it was done in the home schools. As a result, the registration form does not have a place to check off "ORS." Thus, while the testing was still done in Central Administration, a handful of students were sent to her to perform ORS. She had nothing to do with the registration, however. In the subsequent years, however, she had an appointment schedule although she had no indication that any of them actually needed ORS. She was not sure whether they needed ORS or not because she was doing other functions with those kindergartners at the same time and there was still no indication whether they did need ORS or not. She would interview the children and determine whether or not they needed it. She found that none of them qualified for ORS since they all spoke and understood English. All of these interviews

were held in the spring of the year, prior to the next autumn matriculation at Edison. Only after school started in September of one year did she find out that two children needed ORS. None of the eight affected children were discussed with her at any time prior to someone else administering ORS to them.

It is noted that, at this point on day 40, November 24, 2009, the hearing adjourned at 10:25 AM because Ziznewski was ill. The resumed hearing on November 30, 2009, with re-cross examination.

Once again, she denied that Dr. Traficante or Young ever told her that Hagie was, in part, an elementary supervisor over her. And, if they said so in their testimony, they would not be telling the truth, according to Ziznewski. Further, she claimed that she did take all the children who were eligible for BSI and denied that she declined to take any children that other teachers wanted into BSI. They would be mistaken or "lying" if they said that she had not so taken them and they would be mistaken about their eligibility. She also maintained that a reading specialist is not a teacher in the district. Teachers instruct students in a classroom and, in terms of that, a reading specialist is not a teacher and therefore not required to produce lesson plans, according to Ziznewski, although she admitted that a reading specialist does provide reading instruction to children. She then admitted that, at the October 24, 2006 meeting, the supervisors did ask to see her lesson plans but that she declined to do so and that, although she was ordered by them to produce DRA's at the same conference, she did not do so because there were not yet do. In her view, portfolios take the place of lesson plans as they are defined in Exhibit P-182. However, she conceded that in January, 1998, Principal Samolewicz did ask her to produce her "lesson plans" (P-129) and that her reply to him acknowledged her use of lesson plans at the time (P-130). When she was shown those documents, she indicated she had not recalled that exchange earlier. But she then claimed that she had kept "general lesson plans kept by content and subject areas" but never showed them to any principal, including Samolewicz or or Rebovich, or submitted them to either Hagie or Capraro at any time.

Ziznewski also admitted that she did apply for the position of elementary supervisor on three or four occasions, on the last of which Hagie got the job instead of her. She thought that she knew the role of the job but denied that it included supervision of reading specialists or that reading specialists were considered "teachers" in the district.

She then stated that, although on November 22, 2006, Young had written her (P-7) at which time she admits that he told her to bring her lesson plan book and four copies of DRA's administered to a meeting which was originally set for November 28, 2006 (which was eventually and later held in January, 2007), she indicated that she never produced the DRA's to anyone at that meeting because she claims that she was only "asked to bring them" and not necessarily to produce them. As a result, everyone else was "very definitely mistaken" when they said they did ask for them. She also contended that she did bring a lesson plan which was in the form of her portfolio at that time. At that meeting, she did not recall if she questioned the reliability of the DRA, but upon follow up questioning by this tribunal, she then stated that she never questioned the reliability of the DRA at any meeting, but only the running records. As a result, she maintained that Young was wrong here again. In that regard, when Hagie at the March, 2007 meeting claimed that Ziznewski never produced the DRA's, she was "lying." Finally, she claimed that she is not even sure what the Summer Literacy Academy is or what it is supposed to be, i.e., whether it includes enrichment or not. This completed the case in chief on both sides.

Rebuttal

Dr. Rose Traficante

Dr. Rose Traficante was called as the first rebuttal witness in this matter. She referred to Article 1 of the Collective Bargaining Agreement between the Edison Board of Education and the Edison Township Education Association for the period between July 1, 2005 through June 30, 2008 (P-193), which defines the bargaining unit as well as the definition of teacher, the latter which states "Unless otherwise indicated, the term

"teachers" when used hereinafter in this Agreement, shall refer to all professional employees represented by the Association in the negotiating unit as defined above". And, even though the definitional section does not specifically list reading specialists, a reading specialist is nonetheless a teacher since the major function of a reading specialist is to provide instruction and services to assist teachers. They are not treated separately from teachers or paid differently. They also come with an instructional certificate, the current title of which even states: "Teacher (Emphasis added) of Reading." (The old certificates say "Reading Specialist.") Thus, even though the Association also includes non certificated personnel as part of its collective bargaining unit, reading specialists are readily and unequivocally distinguished from them in as much as they are certificated as teachers (Emphasis once again). In addition, the job description of a reading specialist is to provide instruction in the defined reading program, which is a key element which also distinguishes them from non certificated personnel. Reading specialists teach. Thus, if they teach, they are teachers.

The lesson plan is the document or series of documents which define the design of instruction in compliance with the core curriculum instructions. Any teacher who provides instruction to children must do lesson plans, and this includes reading specialists, who work in the classroom and must teach pursuant to the Edison core curriculum. There is no specific form of a lesson plan in the district, although it must be in a collected compendium/binder which includes objectives and activities.The book must also show continuity.

The Teacher Self-directed Evaluation Program (TSDE) has nothing to do with lesson plans. It is used to acquire 100 hours of professional development, which is ongoing and to be generated within the district for tenured teachers in order to gain the required 100 hours within a five year period of time. There are several projects in order to qualify for it, such as use of a portfolio, journal, or co-coaching with a colleague. However, a portfolio cannot be substituted for a lesson plan, even though they can interface. On cross examination, she indicated that she was the founder of TSDE and, in that capacity, she did discuss portfolios as an option for a model available to

teachers as one of the alternatives to meet the goal requirements of the TSDE program.

She did not know if Ziznewski's portfolios contained lesson plans. She acknowledged that if her portfolios had been reviewed over several years then they would have been acceptable by them as portfolios for the TSDE program. But a reading specialist cannot ignore an essential part of the teaching unit. The TSDE has been in use in Edison since 2004. Dr. Traficante started in Edison in 1993 as the principal of the Woodrow Wilson School. There were reading specialists in the district at the time. She has never known any circumstance where reading specialists were not considered teachers at any time whatsoever. They are observed and evaluated in the same manner as other teachers. They also receive periodic instructions on district in-service days, which amounts to 21 days per year by contract and which are to be administered by the elementary supervisors to ensure consistent curriculum-based instruction. In that regard, both Hagie and Capraro got Dr. Traficante's approval in the Fall 2006 and 2007 to provide reading strategies to reading specialists. There was mandatory attendance assessed to that participation by all of the reading specialists. Also, both of them scheduled literacy development to the reading specialists every two to three months for professional development at the Education Center, where training was undertaken in such areas as the use of the Lindamood Bell approach.

In addition, since reading specialists are employed as teachers, they fall directly under the supervision of the elementary supervisors, who constitute the content supervisors for them, in addition to which they also are required to report to the building principals since the two supervisors are located at the Education Center. Exhibit P-182 is the district's Procedure and Policy with reference to lesson plans. It includes periodic review by, among others, the supervisors, who are responsible for the creation of and implementation of the content development.

The information contained in the Policy and Procedure document was discussed with Ziznewski at the January 22, 2007, meeting at Marshall School, where the parties specifically discussed lesson plans with her because the supervisors had previously not

had met with success in getting Ziznewski's lesson plans. She indicated that it was "preposterous" that a teacher/reading specialist would challenge the need to produce a lesson plans, so Dr. Traficante dismissed Ziznewski's urgings at that meeting to not provide them. That was reflected in the summary which she prepared the next day (P-10). The lesson plan is a plan designed to be directed to a child, which is a prerequisite to actual teaching. And, through teaching, the goal is to see if the child really has learned. In addition, Ziznewski never physically offered or handed over any lesson plan to Hagie or Capraro at the meeting, although she candidly did not recall if she did at least try to offer DRA's to them then or not at that meeting. She noted that at the March, 2008 meeting, by contrast, Ziznewski did hand in some DRA's (such as A.P.'s scores. See P-52), but they were at marked variance with the DRA's of the Summer Literacy Academy teachers and the classroom teachers' running records. In any event, Ziznewski had no exemption from producing lesson plans whatsoever. Further, the Summer Literacy Academy assessments were DRA's and not running records, even though Ziznewski alleged the latter to be the case. All BSI children must go into the Summer Literacy Academy as well as late entrants or struggling children in school.

On further cross-examination, she indicated that the role of the elementary supervisors between the period of 2005 to 2008 was (one) conduct periodic meetings with various specialists, including reading specialists (who teach) and literacy development specialists (who do not teach), (two) observe non-tenured teachers, (three) prepare departmental budgets, (four) first line contact with new teachers in schools, (five) non observation of tenured teachers, and (six) providing aid to teachers who needed help. In that regard, both Hagie and Capraro did help Ziznewski regarding her conducting her assessments, identifying children, and keeping proper records regarding the DRA's. Hagie did have actual email dialoguing with Ziznewski over issues regarding her programming. As a further part of this process, they tried to do this on an ongoing basis by looking at her DRA's and lesson plans, all of which efforts failed because of the steadfast and increasing lack of cooperation by Ziznewski. The conferences were conducted after those failed efforts to meet productively with her. She also noted that Deborah Bredahl has been a coordinator and manager of the Title 1 program, since approximately 1998, and was, in that capacity, involved in the

managing of BSI funding. However, she had no supervisory authority over any one at any time.

Dr. Traficante attended a meeting on March 19, 2008, which included Hagie, Donald Tarr, Ziznewski and Young, at which time there was a specific discussion regarding the Summer Literacy Academy and the "most at risk" students. The district wanted to do more and provide them with additional help on a timely basis. As a result, there was no indication by Ziznewski of any confusion by her about the Summer Literacy Academy at that time, contrary to her assertions at the end of her case-in-chief examination herein.

At that same meeting, Ziznewski challenged the validity of the DRA, which provides observable reading behaviors and which is better than fixed standardized tests. However, the DRA had already been approved by the Board of Education and funds had been allocated to purchase the programming for it, which had been an ongoing program in the district for two years by that time. Yet, Ziznewski persisted in challenging what was already an established and authorized program in the district. Thus, when Ziznewski challenged the validity of DRA's, the import of her questioning was to reject and demean the DRA as an assessment tool even though she did not refuse to administer it.

Deborah Bredahl

Deborah Bredahl is the assessment coordinator and "No Child Left Behind" (NCLB) coordinator for the Edison district where she has been employed since 1995. She received her Bachelor of Arts degree in elementary education from the University of Pennsylvania in 1985 and a Master of Arts in education from Montclair State in approximately 1992, with a concentration in cultural thinking. She is certified as an elementary education teacher by New Jersey.

In her present job title she coordinates all NCLB and State and local mandated assessments. She indicated she does not supervise any certificated staff in the district

in her present job or in her prior job with the district. She knows Ziznewski as being a reading specialist who participated in some of her programs for which she files and monitors funding. She handles all seventeen schools in the district in that regard. She has conducted meetings along with the elementary supervisors, the latter of whom set the meeting agenda and then the supervisors run the meetings as it applies to their teachers.

She has never supervised or told Ziznewski that she supervised her at any time whatsoever. All she had was a continuing contact with Ziznewski regarding collecting reading specialist schedules for the funding, which she did with all the reading specialists. Her office was located at the Education Center, and her supervisor was Dr. Traficante. Periodically, she would exchange emails or phone calls with Ziznewski but did not have individual meetings with her. Bredahl indicated she would refer Ziznewski to her elementary supervisors when it involved every question relating to instruction, although on cross examination she did not specifically recall any questions asked of her by Ziznewski. Finally, regarding the submission of her funding schedules, Ziznewski once missed the first one which was due at the beginning of one school year, but that was not unusual since others did too.

Elsie Rebovich

Elsie Rebovich was previously employed by the Edison Board of Education and, prior to her retirement in July, 2003, was then the principal of the James Monroe School. She received her Bachelor of Arts degree in social studies from Montclair State (then) College in 1967 and her Master of Arts degree in education, administration and supervision from Newark State College in 1974. She possesses New Jersey certificates as teacher of elementary education (K through 8), typing (K through 12), math (K through 12), social studies (K through 12), supervisor, administrator and principal. She started as principal at the Monroe School, which is a K through 5 school, in 1996 where she remained until her retirement. She originally began her employment at Edison in 1985 after having been in various assignments as a typing teacher, classroom teacher

or basic skills teacher at various districts, including Belleville and Newark as well as in Arizona.

The James Monroe School included BSI instruction for children which included a combination of instruction by the regular classroom teacher and a reading specialist. She knew Ziznewski who was only there during the year 1996-97, at which time the total student population at her school was then under approximately 400 students.

On December 4, 1996, she sent a memo to Ziznewski (P-126) because Ziznewski had done something which was unacceptable at school, which was to leave the school in the middle of the day at noon and not return until 3:15 PM, without getting the permission of Rebovich, but only her secretary. Rebovich does not specifically recall if she was was readily available at the time. But, in any event, Ziznewski should have looked for her either in the cafeteria or in her office, which was the only two places she would be at, or Ziznewski should have left her a note or brought her a note later regarding the absence.

Prior to her unauthorized departure from school, at approximately 11:15 AM, Rebovich entered the Ziznewski classroom only after having heard children inside that classroom talking loudly. As she arrived in the classroom she noticed that no one was there. Ziznewski was scheduled to meet with the children between 11:15 and 11:45 AM. She personally waited with the children and she paged for Ziznewski, who arrived approximately ten minutes later but gave her no explanation for her absence. Rebovich chose not to confront her at the time for fear of creating a problem in front of the children. Later that day, after Ziznewski returned at 3:15 PM and joined the scheduled faculty meeting, Ziznewski avoided Rebovich completely and made no attempt to provide any explanation for that prior misconduct either.

She noted that when one attempted to speak to Ziznewski it was often more a confrontation and sometimes Ziznewski would "fly off the handle." It was her opinion that Ziznewski is capable of going off on a rage, screaming, and shouting. She personally witnessed this while they were at Monroe.

She also had a problem with Ziznewski regarding her servicing of her assigned students. On November 26, 1996, she asked Ziznewski when she expected to start seeing her students. At that point Ziznewski went into a "verbal tirade" which startled both Rebovich and her office staff. The outburst was totally uncalled for given the basic question asked by her. This occurred during the school day and the possibility of others overhearing the display by her was great and this included visitors, parents and children. Then, within ½ hour, Mrs. Malleck, the speech teacher who shared the SGI room with Ziznewski, came into Rebovich's office and complained how it had been disruptive to have Ziznewski in the SGI room while she was attempting to work with her speech students. Rebovich was then later challenged that same day and confronted by Ziznewski in her office regarding her schedule and room assignment. At that time, Ziznewski flew into another verbal tirade, stood up, yelled at her, start pointing the finger at her and said she would not comply with anything that Rebovich suggested. Ziznewski then put her arm up to prevent Rebovich from leaving her own office after Rebovich had asked her to leave and she persisted in refusing to leave. Ziznewski eventually dropped her arm. Then 10 minutes later, Mrs. Malleck came to the office of Rebovich visibly upset and stated that Ziznewski had blamed her for all her problems at James Monroe and then Malleck requested a room change for the rest of the day since she could no longer work with Ziznewski under those conditions. Rebovich agreed. She viewed Ziznewski's constant disruptive behavior as "conduct unbecoming a teacher" and not acceptable in a school with co-workers and children present, and she wrote her up accordingly. (P-127).

The meeting regarding that complaint was subsequently held with Dr. Capraro, John Gundry, Ralph Ranta, and Ziznewski. Rebovich did not recall much about that meeting except that Ziznewski persisted in telling lies and crying a great deal. This upset her in her role there since there were many "untruths" told by Ziznewski which Rebovich described as "twisting the facts". Thus, Ziznewski's "interpretation" of the facts was viewed by Rebovich as being distortions of the truth by Ziznewski.

She also felt it necessary to write up Ziznewski on January 7, 1997 regarding Ziznewski's students schedule, which Rebovich felt was unacceptable since there was too much free time built in by Ziznewski (P-128). Rebovich wanted the time to be spent with the children. In addition, Ziznewski's written schedule contained too many arrows and asteriks, which was very confusing. It was her belief that since Ziznewski had so much time in her schedule, Ziznewski should have reviewed her PAC referrals at the end of the day instead of when she built it in, which PAC work is only paperwork time anyway. The better part of a should have been spent with the children. Further, even when Rebovich asked for her schedule, Ziznewski would not comply with the request. She only "guesses" that Ziznewski ultimately re-wrote her schedule after the January 7, 1997 memo, since she has no independent recollection of it actually having occurred at this time.

Surrebuttal

Ziznewski presented surrebuttal testimony. Regarding the Rebovich concerns, she admitted that she left the Monroe School at 11:50 AM on December 3, 1996 after having gone to the school nurse around 10:50 AM with complaints of high blood pressure and a severe headache with pain. At that time the nurse told her to see her doctor, but she wanted to go to lunch after taking her morning class. She understood that the protocol was to only notify "the office" upon departure. She never had any subsequent discussion with Rebovich about it afterward, however, but claimed that she wrote a memo back to explain it to her. In fact, prior to November 26, 1996, Ziznewski had been out of school from September 6, 1986, onward. In fact this may have been her her first day back at Monroe although she she may have been working at the Benjamin Franklin school the day before.

Regarding the November 26, 1996, incidents, Ziznewski denied having blocked the way of Rebovich in her office, where she contended that Rebovich had remained at her desk. She insisted that she went to see her because she felt that Mrs. Malleck did not want her in her classroom. She did not recall being in Rebovich's office twice that day even though Rebovich testified that she had done so. And when Rebovich told her

noted that this statement comes after she had nonetheless attended a meeting conducted by Schaefer with Mrs. C. on February 7, 2008, where she had been invited at the request of Mrs. C. She claimed that she basically "listened" at that meeting, although the letter from Schaefer to Young, dated February 7, 2008 (P.-57) is to the contrary in that Schaefer claimed that both Ziznewski and Mrs. C. questioned Schaefer regarding her use of certain types of interventions (i.e., the use of headphones which have been suggested at the prior I&RS meeting in January, 2008). Schaefer also noted that she had felt "ambushed" by the two of them there. Ziznewski's response to that accusation was that she was being "ambushed" all year by Schaefer, Sica and Figueroa and that was the real history of what had gone on.

However, the continuing concerns raised by Schaefer in her March 20, 2008, summary were not agreed to at all by Ziznewski or by Mrs. C. although she agreed that when a parent attends a meeting, the staff should not show its "bad face." Schaefer had wanted G.C. to be brought before the committee, although Ziznewski did not know why at the time . Schaefer reported things about G.C. that Ziznewski was not aware of, such as that she could not read. She was only aware of certain problems in G.C's kindergarten class relating to bodily functions, and problems relating to the constant change of substitute teachers and the impact of lunch aides. She did not get involved instruction in any way until the 2007-08 school year. She disagreed that she was negative, however, at that meeting and she denied that she openly and repeatedly interrupted, questioned, commented and disagreed with the Schaefer findings, as alleged by Schaefer in that summary. Instead, she claimed that she was only "assisting" in trying to resolve issues relative to G.C. and would never discuss negatively in front of a parent. She also denied questioning Schaefer about her running records. She admitted that she did not have the DRA results on G.C. available to present at that meeting but claimed that may have been the case since G.C. may have been ill. Yet, she previously testified that all of her DRA's had been completed by March 19, 2008.

She also then recalled a discussion she previously had with Young about G.C. at which time she had become aware of her when the child was in kindergarten in 2006-

07. She did not meet the mother or her, however, until sometime during the 2007-08 year. She then administered the ORS test to her and then she was recommended by the kindergarten teacher for Ziznewski to have her in BSI. She met the mother at a basic skills parent meeting in the fall 2007 and they were cordial with each other.

In response to the letter which Dr. Traficante had written to her on April 2, 2008, relative to the conference which she conducted with her on March 19, 2008 (P-51), Ziznewski contended that the letter was not an accurate reflection of that meeting, and she denied that her scores were inaccurate/inflated. She once again challenged the authority of Hagie when she indicated that only Bredahl ran the September 28, 2007, meeting and not Capraro nor Hagie, even though all three of them were named on that agenda for the meeting (P-11). She also contended that some children who attended the summer academy were not at risk, but she never produced any proof that regard. And, as it pertained to the student J.B., she "couldn't say with certainty" that J.B. was given the running record equivalent versus the DRA during the Summer Literacy Academy. Yet, she surmised about the testing results since she had admitted that she was not sure how it was all computed and whether it was based upon a complete reading sequence. Also, although she stated that nothing ever happened after that meeting, she was nonetheless suspended on April 15, 2008. She also stated that, although the memo from Hagie to Traficante, dated April 10, 2008 (P-52) complained about the fact that children received support well above their frustration levels rather than their instructional levels, Hagie never observed her in her class and no one ever told her up to that point about those concerns.

Once again, regarding A.P., Ziznewski got permission from Young to attend the January 17, 2008, meeting with the mother of A.P. after she heard about Figueroa planning to conduct such a meeting with the mother. Earlier in the day, Young had written her and wanted to know how A.P. was doing so she went down to his office and asked Young :"What are you talking about?" She claimed that she had no idea that there was a problem regarding the child. She claimed that she did test A.P. on December 11, 2007, but did not tell Figueroa, although she did enter the results in the computer. She nonetheless contended that A.P. should not have been in BSI in

December, 2007, but she never collaborated with Figueroa about her running records during that time period in any case. The reason was that he had done well in June, 2007, during the summer academy thereafter, as well as the Figueroa results up to October 15, 2007. She indicated she did not refuse to give A.P. services and denied that Schaefer even recommended A.P. for summer services. She did not believe that A.P. was even on the BSI list but suggested that he may have mistakenly been there due to his math results. She then stated that on August 23, 2007 (Emphasis added), she was told that A.P. had been in the Summer Literacy Academy. She then changed that statement by saying that it was not until October 23, 2007 (Emphasis added), that she first became aware of that status and corrected herself after a review of her taped testimony was replayed at the hearing. She indicated that she could not have known in August about his status because they did not have school access due to construction at the school during that summer. Also, whenever Young would give her an instruction to take a child, she would. In the case of A.P., he told her not to take A.P. for BSI but instead Figueroa picked up instead by providing extra instruction for A.P. thereafter (even though Figueroa still objected to the lack of services throughout the fall 2007). She also indicated that at no time after January 17, 2008, did Young ever discuss Figueroa's concerns about not taking children.

At the hearing on August 18, 2009, (Day 31), Ziznewski initially indicated that she did provide A.P. with two time slots for Figueroa's student after Young "directed" her to provide those services (Emphasis added). But she then stated, by contrast, that it was a "determination" made after a meeting with Mrs. P., at which time Ziznewski herself determined to provide those services. Thus, she contradicted her own prior statement about who was the source of the determination to provide the services. It is noted, however, that, on January 28, 2008, Young did write to Ziznewski and told her that she was to provide services for A.P. on a weekly basis with the other second graders on her schedule (P-30). Further, although she then denied that Young also ordered her to initiate the services as early as January 16, 2008, the letter from Young to Dr. Traficante on January 16, 2008, indicates that he had so ordered her to do so (P-26). In response, she claimed that his letter to Dr. Traficante was merely his "confirmation" of and not an "instruction" by him for Ziznewski to provide the services, even though in

to leave, she complied. She also thought that she had responded to the memo of the incident (P-127) and did not scream or engage in any outburst. If anything, Rebovich was angry with her instead. At the subsequent meeting with Dr. Capraro and the others, Rebovich complained about an incorrect schedule and Ziznewski having yelled. She contended that she was entitled to the times allotted to her and her schedule to do her preparations and everything else and was authorized authorized to leave at 3:15.

On cross examination, she claimed that she saw the nurse between 3rd and 4th periods at 10:50 to 10:55 AM or 10:55 to 11:00 AM, if the class ran over. She denied being ten minutes late. She did not tell Rebovich then about her medical problem because Rebovich was in a "huff." However, she cannot recall what Rebovich said other than that Rebovich was unpleasant. At the same time, she denied ever yelling in the Rebovich office on that date.

ANALYSIS

Respondent, Carol Ziznewski is a tenured teacher at John Marshall School in the Edison Township School District. (See Petitioner's Statement of Tenure Charges and Statement of Evidence Under Oath (hereinafter "Petitioner's Statement") at 1. Respondent has worked in the Edison Township public school system since 1973 and currently serves in the capacity of reading specialist. Respondent is accused by petitioner, the Edison Board, of violating her professional responsibilities as a tenured teacher by "willfully failing to provide services to her students; engaging in improper conduct toward other teaching staff members and supervisors; and engaging in insubordination." Id. at 1-2.

In total, respondent has been charged with two (2) counts of unbecoming conduct and one (1) count of insubordination. Id. at 3-6. The first count of unbecoming conduct is for the "willful refusal to provide service to students." Id. at 3. Petitioner alleges that respondent ignored administrative directives and peer recommendations regarding basic skills instruction (BSI) and consistently refused to "follow appropriate procedures for student referrals, use required forms, or use appropriate assessment

tools." Id. at 3. Petitioner further asserts that respondent did not believe that there is a need for the English as a Second Language ("ESL") program and "actively discourages student participation in the ESL program." Ibid. Petitioner also alleges that respondent had "engaged in inappropriate communication with parents." Ibid.

The second count of unbecoming conduct alleges that petitioner engaged in "improper conduct toward other staff members and supervisors." Id. at 4. Respondent asserts that petitioner over time has harassed, intimidated and bullied fellow colleagues and has been disrespectful to supervisors. Ibid. Petitioner also alleges that respondent had "berated, discredited and embarrassed others in front of parents, students, and peers." Ibid. Furthermore, it has been asserted that respondent had been disciplined for the above conduct and directed to cease such behavior, but she has failed to comply. Id. at 4-5.

Finally, the third count upon which petitioner is charged alleges that petitioner had "repeatedly disregard[ed] administrative directives and Board policies over the past several years. Id. at 6.

Petitioner contested the above charges and the Commissioner of Education then transmitted the case to the Office of Administrative law as a contested case. It is noted that, at the beginning of this Initial Decision, the procedural history recited the basic particulars regarding the 43 days it took to hear this matter. What it did not automatically reflect, however, were the additional delays built into the hearing schedule due to the recited illnesses, occasional shortened hearing days, and tragic loss, none of which could have been foreseen under any circumstance. As a result, some of those delays were exemplified in the testimonial presentation recited hereinabove and are illustrative of the repeated opportunities the parties had in order to assess and reassess their respective positions, examinations, and proofs relative to the issues to be presented in this matter since they were able to, and in many cases did, revisit them every time the matter resumed, which forced this tribunal to consume additional time in order to allow the parties to get back on point. This causes certain amount of redundancy which was unavoidable under the circumstances. Further, even as issues

were revisited, every effort was made to ensure that due process protections afforded to both sides so much so that they were encouraged to develop their respective positions appropriately. As a result, I **FIND** at the outset that the parties were afforded every reasonable and exhaustive opportunity to present their matters fully since the charges are extremely serious and the impact upon all the parties is significant.

The legislative design of the statutory tenure provisions is "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. Borough of Prospect Park Bd. of Education, 5 N.J. Super. 215, 218 (App. Div. 1949). Tenure protects competent and qualified teachers during good behavior and guards them against "dismissal for 'unfounded, flimsy or political reasons.'" Spiewak v. Rutherford Bd. of Education, 90 N.J. 63, 73 (1982) (citation omitted). "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." N.J.S.A. 18A:6-10(a).

The Board bears the burden of establishing the truth of the charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This tribunal has the duty "to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna & Western Railroad Co., 111 N.J.L. 487, 490 (E & A 1933). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). In other words, 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, 275 (1958). See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Precisely what is needed to satisfy this burden necessarily must be judged on a case by case basis.

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. Dep't. 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 Bd. of Education, 23 N.J. 364, 384 (1956). 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.), certif. den. 65 N.J. 292 (1974). In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See Redcay v. State Bd. of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E.&A. 1944). In that matter, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. 128 N.J.L. 281, 282 (Sup. Ct. 1942).[i] The court held,

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
>
> [130 N.J.L. at 371.]

[i] This citation concerns the original case, in which the court remanded back to the board. The board's decision in the remanded matter was subsequently appealed and that opinion is the one published at 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E.&A. 1944).

Insubordination is 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, EDU 7421-97, initial decision, (May 5, 1999), modified, Comm'r. (August 4, 1999), adopted, State Bd. of Education (December 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

The type of conduct that the Commissioner of Education has determined constitutes "insubordination" and "conduct unbecoming" varies significantly, from verbal/physical altercations and threats of both students and colleagues to failing to comply with school policies. The following are a few recent examples of cases involving conduct which is similar to the conduct in the present case. In these cases, the ALJ's found the conduct of the tenured teachers to constitute insubordination and conduct unbecoming.

In I/M/O The Tenure Hearing of Carl A. Hill, EDU 5979-06, initial decision, (April 2, 2007), adopted, Comm'r. (May 15, 2007), adopted State Bd. (Oct. 17, 2007), <http://lawlibrary.rutgers.edu/oal/search.shtml>, the ALJ found a teacher guilty of both insubordination and unbecoming conduct for refusing to accept letters from supervisors, failing to timely submit roll and grade books, using inappropriate language toward a student, and using disrespectful language and vulgar gestures towards colleagues on multiple occasions.

In I/M/O The Tenure Hearing of Paul Ash, EDU 2799-03, EDU 2658-04 and EDU 2861-06 (consolidated), initial decision, (May 30, 2008), <http://lawlibrary.rutgers.edu/oal/search.shtml>, adopted Comm'r. (July 18, 2008) <http://www.state.nj.us/education/legal/index.html>. In that case, the ALJ found a teacher guilty of insubordination and unbecoming conduct for, among other things, failing to adhere to the district's attendance and leave policies, failing to comply with verbal warnings from supervisors, and failing to turn in required lesson plans.

In I/M/O the Tenure Hearing of Christopher Molokwu, EDU 9650-04, initial decision, (Oct. 26, 2005), adopted Comm'r., (Dec. 12, 2005)

<http://lawlibrary.rutgers.edu/oal/search.shtml>, the Commissioner found that a teacher was guilty of conduct unbecoming for, among other things, failing to report to a period assignment, obtaining medical leave under false pretenses, pushing a female student, lying to his supervisor about attending a mandatory training program, threatening comments to the building principal, and telling a ninth grade female student that she was "acting like a street girl." The Commissioner found that, together, these instances of conduct, "constitute[d] an ongoing pattern of conduct unbecoming a teacher and/or other just cause for dismissal."

In I/M/O the Tenure Hearing of April Renee Bradley, 1990 S.L.D. 790, adopted Comm'r. 1990 S.L.D. 818, adopted State Bd. of Education 1991 S.L.D. 2521, a teacher was found to have demonstrated conduct unbecoming and insubordination for "defying Board administrative directives," failing to comply with call-in/sign-in policies, and refusing to speak with a supervisor who approached her about a previous incident that had occurred.

The above-cited cases surprisingly mirror many of the allegations which are encapsulized in the three basic charges preferred against Ziznewski, and this Analysis summarizes all of my findings in that regard. As a linchpin finding, whether she holds herself out as either a reading specialist or a classroom teacher, the charges against her, if affirmed, constitute a violation of the tenure statute under N.J.S.A.18A: 6-10. Ziznewski has pointed to nothing which would allow her to be held exempt from the Tenure Act as it applies to teachers or reading specialists, the latter of whom are teachers of BSI in the district. They are one in the same for purposes of tenure disposition. In the process, I reject her claim that, as a reading specialist, she somehow is above or superior to the position of teacher, even though in her own mind she may think that she is. And, although the Edison Collective Bargaining Agreement cited in this matter does not specifically list the job or title of reading specialist in its definitional Article 1 (P-193), since her role is to teach students, that function is consistent with the coverages afforded to and covered by the defined term "teachers" who are otherwise protected by that same agreement, among other defined groups within the district. She is certificated in the same fashion as teachers. By contrast, non-certificated personnel,

although included in the same agreement, do not fall under the same category as teacher.

The threshold of any findings relative to the conduct of Ziznewski centers on the concept of balanced literacy and it's use and adoption by Edison. After having considered all of the proofs presented and the arguments advanced, I **FIND** that the unequivocal proofs demonstrate that, over time, Edison has adopted and endorsed the concept of balanced literacy and student-centered learning as a district-wide policy and that, as a result, all personnel have been required to adhere to this authorized program of instruction for the benefit of the students within the district. In particular, Dr. Traficante presented highly credible testimony and proofs relative to the implementation of the balanced literacy program by Edison. In fact, she was instrumental in managing the requirement to utilize running records and DRA's, as well as the determination to reject Terra Nova testing (the latter of which had been discontinued by Edison after the 2006-07 school year but which Ziznewski admitted she still employed), and for reading specialists to provide appropriate BSI services when the student profiles and teacher recommendations called for those services.

All of the relevant proofs presented indicate that everyone in the district signed on to and followed the mandated directives relative to balance literacy except for Ziznewski, who, despite that mandate, and, further, despite being afforded numerous and repeated opportunities at hearing to justify her steadfast resistance and, in many cases, blatant noncompliance with it, Ziznewski, for reasons never explained, repeatedly rejected the requirement to adhere to district policy to provide timely DRA testing for certain students and to also provide appropriate and timely BSI to a number of students, even though they had been recommended for such services by their teachers, or had become eligible as a result of attendance at the Summer Literacy Academy, or despite the fact that Ziznewski had been ordered to immediately provide those services by her principal, Gerald Young. Her own admissions that she did have a number of children read above their appropriate reading levels constituted a direct violation of Board policy to provide reading appropriate to and targeted to the individual skill needs of those children. Her declaration and assertion that she provided enrichment flies in the face of her requirement and authority to only provide

remediation. And despite the urgings and instructions of her superiors, including her supervisors, to refrain from such activity, she nonetheless persisted in her self-determined approach to learning. Those repeated actions by her constituted insubordination and unbecoming conduct when she failed to adhere to district policy in that regard. This alone constitutes a basis for removal since it strikes at the very heart of the program by the Board to provide a uniform approach to learning on behalf of all of the children. Her admission that she has not changed her style as a reading specialist over the years only reinforces the argument of the district that she has failed to sign on to the newly structured academic programming of the district. And I so **FIND.** As a result, when she failed to follow those directives, she was in direct violation and insubordinate.

In that further regard, her actions in repeatedly challenging the integrity of the balanced literacy program and the utilization of the DRA's went well beyond reasonable intellectual discourse since she adamantly refused to reject her preference for "product teaching" (including her insistence upon using novels with reading deficient children) in favor of the accepted and district approved "process teaching," and as so testified to by Dr.Traficante. This ongoing resistance by her placed her on a collision course with the approved learning style of the district, and placed her at variance with all of the other teachers who did comply with it. She was out of sync with and in defiance of those directives.

In addition, Ziznewski failed to provide timely services for a number of students, as testified to by the various teachers in this matter, who were the primary guardians of instruction for them. Although the testimony examined hereinabove is replete with such references and will not be repeated, it is necessary to point out some situations which illustrate her defiance that regard. For example, the child A.O., a Schaefer first grader, was the weakest child in her class, and yet, as of October 5, 2007, Ziznewski refused to service the child, claiming in the process that she had independently tested the child twice and that, as a result, the child did not need any services. But that was not her decision to make since she was not the classroom teacher. And, even giving her the benefit of the doubt that she actually did test that child, the proofs demonstrate that the

child still nonetheless suffered in the Schaefer class until Schaefer was forced to and took it upon herself to provide individual additional services to A.O., at a time when she was thus forced to redirect those energies away from her other students in the class. Ziznewski's function as reading specialist was to augment or supplement classroom instruction. When she failed to provide appropriate services in response to such teacher requests, she engaged in unbecoming conduct. She also placed an unseemly burden upon others to fill in and shift their teaching methodology to meet those individual needs, whether was during the class periods or after school, as necessary and appropriate. Not only was invaluable time lost for the benefit of all the students, but additional resources and costs were incurred as a result in order to offset her deficiencies in that regard.

At the same time, she selectively took only children she wanted to take such as M.V. (who,curiously, was nonetheless reading at his grade level at the time) and R.U, while rejecting and refusing to take other Schaefer children such as T.J., E.H. and E.P., even at a time when she failed to provide paperwork to support her claims of their individual competence. This conduct by her was most disturbing.

A.P. is another troublesome example of her disregard of teacher determinations and preferences. This was a child in the second grade of Jennifer Figueroa who had attended the Summer Literacy Academy (thereby immediately qualifying the child for BSI the next September) and was, as indicated by Figueroa, the poorest reader in her class, as evidenced by her test results and her experience with the child as the classroom teacher. Yet, Ziznewski dropped the child in September, 2007 from BSI and claimed that he was nonetheless a good reader. She also claimed that she had independently tested the child on December 11, 2007, but admitted that she never shared that information with Figueroa, the classroom teacher. Such action is highly inappropriate and represents unbecoming conduct since her affirmative obligation was to provide any such evidence to the classroom teacher on a timely basis. Then she compounded her inappropriate behavior by rudely interrupting and challenging both Figueroa and Sandra Pellicane regarding her position relative to A.P. at the January 16, 2008 with the parents. This was not acceptable actions by an educational professional,

since she injected herself between the staff and the parents, thereby creating an unnecessary level of confusion into the discussion. The parents do not need to see dissension in the ranks and her failure to properly discreetly channel any professional disagreement as between professionals violated her obligation to ensure that her disagreement with them should not be the subject of exposure in the environment with the parents present. Her tactlessness in that regard was unforgiving and inexcusable.

And she did the exact same thing again when, by her own admission, she injected herself into the disagreement between T.C. (the mother of G.C.), and Schaefer on February 7, 2008, relative to the use of earphones for G.C., instead of going into a sidebar discussion with the teacher instead. This merely added a bad mixture of fuel to an otherwise major disagreement between the parent and Schaefer, which apparently had been manifest for a period of time. Her interference there, despite her self-proclaimed advocacy on behalf of the child and parent, was inappropriate in light of the manner in which she engaged herself into that conversation. That was uncalled for and represented unbecoming conduct inasmuch as it demonstrated a lack of appropriate and acceptable protocol when parents or other outsiders interfaced with the professional staff in any discussions regarding their children. Similarly, her subsequent private dialoguing with that parent at the school a day later is further evidence of and gives the very strong appearance of impropriety and of her efforts to create dissension, unrest and ferment to undermine the efforts of the classroom teacher to attempt to resolve any discord with the parent herself. Curiously, the testimony of T.C. only added to the specter of some undercurrent of discord generated by Ziznewski inasmuch as T.C. admitted that she had put more reliance on Ziznewski despite the fact that she never saw any purported DRA from her which indicated that G.C. did not even need any extra help and even though her teacher had made observations and had ongoing concerns to the contrary. It is most curious how this parent would have attached more reliance on the opinion of Ziznewski absent any educational proofs to support her position. The only answer might be that T.C. was looking for any one she could attach herself to in her escalating disagreement with Schaefer. In that regard, Ziznewski was a ready and willing candidate.

It is noteworthy that the concept of advocacy was never disputed by the district in this matter. In fact, absent any specific prohibitions to the contrary, it should be a standard mission of all educators to advocate on behalf of children. However, as the district demonstrated, it is the manner in which the advocacy takes place which dictates the appropriateness of its application. The reason is to provide a level playing field so that the parents are not confused or misguided in their efforts to either understand, appreciate, or contribute to the success of their children in the school environment. That process is not helped when school personnel become openly combative, disruptive, and/or conspiratorial and/or apparently conspiratorial with the parents or their children (such as child J.B., the brother of D.B., noted hereinafter, whom Ziznewski used as a messenger to the father) relative to any potential disagreements which may erupt during the course of the analysis of the child by all the parties, whether it be at scheduled and unscheduled conferences, I&RS meetings, or any day to day interactions. In that context, the counterproductive actions taken by Ziznewski relative to her injecting herself in the G.C. matter were highly inappropriate, and they were similarly negative when she fostered, aided and abetted the parents of D.B., and even allowed herself to be drawn further into the fray by communicating in part through D.B.'s brother, J.B. She significantly overstepped reasonable bounds when she engaged the brother in any form whatsoever in the parents' placement dispute with the district. She also fostered confusion in the mother of A.P., which was highly inappropriate. All of those actions by her represented unbecoming conduct and constituted meddling.

And, in that further regard, after having considered all of the proofs presented, I **FIND** that the upset expressed by Gerald Young relative to the meeting with the parent of A.P. on January 17, 2008, being one of the most embarrassing meetings he has ever attended in his 53 years of education because of the actions by Ziznewski (P-28) was totally corroborated by Figueroa and Pellicane and that, in the process, her attempt to flip the responsibility for the disruption in front of the mother by claiming that they instead had embarrassed her was unfounded.

Further, she refused to immediately provide A.P. with services even though Young ordered her to do so immediately at that same meeting. Her refusal to do so

unless and until an I&RS meeting was held also violated Board policy, which permitted such a meeting to take place only after a child had been receiving BSI. Her denial about being so ordered by Young at the time or when he sent her a follow-up letter on January 28, 2008 (P-30) is rejected as not being believable in light of the documented evidence produced at hearing as well as the highly credible testimony of Young, Figueroa and Pellicane in that regard. Her refusal to provide those immediately ordered services constitutes insubordination and unbecoming conduct. Her denial of any responsibility to respond to that direct order is equally disturbing in light of all of the evidence produced in that regard.

Ziznewski was similarly confrontational in 2006 with Figueroa regarding the child R.B. after she had rejected him for BSI services, even though he was doing poorly. And, even though R.B. eventually received services, none of the other recommended children received them until November, 2007 from Ziznewski, which was well after the time when such services should have been implemented. The overwhelming majority of the proofs amply demonstrates that BSI was supposed to begin just a few weeks after school commenced in September of the school year. Yet, Ziznewski's failure to immediately comply with that requirement in a timely fashion denied a whole host of students the opportunity and ability to receive needed reading benefits. Her failure to respond to that requirement was inexcusable and constitutes unbecoming conduct.

And her argument that there has been no actual showing of damage to the children falls short of convincing me that there wasn't such an adverse impact. Her job was to teach and provide timely services to students, which she routinely failed to do. If anything, it was only because of the diligent and dedicated efforts of the other teachers and administrators to provide alternate services for the children that there wasn't such extensive damage. At the same time, sizable needless energy had to be expended by them all in order to address the deficiencies in providing timely reading services by Ziznewski which could otherwise have been more properly directed by the teachers to positive classroom efforts on behalf of the affected children as well as the other children in their respective classes. Thus, in that additional sense, Ziznewski caused the other children to also be denied of their full entitlement to educational benefits because their

teachers had to redirect their energies to fill in the gaps caused by Ziznewski's failure to provide such timely services to her assigned students.

It is also evident that Ziznewski failed to provide services for the Sica child, A.G. (2), as well as the sisters A.N. and A.N., even though their respective teachers had requested such services. At the same time, it is noted that Ziznewski's refusal to take A.G. (2), despite that request by Sica, was in part motivated by Ziznewski's declaration that Sica had the assistance of a special education teacher and an aide in her classroom, and that, as a result, Sica had more than enough help there. This resentment by Ziznewski of Sica and her available help translated into a real motive to deny necessary services for children, which is unconscionable. She also failed to provide timely services for the Schaefer children D.J., E.P., and A.O., even though their reading levels were extremely low. She also failed and refused to provide BSI services to children such as A.O., even though Schaefer had requested her to provide such services in early October, 2007. The proofs demonstrate that A.O. did not even receive services as of January 17, 2008 (P-27). She also had refused to take E.H., T.J., and E.P., all of whom had been recommended to be assigned by Schaefer at the beginning of 2007-08.

Regarding portfolios, her self-determined and crafted use of the portfolio method, instead of the mandated lesson plan, was neither authorized nor approved by the district. And the fact that the district may have acquiesced at some point regarding her use of it, did not grant her license to employee it instead of lesson plans. Portfolio is retrospective, while lesson plan is prospective. Thus, when she adamantly refused to adhere to district policy regarding the use of lesson plans and then steadfastly failed to produced lesson plans upon request by her supervisors and/or her principal, Ziznewski was insubordinate and her conduct was unbecoming. And her late testimonial explanation that she viewed her portfolio style as being a form of lesson plan was a lame effort to bootstrap her unapproved use of portfolio onto the acceptable lesson plan requirement.

In addition, Ziznewski demonstrated a track record of not being available at all of her assigned classroom instructional times when she was required to provide services for the children, as evidenced by the running log which Schaefer maintained for a period of time (P-62). Her explanations regarding her latenesses, absences, or non appearances are weak at best and do not provide any plausible rationale for her noncompliance with her assigned professional responsibilities. But her absences and latenesses were apparently not new. Her track record in that regard goes back to the even to the days in 1996 when she served under principal Elsie Rebovich, who similarly observed Ziznewski's failure to timely attend to her class in order to do her assigned duties. Rebovich even had to tend to the Ziznewski class for ten minutes where there was no supervision by any other adults at the time in Ziznewski's absence there. This was shocking to have left children so unattended. This also represents unbecoming conduct and it reflects a failure to provide needed services for, as well as protections for, children. There is also no indication that she ever made any efforts to make up the lost times, which is a disservice to both those children and their parents.

Ziznewski has also been cited with inflating children's DRA scores, which thereby placed these at-risk children into further jeopardy. This is a most serious charge and represents a most flagrant violation of her duties. A significant amount of time was spent at hearing exploring and investigating the various test results and the glaring discrepancies which existed between the results obtained by Ziznewski and the other DRA testers, as well as the results of the running records, all of which was further collated pursuant to the district-adopted Fountas and Pinnell standards set forth at Exhibit P-53. After having carefully considered all of the proofs in that regard, I adopt all of the testimony and the proofs presented by the district in that regard as being believable, worthy of belief and consistent and, as a result, I **FIND** that the overwhelming evidence demonstrates that Ziznewski's results were highly at variance with virtually everyone else who tested the children at the various times during their pre and post Summer Literacy Academy instructions, and this reflects the heightened concern with which Hagie and Dr. Traficante had to wrestle in order to provide appropriate services for those affected children. The huge uniform disparity in those test results suggests any number of reasons, such as, to wit, either that Ziznewski was

incompetent in the manner in which she conducted her tests, that she misunderstood the manner in which she was supposed to administer them, that she disregarded her role as part of the balanced literacy process, or that she may even have somehow manifested some undetermined motive to deny appropriate BSI services to certain children. An explanation regarding a possible motive may lie in the letter which she sent to Gerald Young on November 22, 2006, at which time she stated, in relevant part: "You are familiar with everything I do here and I have done here since my illegal involuntary transfer in 2004." (P-8). This strongly suggests bitterness and resentment which could form an undercurrent for her ensuing and flagrant actions at Marshall, which became readily apparent early on to Young, who nonetheless attempted to give her some slack during the first year of her transition there. But, no matter what the real reason, however, the result is the same. Her testing results, when contrasted with every other result by the other test administrators, were apparently grossly wrong and, as a result, her actions in denying those necessary services represented unbecoming conduct. Further, as indicated hereinabove, when she failed to provide timely immediate services when ordered by her principal (in particular, relative to A.P.), she was insubordinate.

I also **FIND** that Ziznewski failed and refused to follow proper procedures for student referrals for ESL, despite her assigned obligation to conduct the ORS screening for them. She failed to submit the required ORS forms even though she was repeatedly asked to do so. Her failure to do so was inexcusable. During the 2006-07 school year, Ziznewski failed to provide ORS for 58 children in folders which she was required to do and that process was to be completed within 48 hours of the child's registration. Her retention of her folders in the trunk of her car was also a clear violation of policy and procedure regarding the safekeeping of the student ORS folders, notwithstanding her explanation to Young at the time that they should "trust" her.

Smith found out about her dereliction in that regard after he had been approached by a teacher during the third week in September, 2006, who expressed concerns about the status of A.G., whom she felt would be in need of ESL. Ultimately and significantly, nine children were retested and found to need ESL, including A.G. (in the second grade) (P-116). All nine children were then kept at Marshall since the

school year was already underway and the district was required to pull in another teacher, Mrs. Pandit, who was paid for extra time in order provide for those ESL services for those children. In the process, I **FIND** that the district went to extraordinary lengths in order to intercept and contain damage to these children due to the irresponsible failure by Ziznewski to provide accurate and fair test results for them so that they would not be deprived of necessary ESL services, this having occurred even though Ziznewski had still not turned in her required ORS forms and despite repeated requests from her supervisors to the contrary. Further, Ziznewski acted inappropriately when she became enraged when she was challenged about her failure to have the ORS in the second grader's folder, as Smith had directed (P-64). This also constituted unbecoming conduct.

In addition, she inappropriately intervened in the role of the ESL supervisor Martin Smith when she actively discouraged parents from consenting to having ESL services provided for their children. This was particularly and graphically apparent in the proofs presented relative to the issues involving the parent of D.B., who had informed Smith that Ziznewski was going to great trouble to keep his child out of ESL and that he was frustrated about Ziznewski because of her repeated statements to him which indicated that his daughter did not belong in any ESL program but rather that she belonged at the Marshall School (P-125). This contravention of the direct authority of ESL supervisor Smith was insubordination and conduct unbecoming. In addition, it represented a prime example of her self determined and inappropriate advocacy on behalf of a child, which translated into confusion and upset in a parent as well as the appearance of subterfuge against the organized efforts of the official ESL program as well as the building principal. Her admission that she did get involved in the discourse regarding the status of D.B. was also graphically echoed in the voicemail which the parent shared with the district in which Ziznewski told the father not to place his child in ESL and that Smith did not know what he was doing. Her actions in that regard were highly inappropriate and unbecoming in her role as a teacher. Thus, it is also no wonder that she was relieved of her ESL responsibilities in April/May, 2007 due to her failure to provide appropriate services to children in that area.

As found hereinabove, Ziznewski's repeated failures to provide appropriate BSI and ESL services to needy students represented a significant deviation from acceptable standards of conduct and performance. Further, her misapplication of advocacy was misguided and misplaced under the circumstances.

In addition, her repeated and ongoing outlandish conduct toward her fellow teachers, supervisors and administrators was extensively explored during the course of the due process hearing.

The policy of Edison regarding harassment, intimidation and bullying (P-154) (hereinafter the "Policy") indicates, in relevant part:

"The Board acknowledges that a safe and civil environment in school is necessary for students to learn an achiever high academic standards. Harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and the school's ability to educate its students in a safe environment. Since students learn by example, employees, staff members (Emphasis added), vendors, or visitors, and students themselves, must demonstrate appropriate behavior, treat others with civility and respect, and refuse to tolerate harassment, intimidation, or bullying.

The Board prohibits engagement in any act or behavior of harassment, intimidation, or bullying towards others on school property, and school-sponsored functions, or on a school bus. Harassment, intimidation or bullying means any gesture or written, verbal or physical act that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic, that takes place on school property, and any school-sponsored function or on a school bus and that:

1. a reasonable person should know, under the circumstances, will have the effect of harming the person or damaging the student's

property, or placing a person in reasonable fear of harm to his person (emphasis added) or damage to his property; or

2. has the effect of insulting or demeaning any person (Emphasis added) or group of people in such a way as to cause substantial disruption in, or substantial interference with the orderly operation of the school.

The Board expects students and adults (Emphasis added) to conduct themselves in keeping with their levels of development, maturity and demonstrated capabilities with a proper regard for the rights and welfare of others, the educational purpose underlying all school activities, and the care of school facilities and equipment."

It is within the context of that policy that I have analyzed the extensive proofs offered regarding the allegations of harassment, intimidation and bullying which have been preferred against Ziznewski. In the process, and after having considered the width and breath of that policy, I **FIND** that the enumerated categories of characteristics are not dispositive and/or exclusive. Nor, does it appear to limit offensive conduct to persons who possess only those listed characteristics. Rather, the controlling language of the policy dictates that employees and staff members are expected to demonstrate appropriate behavior at all times on school property, and that their maturity and demonstrate capabilities must be in keeping with a proper regard for the rights and welfare of others. As a result, any conduct which reflects harassment, intimidation or bullying is prohibited at Edison.

After having considered the testimony of all the accusers in that regard after having considered and given due deference to the responses by Ziznewski, I **FIND** that the overwhelming evidence supports the conclusion that Ziznewski engaged in repeated, unprovoked, and uncalled-for abusive verbal and threatening displays against numerous teachers, supervisors, and principals over time, all of which violated the Policy. As part of that analysis, I was required to assess the credibility of the respective parties and their interests in the outcome of the matter. Needless to say, the sheer number of such incidents raised an initial specter of doubt regarding the versions and

denials advanced by Ziznewski since one could preliminarily be suspicious as to question how so many people could so wrongly have accused her. However, that inference was not at all dispositive since each matter was examined on its own merits and each represented interactions unique between Ziznewski and those individual players. As a result, each such incident was considered independent of the others and the appropriate weight was attached accordingly. After having considered all of them independently, however, one common theme became abundantly apparent which was that, by and large, each of the incidents reflected a significant negative level of conduct by Ziznewski which illustrated unbecoming conduct by her. In the process, she created a hostile work environment for those around her and made it extremely difficult for others to function properly for the benefit of the children. In many cases, the people around her virtually "shut down" any opportunity to continue meaningful interactions with her as a means of survival in the school environment as well as to further protect the children from her ongoing negative conduct.

As a result, I **FIND** that each of the witnesses against her presented credible testimony, which was amply supported by numerous memos, emails, letters, or conference summaries. As a result, each of those testimonies was worthy of belief. By contrast, the testimony by Ziznewski was self serving, sometimes contradictory, and suspicious at best. She also would put a spin on answers which appeared to shade the truth. For example, at a meeting with Young on January 29, 2008 (which she at one point contended she was not sure was the actual date, despite the memo from Young to her (P-31) to the contrary), she emphatically denied that she called him a "liar." Instead, her response was that, when Young told her that she did not have his permission to cancel a class, she said "That's a lie. I did have permission." The distinction she was attempting to draw here was obviously disingenuous.

Further, in many cases, she attempted to shield her own misconduct by pointing the finger at the other parties. Such an example is reflected in her attempt to show that the meeting with Young, Figueroa, Pellicane and the mother of A.P. on January 17, 2008, was highly embarrassing to her because of the efforts of everyone but herself. Once again, I am satisfied that the proofs to not support her contention in that regard

whatsoever (P-28). Rather, this was one prime example of her negativism, harassment and intimidation of others, not to mention the embarrassment and humiliation which caused her fellow teachers in the presence of the parent.

And another most telling challenge to her credibility was her apparent selective memory loss regarding her receipt or non receipt of many of the documents which supported the claims of the others in this matter, not to mention her refusal to accept various official documents from the administration, which in itself was inexcusable, unprofessional and totally uncalled for under the circumstances. It is indeed curious how Ziznewski could remember receiving only certain messages or other communications while failing to recall any receipt of others, which in the vast majority of the cases just coincidentally happened to be contrary to her position in the matter. For example, she does not recall getting any letter from Hagie or Capraro on October 23, 2006, receipt of any notices of meetings from Young, or receipt of Young's letter to her on January 28, 2008, in the latter of which case she was ordered by him to provide BSI services to A.P. and that he would be monitoring her. Yet, despite her denial of getting any such letter, she still claimed that she still unilaterally determined to provide services for A.P. even though she had felt that his past performance did not warrant it. She claimed that she did that on her own in her capacity as a reading specialist. Why would she have generated those services in light of her belief about his performance level unless she was otherwise told to do so by her superior? That assertion by her was suspicious at best and illustrated her overall and ongoing lack of credibility.

In addition, although she asserted that she never had any personal problems with other educators until she arrived at Marshall in 2004, the substantial proofs presented by the district are to the contrary. Thus, when she denied that she ever had had any problems with Elsie Rebovich, she then attempted to back track by saying that it was only a "misunderstanding." The proofs presented with reference to the incidents, as well as the testimony of Rebovich, are much to the contrary inasmuch as Rebovich credibly described Ziznewski as going into a rage, screaming and shouting and, as she described it, "fly off the handle" on more than one occasion, which included an incident which occurred on November 26, 1996, and for which she was cited for unbecoming

conduct by Rebovich(P-127). This hardly represents a person who merely had misunderstandings with another, particularly the principal at one's school. Those actions also reflect unbecoming conduct and are consistent with the allegations of intimidation lodged against her in this matter. Further, she had ongoing disputes with another principal, Mr Samolewitz, which additionally represents problems which she claimed never happened before she arrived at Marshall. Thus, for these reasons, plus all of the presentation and responses made by her in this matter, I **FIND** that I could afford little weight to the credibility of Ziznewski under the circumstances. This also occurred in light of the extensive opportunities given to both sides to examine each and every one of the witnesses presented at the hearing. In the process, virtually everyone presented by the district held up exceedingly well and presented cogent testimony which was aptly supported by the proofs and the paper trails which followed various incidents and encounters involving Ziznewski.

In that regard, the Affirmative Action investigations conducted by Maryann Banks amply demonstrate the seriousness, consistency and severity of her misconducts against various teachers and her principal, Gerald Young on repeated occasions. Based upon all of the foregoing, I **FIND** that Ziznewski instigated inappropriate confrontations with teachers during their class times and within the earshot or the eyesight of numerous children, which not only interfered with the teachers' instructional time with the children but also subjected the children to potential upset. There is a time and a place in order to have a dialogue among professionals, but, for whatever reason, Ziznewski apparently chose to pick her own time and place in order to challenge the authority and preferences of the teachers relative to the needs of various children regardless of the proximity of children and/or visitors or parents. By doing so, she also violated the privacy rights of those children when she would announce their names in the presence of others in the area. This was totally uncalled for under all circumstances.

In addition, Ziznewski was so abusive upon occasion that she inappropriately caused other teachers such as Kerry Peters to break down, get physically ill, or want to flee. To cause such a response is shocking and represents a most horrible case of

hostile work environment. Her various intimidations of and confrontations with Jennifer Figueroa, Mary Schaefer, Toni-Ann Hooker, Hope Blecher-Sass, Melissa Smith-Zeichner and Ami Hoffman, among others, were similarly egregious, intimidating, harassing and bullying. For example, Ziznewski screamed at Hooker on November 1, 2007, for jumping on "the bandwagon" against her and threatened her with a court suit, which represented bullying by her. Similarly, Keane got upset when she observed Ziznewski yell at Hooker in the presence of her children. This also constitutes a form of intimidation against Keane, which is even the more straining since Keane was a union representative of hers. In the process, I **FIND** that Ziznewski engaged in highly inappropriate conduct toward each of them in the cited incidents described by each of them herein. Also, her child-like shenanigans regarding her refusal to speak or respond verbally at conferences and the use of her Post-It Notes, her obstinance regarding the status of the library door and her humming antics within routine earshot of Sviderskis-Carroll, the unauthorized use of and misuse of her cell phone during teaching hours which disturbed not only Sviderskis-Carroll but also Pellicane and their students, and her visual staring at and against Sviderskis-Carroll were meant to intimidate and harass the victims of her wrath, all clearly in violation of the Policy. It is noted that the issues regarding the inappropriate cell phone usage was clearly corroborated by Sandra Pellicane, who was thus another victim of Ziznewski's excessive and inappropriate use of her cell phone during classes.

Ziznewski's failure to follow instructions was also illustrated in her refusal to utilize her swipe card upon entry to the Marshall facility, which was a violation of the directive of superintendent Vincent Capraro, dated March 25, 2004 (P-190) as well as the order of her principal, Gerald Young on November 14, 2006.(P-141). This was a district wide security requirement which the superintendent required all parties to follow. Her claim that there was nothing in the collective bargaining agreement to require morning entry swiping is **REJECTED** in light of those clear-cut directives. If she had a problem with those orders, she should have grieved them in a timely manner. Instead, she ignored those written directives and chose to do what she wanted to do. There is no evidence that she did so grieve those orders.

Further, her ongoing steadfast denial and wrongful challenge to the authority of Lois Hagie and Suzanne Capraro was abusive, intimidating, and harassing, all of which constituted unbecoming conduct and also represented a gross level of insubordination. Ziznewski maintained throughout the entire matter that neither one of them was her supervisor, despite the relevant proofs which demonstrated the on-going extraordinary efforts made by the district to remind her of her responsibility to accept the authority of those elementary supervisors over her. In addition, by her own testimony, she conceded that she had applied for the job of elementary supervisor on several occasions. I find it inconceivable to believe that she would not have known either the job responsibilities or the authority of that job. As a result, her claim that she did not understand the direct authority of either Hagie or Capraro over her is insulting at best. Yet, her refusal to acknowledge the supervisors' role over her and her refusal to respond to their direct orders to produce various student records persisted even to the end of this entire matter, and even despite the testimony of Deborah Bredahl, who appeared as a rebuttal witness on behalf of the district, and whose direct testimony, in addition to all of the other proofs advanced relative to this issue, clearly and unequivocally stated that she was never the supervisor to Ziznewski and she never held herself out as such.

Ziznewski also acted with a high level of disrespect to Martin Smith, even at a time when she similarly inappropriately challenged his authority as the ESL supervisor for the district. Once again, her berating, cynical attitude and derogatory comments with reference to him (i.e., "Uncle Martin") can only be best viewed as harassment and attempted (emphasis added) intimidation, that latter observation being so emphasized as being an attempt by her only because, having had the opportunity to assess the extensive and impressive credentials, dignity and stature of Mr. Smith, I am more than satisfied that Mr. Smith had both the capacity and the professional bearing to keep the bar high notwithstanding the petty, inappropriate efforts by Ziznewski to demean him and his position within the district. If anything, his role there on behalf of ESL students represents one of the most significant and crucial aspects of education since the purpose of that program is to identify and intercept children who have language interpretation needs and to channel them immediately and appropriately into

educational services which will allow them to succeed within the school environment. For, without it, those children can be easily irretrievably lost in an educational system or misdirected into special education instead of receiving what they really need. In addition, the costs which would attend that misdirection are totally unacceptable. And the fact that Mr. Smith was able to courageously challenge the status of the ORS testing purportedly done by Ziznewski, notwithstanding her apparent longstanding reputation of being a negative, non-cooperative, bullying force in the district, is a credit to him and the integrity with which he approached his obligations. Thus, the negative actions by Ziznewski relative to Smith were highly unbecoming conduct and were insubordinate.

Her interactions with Gerald Young standing alone on their own merits demonstrate a high level of disrespect, which can best described as shocking and deplorable. It was evident during the course of the hearing that Ziznewski had been dealt with repeatedly by the district by, in many cases, mostly reassigning her around the district. One questions whether or not that represented the old concept of "out of sight, out of mind." Although one shall not at this point dwell on that fact or chide the district for having utilized that type of methodology or strategy in order to deal with her as a problem since it is evident that the district was apparently attempting to maintain as much harmony as possible and to keep a tenured teacher within the ranks in light of the legal requirements attendant to such retention, it is nonetheless anticipated that any future similar flagrant infractions by others, if any, will be intercepted much sooner. This is not to suggest, however, that the district should not have considered alternate ways of intercepting her negative conduct earlier on. Rather, despite the enormous costs which tend to associate with attempts to remove tenured teachers, the fact remains that the district must be more vigilant and aggressive in singling out and handling such negative influences henceforth. Teachers who exhibit unbecoming conduct or who are incompetent, insubordinate, insolent, harassing, intimidating or bullying must be intercepted and re-directed or, if necessary, disciplined as soon as possible to avoid adversely affecting the morale of those professionals who consistently try to maintain a high level of good order and positiveness in the school community for the benefit of the children, staff and the citizens which it services. If teachers seek to be treated as

professionals, they should act as professionals. When they violate that mandate, they must then be held accountable.

In any case, the process of that school assignment shifting caused Ziznewski 's final landing place to be at the Marshall School, at a time when Young was asked to take her on by the district. Here was a man with an apparent long standing reputation of creating and maintaining a wholesome environment for his entire educational community and family, as it were. My overriding impression is that he also had a reputation for being a decent, responsible man and one who could hopefully be best positioned to cope with the negative attitude of Ziznewski. In addition, it is reasonably assumed that there may have been some general understanding or hope that, since Ziznewski and Young attended the same church, there could have been some additional opportunity for him to bridge her pervasive negativism in an attempt to bring her more in line with his harmonious community at Marshall. Even though he expressed reservations upon the initial re-assignment of Ziznewski to his school, he nonetheless took orders like a good soldier and attempted to embrace her there. However, despite those best efforts by him, including his periodic attempts to remind Ziznewski to conduct herself in a more professional manner, she persisted in generating a hostile environment and also inflicted upon Young himself a level of abuse which included shouting, berating, and threatening even him personally to such a point that he ultimately asked superintendent Carol Toth to keep her out of his school after the 2006-07 school year (P-165), which request, for whatever reason, was rejected. Thus, he was forced to endure her ongoing tirades and humiliations for another year, which actions by Ziznewski persisted in eroding the morale of the school which he had so strenuously and proudly cultivated and protected for the benefit of the children and teachers. In fact, Ziznewski challenged Young to such a point that others, such as Hoffman, even got upset with the matter in which she had verbally attacked Young in his office. Additionally, and in light of the hostile actions which Ziznewski directed toward Young on a recurring basis, I **FIND** that it is more likely than not that Ziznewski was responsible for having ripped up her birthday certificate and cowardly re-deposited it at Young's office which certificate Young had prepared for her benefit, as he routinely and consistently did for all of his professional staff in order to foster a happy

environment. Thus, even though it was suggested that hearing that the this particular incident was not independently actionable, I nonetheless **FIND** that it represents another example of her festering negativism which went counter to the harmonious spirit which Young attempted to cultivate at Marshall for the benefit of everyone.

What was most flagrant, shocking and glaring, however, was the totally uncalled for outburst, challenges and threats by Ziznewski to Young about his Christian spirituality, which was also expressed in the presence of Young's secretary. It is also conceivable that others in the immediate area may have been privy to it since she was so vocal and flagrant in her inappropriate verbal attack upon him. Thus, even though he was nonetheless attempting to reach out to her in order to maintain a level of civility, dequorum and decency within his school community, these types of reaction typify the hostile actions, meanness and bitterness of Ziznewski under the circumstances. For all the foregoing reasons, I **FIND** that Ziznewski exhibited significant hostility, belligerency, intimidation and bullying against Young in direct violation of the Policy. All of this constituted unbecoming conduct and insubordination to a very high degree.

Her adverse impact extended to the greater community at Marshall. Each of district witnesses presented credible testimony about the individual difficulties they had with Ziznewski, while the few whom she presented offered very little to rebut those allegations. Although the sheer numbers do not dictate credibility, it is the substance of their respective testimonies and interests in the outcome of the matter which form a viable basis for such evaluation. As noted hereinabove in this initial decision, the closest that one came to challenging any of the Board witnesses was T.C., the mother of G.C. However, as also found hereinabove, her reliance upon Ziznewski, despite never having received the benefit of her purported documentation regarding the status of her daughter, raised suspicion regarding her true alliances and, as a result, her overall credibility.

Further, it is noteworthy that the uniform credibility of the Board's witnesses was particularly highlighted by the testimony of Dr. Traficante, who was ultimately on the receiving end of a snowball of escalating concerns regarding Ziznewski and who was

charged with maintaining a consistent level of academic performance by all teachers within the district and in conformity with Board policy. Ultimately, as the problems escalated, she was forced to enter and engage the controversies surrounding Ziznewski and by so professionally superintending that process, she was able to effectuate control over a situation which was otherwise creating a huge morale problem at Marshall. In that regard, she presented cogent, clear-cut and highly credible testimony regarding the expectations and goals of Edison and managed to keep the bar high even in the face of the ceaseless belligerency by Ziznewski.

Further, based upon the enormous amount of testimony presented against her, I **FIND** that Ziznewski's increasing use of the abrasive and confrontational term "lying" to describe her reaction to the testimonies of several of the key witnesses, such as Young and Figueroa, gave a rare glimpse into the true flavor of the matter. While most hearings, being so relatively brief in duration, can only afford us a tiny snapshot of the real personalities of the parties, the unexpectedly long and arduous hearing journey in this matter allowed for the deeper personalities of the parties to surface. The examination of all the witnesses was extensive and searching by both counsel. As a fact finder, this tribunal gave considerable, ongoing latitude to both sides to ensure that due process was provided and in order to present as complete a record as possible. The width and breath of this initial decision reflects those efforts.

This extensive process of fact finding which unfolded before us was not unlike a trip on a cruise ship. Initially, every one appears to be on their best behavior, but as the ship leaves port and encounters the rips, swells and upheaval of an uneven sea, and as the physical confines of the ship become increasingly and acutely defined (much like a courtroom), a lot of the initial façade washes away quickly and the real personalities emerge.

Such was the case here. It is noted that, in addition to all of the proofs presented by the district's witnesses about the incidents in question, even Ziznewski's own conduct at the due process hearing appeared to reflect some of the basic concerns raised by the various witnesses who had been subjected to her wrath and verbally

assaultive behavior in the school environment. As counsel for the district accurately argued: "Throughout both her direct and cross examination testimony, Ms. Ziznewski doggedly asserted that the Board's case in chief consisted wholly of lies. (My emphasis added). In an effort to advance her perception of the facts, she regularly ignored the questions being asked of her by her own attorney, the Board's attorney, and His Honor, often having to be redirected or admonished for straying off topic." (post-hearing brief of petitioner Board at pages 87-88). In fact, she frequently referred to a number of those witnesses as either being "liars" or characterized others of them as being "mistaken" in their accounts of the incidents. The use of the term "lying" is extremely harsh on its face and demonstrates a callous, pointed and glaring response, which was consistent with the allegations of the verbal assaults by her to which those witnesses had testified. In addition, on several occasions at the hearing she had to be instructed to refrain from any attempt to intimidate witnesses who were testifying after they broke down emotionally on the witness stand and expressed concerns about her gestures and facial expressions which were apparently directed toward them at that time. Although this tribunal did not witness those acts due to being focused on writing bench notes at the time or examining exhibits, it nonetheless became apparent that more than one witness was upset with and/or intimidated by her in the courtroom to such an extent that, at least in the case of Figueroa, it took several minutes of recess for her to get recomposed before she could continue. This also occurred after Ziznewski had been previously instructed not to engage in any negative, disruptive activities when a previous witness had raised similar concerns. This also did not speak well to Ziznewski and suggested her ongoing failure to maintain a proper decorum, as well as her failure to follow instructions even in a controlled environment of a courtroom.

The Board's case ended on the 24th day of the 43 day hearing schedule, at which time Ziznewski presented her defense to the various allegations. Although she initially generally politely tended to characterize much of the Board witnesses' testimony as only having been "mistaken", as the matter proceeded onward, she eventually shifted her responses as to some of those same people by using the blunt term "lying" to re-describe their testimony. The only specific routine exception to that use and description of the term "lying" to the Board witnesses applied to Dr. Traficante, whose

testimony, except for only one or two minor occasions near the end of the entire hearing schedule, Ziznewski still continued to describe as only having been "mistaken." In that regard, it is noted that Dr. Traficante was in attendance at the hearing as the Board liaison throughout most of the earlier portions of the hearing process, but was much less present during the the respondent's part of the case due to other apparent and presumed personal commitments, obligations and family needs. Curiously, as indicated hereinabove, Ziznewski's description of and challenge to the presentation of Dr. Traficante remained largely toned down (by only mostly referencing her challenges to her in the context of using the "mistaken" term, as indicated hereinabove), but it was in marked contrast to her blunt "lying" verbal characterizations and accusations of the other district witnesses, who were never in the courtroom at the time of her testimony or during the testimony of any other witnesses because of the ongoing sequestration order.

And, much like the real personalities of ocean cruisers which seem to surface in the face of an angry sea, so did Ziznewski ultimately color and lace her "lying" assessments of those other witnesses, other than Dr. Traficante, as the momentum of her testimony escalated during the extensive and exhaustive examination by both counsel. Thus, it appeared to offer a very rare but important glimpse into the real Ziznewski, which apparently was the same one which the various teachers, supervisors and administrators had to face on a daily, routine basis. In fact, at times, it sometimes seemed that she may have forgotten that she was in a courtroom and not a classroom, since her periodic emotional outbursts, reactions, refusal to answer questions, or respond to directions to answer were rife. Thus, that real life aspect of her personality surfaced and stood out repeatedly at the hearing. Such is the similar makings of life at sea on a cruise.

Although counsel for the Board repeatedly and increasingly exasperatedly requested and pleaded for Ziznewski to respond relevantly to her questions, and despite numerous, specific instructions by this tribunal for her to respond appropriately, Ziznewski persisted in providing extended, and in many cases, non-responsive discourses. She attempted to do what she wanted to do no matter what. It is only due to

the enormous credit of Board's counsel in forbearing and the professional decency and courage of Ziznewski's own counsel to attempt to control and refocus her, even in the face of such insolence, that the hearing itself did not become uncontrolled or confrontational.

As indicated hereinabove pursuant to this analysis, in tenure matters, as in all other matters which are the subject of due process, the moving party, which in this case is the Board, 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). After having examined and considered all of the evidence and testimony presented, as well as after having considered all the arguments advanced, I **FIND** that the overwhelming evidence supports the ongoing concerns raised by the district as to each of the charges preferred against Ziznewski.

Her arguments about her longstanding good service do not give her leave to be excused for her misconduct and insubordination, much of which became increasingly significant and re-occurring upon her arrival at Marshall. Yet, despite her claims that she really had no major problems with any one prior thereto, she did have a similar prior pattern of misconduct and/or failure to follow the directives of at least three prior administrators in other schools. And even if one were to find that her negative actions were only of brief duration, case law does not support her assertion in that regard. In the matter of In re Tenure Hearing of Rosa Sardury, App. Div Dkt. No. a-5913-0323 (December 13, 2005), the Court held that even though the teacher had had numerous years of service, her insubordinate behavior and unbecoming conduct actions had so severely compromised her role as to justify her employment relationship with the board to be severed.

In the last analysis, a thorough review of the history of Ziznewski in the Edison district illustrates a classic example of a board, through its authorized supervisors and principals, attempting to work with an increasingly disruptive teacher within the school environment. But those efforts failed as she, for whatever reason, persisted in generating negative interactions with her fellow teachers, her supervisors, as well as

her administrators. She compounded it by adding confusion to parents of children in the district. Further, she failed to follow district policies regarding the implementation of appropriate programming for the students to which she was assigned, whether it was in BSI or ESL instruction. The net result was an ongoing disruption which adversely affected the proper functioning of the school environment and which negatively impacted upon appropriate services being provided for needy students. All of that misconduct was egregious. Her actions in that latter regard reflect tragedy in the making since the long-term effects upon children who have been denied relevant services can be devastating. This is intolerable. Blatant insubordination is grounds for dismissal of a tenured teacher. Gross and unbecoming conduct are also grounds for dismissal of a tenured teacher. Thus, while I am acutely aware of the entitlements which attach to tenure status and diligently sought to scrutinize the evidence in light of the impact it will have upon her future, Ziznewski has nonetheless offered no viable explanation whatsoever to justify either her insubordination or her unbecoming conduct. And I so **FIND.**

CONCLUSION AND ORDER

Based upon all of the foregoing, I have thoroughly considered all of the extensive proofs offered in this matter. Although there are no explicit bright-line rules as to what may be considered "insubordination" or "conduct unbecoming" in cases involving teachers facing tenure charges, the determination must be made on a case by case basis. As a result, in the present case, the petitioner Board has presented consistent and corroborated evidence in the form of extensive testimony, incident reports and memorandum regarding the unauthorized leave and abuse of the attendance policy by respondent, failure to follow approved and acceptable educational plans and protocols of Edison, disrespect and disregard of her authorized supervisors Hagie and Capraro, selective teaching of certain students and selective disregard of the BSI and ESL learning requirements of other students, unacceptable BSI schedules, thoroughly and unprofessional conduct in the manner in which she challenged both school authorities and fellow teachers at parent/teacher conferences, her disgraceful insolence directed at her principal Gerald Young and ESL supervisor Martin Smith, and several Affirmative

Action complaints lodged against respondent from other staff members alleging repeated and grossly unnecessary minor incidents/confrontations by Ziznewski as well as repeated and recurring disturbing instances of harassment, intimidation and bullying by her, frequently in or near the immediate presence of school children during school hours or in environments in which either children or their parents or other visitors could overhear these confrontations in the immediate after school environments. In several of these incidents, the teachers whom the Ziznewski confronted became physically and/or emotionally upset by these encounters to the extent that they required medical attention. Further, her conduct jeopardized the tranquility, orderliness, stability and general professional school environment to a large degree. I **FIND** and **CONCLUDE** that all of the allegations against respondent, Carol Ziznewski, as to the each of the three charges cited against her in the Statement of Tenure Charges and Statement of Evidence Under Oath by John DiMuzio, dated April 30, 2008, are sufficient to constitute insubordination and conduct unbecoming and that she is **GUILTY** of all of the charges contained therein relative to same. I make all of these findings and form all of these conclusions by a preponderance of the credible evidence.

It is **ORDERED** that respondent Carol Ziznewski be **DISMISSED** and **REMOVED** from her tenured employment with the Edison 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.

May 5, 2010

DATE	**JOHN R. FUTEY**, ALJ May 5, 2010
Date Received at Agency:	May 5, 2010
Date Mailed to Parties:	

/mamf

EXHIBITS

Jointly submitted:

J-1 Joint Stipulation of Facts, received into evidence on September 2, 2008

For petitioner:

P-1 Memorandum from Carol Ziznewski to Mary Schaefer, dated November 19, 2004

P-2 Memorandum from Mary Schaefer to Gerald Young, Ami Hoffman and Carol Ziznewski, dated November 30, 2004

P-3 Memorandum from Gerald Young to Dr. Maryann Banks, dated October 18, 2006

Attachment: Carol Ziznewski's BSI Schedule, 2006-2007

P-4 Memorandum from Suzanne Capraro and Joan Hagie, to Carol Ziznewski, dated October 23, 2006

P-5 Memorandum from Joan Hagie and Suzanne Capraro to Gerald Young, Carol Ziznewski, Diane Keane, dated October 25, 2006

P-6 Not in Evidence (NIE). Memorandum from Gerald Young to Carol Ziznewski, dated October 26, 2006

P-7 Memorandum from Gerald Young to Carol Ziznewski dated November 22, 2006

P-8 Memorandum from Carol Ziznewski to Gerald ,

P-9 Memorandum from Gerald Young to Dr. Rose Traficante, dated December 11, 2006.

P-10 Report on Meeting with Carol Ziznewski, dated January 23, 2007

P-11 Reading Specialists/LDT Meeting Agenda, dated September 28, 2007

P-12 Memorandum from Joan Hagie and Suzanne Capraro to Reading Specialists and Literacy Development Teachers, dated October 3, 2007

P-13 Memorandum from Gerald Young to Deborah Bredahl, dated October 5, 2007

P-14 NIE - Developmental Reading Assessment Second Edition Information Leaflet.

P-15 Memorandum from Mary Schaefer to Gerald Young, dated October 8, 2007

P-16 Letter from Mary Schaefer to Deborah Bredahl, dated October 10, 2007

P-17 Memorandum from Mary Schaefer, dated October 15, 2007

P-18 Memorandum from Gerald Young to Jennifer Figueroa, dated October 16, 2007.

P-19 Memorandum from Gerald Young to Jennifer Figueroa, dated October 16, 2007

P-20 NIE - Letter from Ruth Garibotto to Gerald Young, dated October 16, 2007

P-21 Memorandum from Gerald Young to Jennifer Figueroa, undated

Attachment: second memorandum from Gerald Young to Jennifer Figueroa, undated

P-22 Letter from Kerry Peters to Gerald Young, dated October 26 2007

P-23 Memorandum from Gerald Young to Carol Toth, dated October 29, 2007

P-24 Memorandum from Carol Ziznewski to Kathleen Sica, dated November 12-15, 2007.

P-25 Memorandum from Suzanne Capraro to Dr. Traficante, dated November 13, 2007

Attachments: From Gerald Young to All Teachers, dated November 12, 2007

P-26 Memorandum from Gerald Young to Dr. Traficante, dated January 16, 2008

P-27 Memorandum from Mary Schaefer to Gerald Young, dated January 17, 2008

Attachment: Carol Ziznewski's Reading Instruction Schedule for 2008-2008 school year

P-28 Memorandum from Gerald Young to Dr. Traficante, dated January 17, 2008

P-29 I&RS Meeting Report re: G.C. dated January 24, 2008

Attachment:

Chart of G.C., behaviors, interventions and responses dated January 24, 2008

P-30 Memorandum from Gerald Young to Carol Ziznewski, dated January 28, 2008

P-31 Memorandum from Gerald Young to Dr. Traficante, dated January 29, 2008

P-32 Memorandum from Gerald Young to Carol Ziznewski, dated January 29, 2008

P-33 Electronic mail from Carol Ziznewski to Joan Hagie, dated February 5, 2008

P-34 Memorandum from Joan Hagie to Carol Ziznewski, dated February 7, 2008

P-35 NIE - Letter from T.C. to Mary Schaefer, dated February 8, 2008

P-36 Electronic mail from Joan Hagie to Carol Ziznewski, dated March 4, 2008

P-37 Electronic mail from Joan Hagie to Carol Ziznewski, dated March 5, 2008

P-38 Electronic Mail from Dr. Traficante to Gerald Young, dated March 6, 2008

P-39 Electronic mail from Gerald Young to Joan Hagie, dated March 6, 2008

P-40 Memorandum from Gerald Young to John DiMuzio, dated March 7, 2008

Attachment: memorandum from Gerald Young to Carol Ziznewski, dated March 10, 2008

P-41 Memorandum from Joan Hagie to Carol Ziznewski, dated March 7, 2008

P-42 Electronic mail from Gerald Young to Joan Hagie and Dr. Traficante, dated March 10, 2008

P-43 Electronic mail from Joan Hagie to Dr. Traficante, dated March 10, 2008

P-44 Memorandum from Gerald Young to Carol Ziznewski, dated March 10, 2008

P-45 Memorandum from Gerald Young to Carol Ziznewski, dated March 10, 2008

P-46 Memorandum from Gerald Young to Dr. Traficante, dated March 11, 2008

P-47 Memorandum from Gerald Young to Carol Ziznewski, dated March 18, 2008

Attachments: Memorandum from Gerald Young to Carol Ziznewski, dated March 13, 2008

Memorandum from Joan Hagie to Carol Ziznewski, dated March 7, 2008

P-48 NIE - Letter from T. and T.C. to John DiMuzio, dated June 9, 2008

P-49 Memorandum from Gerald Young to John DiMuzio, dated June 11, 2008

P-50 Memorandum from Mary Schaefer to Gerald Young, dated March 25, 2008

P-51 Memorandum from Dr. Traficante to Carol Ziznewski, dated April 2, 2008

P-52 Memorandum from Joan Hagie to Dr. Traficante, dated April 10, 2008

Attachment: Chart of Students receiving Services

P-53 Equivalency Chart for Reading Leveling Systems

P-54 Developmental reading Assessment reporting Chart of Discrepancies

Between Carol Ziznewski's Assessments for the 2007-2008 School Year

P-55 Developmental Reading Assessment Reporting of Students for 2007-2008 submitted by Carol Ziznewski.

P-56 Administrative Request for Supplemental Instruction for the Years 2007-2008, dated January 28, 2009

Attachments: Administrative request for Supplemental Instruction for G.C. (student) for the years 2007-2008, dated March 25, 2008

Assessment of Reading Behaviors for G.C.

Teacher Observations of Reading Behaviors, dated October 1, 2007

P-57 Letter from Mary Schaefer to Gerald Young, dated February 7, 2008

P-58 Administrative Request for Supplemental Instruction for A.N. for the years 2007-2008

P-59 Letter from Jennifer Figueroa to Gerald Young, dated January 30, 2008

P-60 Handwritten letter from Mary Schaefer to Gerald Young, dated October 16, 2007

P-61 Letter from Gerald Young to Dr. Traficante, dated January 17, 2008

Attachments: Letter from Mary Schaefer to Gerald Young, dated January 17, 2008

Division of Curriculum and Instruction Schedule for Carol Ziznewski

P-62 Letter from Mary Schaefer to Gerald Young, dated January 17, 2008

P-63 Letter from Jennifer Figueroa to Gerald Young, dated January 14, 2008

P-64 Electronic mail from Gerald Young to Martin Smith, dated September 26, 2006

P-65 Observation Rating Sheet (ORS)

P-66 Memorandum from Gerald Young to Carol Ziznewski dated October 3, 2006

P-67 NIE, Division of Curriculum and Instruction for 2007-2008 for the following Teachers: Sandy Pellicane, Mary Schaefer, Kathleen Sica, Ruth Garibotto, Kathleen Gluchowski, Karen Marmion, Diane Keane, Toni-Ann Hooker, and Cara Malloy

P-68 Assessment of Reading Behaviors for A.O.

Attachment: Teachers Observations of Reading Behaviors for A. O.

P-69 Assessment of Reading Behaviors for D.J.

Attachment: Teachers Observations of Reading Behaviors for D.J.

P-70 Assessment of Reading Behaviors for A.P.

Attachment: Teachers Observations of Reading Behaviors for A.P.

P-71 Assessment of Reading Behaviors for E.P.

P-72 Teachers Observations of Reading Behaviors of B.U.

P-73 Assessment of Reading Behaviors of M.V.

P-74 NIE - Assessment of Reading Behaviors for N.J.

P-75 NIE - Assessment of Reading Behaviors for N.N.

P-76 NIE - Assessment of Reading Behaviors for K.R.

P-77 Assessment of Reading Behaviors for S.J.

P-78 NIE - Assessment of Reading Behaviors for S.B.

P-79 NIE - Assessment of Reading Behaviors for H.S.

P-80 NIE - Teachers Observations of Reading Behaviors for N.

P-81 NIE - Assessment of Reading Behaviors for R.B.

P-82 NIE - Teachers Observations of Reading Behaviors for W.S.

P-83 NIE - Teachers Observations of Reading Behaviors for B.

P-84 NIE - Teachers Observations of Reading Behaviors for S.

P-85 NIE - Teachers Observations of Reading Behaviors for I.

P-86 NIE - Teachers Observations of Reading Behaviors for S.

P-87 NIE - Assessment of Reading Behaviors for T.A.

P-88 NIE - Assessment of Reading Behaviors for J.B.

P-89 NIE - Assessment of Reading Behaviors for K.B.

P-90 NIE - Assessment of Reading Behaviors for F.L.

P-91 NIE - Assessment of Reading Behaviors for A.K.

P-92 NIE - Assessment of Reading Behaviors for C.P.

P-93 NIE - Teachers Observations of Reading Behaviors for R.

P-94 NIE - Teachers Observations of Reading Behaviors for S.T.

P-95 NIE - Teachers Observations of Reading Behaviors for B.E.

P-96 Teachers Observations of Reading Behaviors for A.

P-97 Teachers Observations of Reading Behaviors for E.H.

P-98 NIE - Teachers Observations of Reading Behaviors for A.K.

P-99 Teachers Observations of Reading Behaviors for E.P.

P-100 ESL/Bilingual Screening K-8 for N.C.

P-101 ESL/Bilingual Screening K-8 for N.J.

P-102 ESL/Bilingual Screening K-8 for R.R.

P-103 ESL/Bilingual Screening K-8 for M.V.

P-104 Student Enrollment Data for M.K.

P-105 ESL/Bilingual Screening K-8 for S.V.

P-106 ESL/Bilingual Screening K-8 for A.G.

P-107 ESL/Bilingual Screening K-8 for Y.N.

P-108 NIE – ESL/Bilingual Screening K-8 for N.A.

P-109 NIE - ESL/Bilingual Screening K-8 for M.J.

P-110 NIE - ESL/Bilingual Screening K-8 for F.F.

P-111 NIE - ESL/Bilingual Screening K-8 for W.H.

P-112 ESL/Bilingual Screening K-8 for D.B.

P-113 NIE - ESL/Bilingual Screening K-8 for P.P. and A.K.

P-114 NIE - - ESL/Bilingual Screening K-8 for H.A.

P-115 NIE - Roster List of Students Receiving Services

P-116 ESL Program – 2006/2007 Report

P-117 Memorandum from Gerald Young to Carol Ziznewski, dated October 6, 2006

P-118 Memorandum from Gerald Young to Carol Ziznewski, dated October 10, 2006

P-119 Memorandum from Gerald Young to Carol Ziznewski, dated October 10, 2006

P-120 Memorandum from Gerald Young to Carol Ziznewski, dated November 13, 2006

P-121 Memorandum from Gerald Young to Carol Ziznewski, dated November 22, 2006

P-122 ESL Testing Report

Attachment: Student Roster Report- 2007

P-123 List of the Marshall Elementary School students who received ESL Services for the 2007/2008 school year

P-124 Handwritten notes from C.B. to Gerald Young

Attachments: Handwritten letter from Mr. B. to Gerald Young, dated June 7, 2007

Typed Memorandum regarding Mr. B. coming to the school

Handwritten note from Mr. B. to Gerald Young, dated June 7, 2007

Handwritten note from Mr. B. to Gerald Young, dated May 5, 2006

Memorandum from Carol Ziznewski to Gerald Young, dated June 6, 2007

Memorandum from Dr. Traficante to Carol Ziznewski, dated June 18, 2007

P-125 Memorandum from Dr. Traficante to Carol Ziznewski, dated July 6, 2007

Attachment: Memorandum from Gerald Young to Carol Ziznewski, dated November 22, 2006

P-126 Memorandum from Elsie Rebovich to Carol Ziznewski, dated December 4, 1996

P-127 Memorandum from Elsie Rebovich to Carol Ziznewski, dated December 9, 1996

Attachment: Handwritten letter from Esie Rebovich to Dr. Vincent Capraro

P-128 Memorandum from Esie Rebovich to Carol Ziznewski, dated January 7, 1997

Attachment: Basic Skills Improvement Program Time Activity Report for the 1996-1997 School Year

P-129 Memorandum from Edward Samolewicz to Carol Ziznewski, dated January 7, 1998

P-130 Memorandum from Carol Ziznewski to Edward Samolewicz, dated January 21, 1998

P-131 NIE - Memorandum from Edward Samolewicz to Carol Ziznewski, dated January 27, 1998

P-132 Memorandum from Edward Samolewicz to Carol Ziznewski, dated February 27, 1998

P-133 NIE - Handwritten note from Gerald Young to Carol Ziznewski, dated October 9, 1998

P-134 NIE - Memorandum from Katherine Peterson to Carol Ziznewski, dated November 29, 2000

P-135 NIE - Memorandum from Carol Ziznewski to Katherine Peterson, dated November 30, 2000

P-136 Memorandum from Gerald Young to Carol Ziznewski, dated October 26, 2006

P-137 Memorandum from Gerald Young to Carol Ziznewski, dated October 26, 2006
(not in evidence)

P-138 Memorandum from Gerald Young to Carol Ziznewski, dated October 30, 2006

P-139 Memorandum from Gerald Young to Carol Ziznewski, dated November 3 2006

P-140 Memorandum from Gerald Young to Carol Ziznewski, dated November 3, 2006

P-141 Memorandum from Gerald Young to Carol Ziznewski,dated November 14, 2006

Attachment: Swipe Card History, Fall 2006

P-142 Memorandum from Gerald Young to Carol Ziznewski, dated November 20, 2006

P-143 Memorandum from Gerald Young to Dr. Banks, dated November 29, 2006

Attachments: Memorandum from Gerald Young to Carol Ziznewski, dated November 20, 2006

Memorandum from Gerald Young to Carol Ziznewski, dated October 30, 2006

P-144 Memorandum from Gerald Young to Ms. Toth, dated November 30, 2006

Attachment: Note from Edward Magaziner, M.D. dated November 6, 2006

P-145 Memorandum from Dr. Banks to Gerald Young, dated December 12, 2006

P-146 Letter from Dr. Banks to Carol Ziznewski, dated December 21, 2006

P-147 Handwritten note from Gerald Young to Dr. Banks ,dated January 2, 2007

Attachment: Birthday card sent from Gerald Young to Carol Ziznewski

P-148 Letter from Dr. Banks to Carol Ziznewski, dated January 4, 2007

Attachment: Memorandum from Dr. Banks to Gerald Young, dated January 7, 2007

P-149 NIE- Letter from Mary H. Smith, Esq., to Stephen E. Klausner, Esq., dated February 16, 2007

P-150 NIE - Letter from Mary H. Smith, Esq. to Stephen E. Klausner,Esq., dated March 8, 2007

P-151 Letter from Dr. Banks to Carol Ziznewski, dated March 14, 2007

Attachment: Memorandum from Dr. Banks to Gerald Young, dated March 14 2007

P-152 Memorandum from Gerald Young to Dr. Banks, dated March 23, 2007

P-153 Letter from Dr. Banks to Carol Ziznewski, dated March 23, 2007

P-154 Edison Township Board of Education Policy 4111.1/4211.1 – Harassment, Intimidation and Bullying

P-155 Affirmative Action Investigation Report, dated October 9, 2006

Attachments: Letter from Jennifer Figueroa to Gerald Young, dated October 9, 2006

Description of incidents that occurred between Carol Ziznewski and Jennifer Figueroa

Letter from Adrienne A. Sviderskis-Carroll to Gerald Young, dated November 2, 2006

Memorandum from Gerald Young to Ms. Toth, dated November 30, 2006

Letter from Emily Zazanis to Dr. Banks, dated January 10, 2007

Handwritten note from Carol Ziznewski to Jennifer Figueroa

Memorandum from Suzanne Capraro and Joan Hagie to Carol Ziznewski, dated October 23, 2006

Memorandum from Joan Hagie and Suzanne Capraro to Gerald Young, Carol Ziznewski and Diane Keane, dated October 25, 2006

Memorandum from Dr. Traficante to Gerald Young, dated November 2, 2006

P-156 Memorandum from Dr. Banks to Carol Ziznewski, dated April 24, 2007

Attachment: memorandum from Dr. Banks to Gerald Young, dated April 24, 2007

P-157 Memorandum from Gerald Young to Dr. Banks, dated April 25, 2007

P-158 NIE - Letter from Daniel Michaud to Carol Ziznewski, dated May 14, 2007

P-159 NIE - 2006-2007 Professional Staff Performance Report, prepared by Gerald Young

P-160 Letter from Hope Blecher-Sass to Dr. Banks, dated June 13, 2007

P-161 Affirmative Action Investigation – Hope Blecher-Sass, dated June 15, 2007

P-162 Affirmative Action Investigation – Diana Keane and Sandra Pellicane, dated June 15 2007

P-163 Memorandum from Gerald Young to Dr. Banks, dated June 19, 2007

P-164 Letter from Dr. Banks to Carol Ziznewski, dated June 19, 2007

Attachment: memorandum to Carol Ziznewski, from Dr. Banks dated June 19, 2007

P-165 Letter from Gerald Young to Ms. Toth, dated June 20, 2007

P-166 Letter from Dr. Banks to Carol Ziznewski, dated July 3, 2007

P-167 NIE - Letter from Daniel Michaud to Carol Ziznewski, dated July 3, 2007

P-168 Electronic mail from Carol Ziznewski to Sandra Pellicane, dated July 11, 2007

P-169 NIE - Letter from Ms. Toth to Carol Ziznewski, dated July 12, 2007

P-170 Letter from Ms. Toth to Carol Ziznewski, dated July 24, 2007

Attachment: Board Resolution Withholding Carol Ziznewski's Employment and Adjustment Increments

P-171 Memorandum from Gerald Young to Ms. Toth, dated October 8, 2007

P-172 Memorandum from Gerald Young to Ms. Toth, dated November 1, 2007

P-173 NIE - Letter to Whom It May Concern from Diane Keane, dated November 2, 2007

P-174 Memorandum from Gerald Young to Ms. Toth, dated November 12, 2007

Attachment: Memorandum from Carol Ziznewski to Gerald Young, dated October 31, 2007

P-175 Memorandum from Gerald Young to Ms. Toth, dated November 12, 2007

P-176 Affirmative Action Investigation Report, dated October 15, 2007

Attachments: Letter from Kathleen Sica to Gerald Young, dated October 7, 2007

List of incidents that occurred between Carol Ziznewski and Kathleen Sica

Letter from Mary Schaefer to Gerald Young, dated October 10, 2007

Letter to Whom It May Concern from Diane Keane, undated

Memorandum from Jennifer Figueroa to Gerald Young, dated October 29, 2007

Memorandum from Jennifer Figueroa to Carol Ziznewski, dated October 12, 2007

Letter from Jennifer Figueroa to Gerald Young, dated October 9, 2006

List of incidents that occurred between Carol Ziznewski and Jennifer Figueroa

Memorandum from Carol Ziznewski to Jennifer Figueroa, dated October 12, 2007

Letter from Toni-Ann Hooker to Whom It May Concern, dated November 1, 2007

Memorandum from Gerald Young to Deborah Bredahl, dated October 5, 2007

Memorandum from Gerald Young to Carol Ziznewski, dated October 16, 2007

P-177 NIE - Memorandum from Susan Mahan to Gerald Young dated February 8, 2008

P-178 Meeting Summary, dated February 14 2008

P-179 Memorandum from Gerald Young to Carol Ziznewski, dated March 19, 2008

P-180 Board Resolution of Employee Suspension, effective April 15, 2008

P-181 Basic Skills Improvement Program 2007-2008

P-182 Lesson Plans Policy and Procedure, dated June 16, 1997

P-183 Curriculum Vitae of Martin Smith

P-184 Diagram of Library by Ami Hoffman, dated March 24, 2009

P-185 Diagram of Toni-Ann Hooker's classroom by Toni-Ann Hooker, dated July 21, 2009

P-186 Chronology Chart by Sandra Pellicane, dated April 20, 2009

P-187 Diagram of Resource Center by Sandra Pellicane, dated April 20, 2009

P-188 Diagram of Gerald Young's office area by Sandra Pellicane, dated April 20, 2009

P-189 Diagram of library by Adrienne-Sviderskis-Carroll, dated May 6, 2009

P-190 Memo from Dr. Vincent Capraro, dated March 25, 2004

P-191 Program invitation dated 2004

P-192 BOE Policy re Lesson Plan, dated December 2, 2009

P-193 Edison Township Education Association Agreement, July 1, 2005 Through January 30, 2005

For Respondent:

R-1 2006-2007 Professional Staff Performance Report for the period ending May 2007,

R-2 2006-2007 Professional Staff Performance Report dated June 2007,

R-3 2005-2006 Professional Staff Performance Report for the period ending May 2006

R-4 2005-2006 Professional Staff Performance Report dated June 2006,

R-5 2004-2005 Professional Staff Performance Report for the period ending May, 2005

R-6 2003-2004 Professional Staff Performance Report for the period ending May, 2004

R-7 Certified Professional Staff Written Performance report for the period ending June, 2000

R-8 Document entitled "Bits &Pieces #16".

R-9A Copy of section of Collection Bargains Agreement (CBA) – Re: Absence

R-9B Section of CBA re striking of security

R-10A and
R-10B Resumes of Carol Ziznewski

R-11 Letter from Mr. Staltenburg to Mr. and Mrs. C., dated January 16, 2008

R-12 Post-it Notes

R-13 Letter from Carol Ziznewski to Jennifer Figueruso, dated October 12, 2007

R-14 Letter from Carol Ziznewski to Mr. Young, dated January 16, 2008/revised January 17, 2008

R-15 Diagram of library by Carol Ziznewski

R-16A Letter from Mary Schaefer to Carol Ziznewski, dated October 2, 2007

R-16B Note from Kathy Sica to Carol Ziznewski, dated October 16, 2007

R-16 Carol Ziznewski's diary agenda entry dated October 24, 2007

R-17 Carol Ziznewski documents re email from Sandra Pellicane, dated June 28, 2000

R-18 Memorandum from Gerald Young to Carol Ziznewski, dated "12/22"

R-19 Rose Traficante memo re "File Ziznewski"

WITNESSES

For Petitioner:

Rose Traficante, Ed.D.
Joan Hagie
Jennifer Figueroa
Kathleen Sica
Mary Schaefer
Kerry Peters
Suzanne Capraro
Martin Smith
Maryann Banks, Ed.D.
Ami Hoffman
Joseph Drew
John A. DiMuzio
Toni-Ann Hooker
Sandra A. Pellicane
Adrienne Sviderskis-Carroll
Gerald Young
Deborah Bredahl
Elsie Rebovich

For Respondent:

Carol Ziznewski

T.C.

Donald Tarr

Tatiana Charapova

241-10

OAL DKT. NO. EDU 09609-09
AGENCY DKT. NO. 185-8/09

ELAINE REINMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|06|10

Date of Mailing: 8|06|10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09609-09

AGENCY DKT. NO. 185-8/09

ELAINE REINMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY

Respondent.

Steven M. Latimer, Esq. for petitioner (Laughlin & Latimer, attorneys)

Kyana Woolridge Esq., for respondent (Hunt Hamlin & Ridley, attorneys)

Record Closed: July 8, 2010 Decided: July 12, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 24, 2009 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 on the attached settlement agreement. The Plainfield Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated June 22, 2010.

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 12, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 7-14-10

Mailed to Parties: JUL 14 2010

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/rr

PLAINFIELD BOARD OF EDUCATION
PLAINFIELD, NEW JERSEY

CERTIFIED RESOLUTION FROM THE JUNE 22 2010 BUSINESS MEETING

REPORT OF THE FINANCE COMMITTEE

Q. Litigation/Settlement

The Interim Superintendent of Schools recommends, and I so move, adoption of the following:

RESOLUTION

RESOLVED, that the Plainfield Board of Education approves a settlement agreement dated June 10, 2010 of litigation involving a former employee whose name is on file with the Board Secretary.

Mrs. Campbell moved seconded by Mrs. Hernandez. The motion carried with Mr. Abdul-Haqq, Ms. Barksdale, Mrs. Campbell, Mr. Cathcart, Mrs. Edwards, Mrs. Hernandez, Mrs. Logan-Leach and Ms. Peterson in favor and Mrs. Gilbert abstained and none opposed.

THE FOREGOING RESOLUTION IS A CORRECT COPY OF THE MINUTES OF THE PLAINFIELD BOARD OF EDUCATION BUSINESS MEETING CONDUCTED ON JUNE 22, 2010.

Gary L. Ottmann, Board Secretary

GLO/bsc

On June 10, 2010 Plainfield School District entered into a settlement agreement with Petitioner Elaine Reinman that Petitioner will be re-instated into the District as an Elementary School Teacher starting in September 2010. Petitioner will maintain her status as tenure and accumulated benefits in the District and will be able to keep her years and benefits she already obtained in the District. The Board does not have to pay the Petitioner retro-active pay for the time she has been out of the District.

This agreement is subject to Board Approval on June 15, 2010.

Board Attorney

Petitioned Attorney

Elaine Reinman
Petitioner.

264-10E

OAL DKT. NO. EDU 7786-10
AGENCY DKT. NO. 166-7/10

JENNIFER DeKENIPP, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on July 30, 2010 – along with 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 satisfy the requirements necessary for the granting of emergent relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably – she has failed to demonstrate that the legal right is established in her favor or that she has a likelihood of prevailing on the merits of the underlying controversy.

Accordingly, the recommended order of the OAL denying petitioner's application is hereby adopted. This case shall proceed at the OAL for such further proceedings as may be required to bring it to conclusion. Due to the circumstances of this matter, such proceedings should – to the greatest extent possible – be conducted on an expedited basis.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/10/10

Date of Mailing: 8/10/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 7786-10
AGENCY DKT. NO. 166-7/10

JENNIFER DeKENIPP,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WALL, MONMOUTH COUNTY,
Respondent.

Marissa A. McAleer, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: July 30, 2010 Decided: August 2, 2010

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Jennifer DeKenipp (petitioner) appeals Wall Township Board of Education's (respondent's) rescission of a previous grant of extended maternity/child care leave.

PROCEDURAL HISTORY

On July 21, 2010, petitioners' petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergency relief seeking an order compelling respondent to grant the previously granted leave. On July 26, 2010, the emergent matter alone was filed with the Office of Administrative Law for oral argument, which was held on July 30, 2010.

FACTUAL DISCUSSION

Petitioner commenced employment with respondent on or about September 1, 2004 as a teacher holding a K-12 art endorsement on an instructional certificate. Petitioner began contractually provided maternity leave on or about April 24, 2009 in expectation of the birth of her second child, who was born on June 8, 2009. Pursuant to the collective bargaining agreement between respondent and petitioner's bargaining unit such leave was to conclude at the end of the 2009-2010 school year. Petitioner requested that respondent grant a discretionary extension of her unpaid leave for the duration of the 2010-2011 school year, effective September 1, 2010. Respondent granted this request on March 9, 2010, but subsequently rescinded its approval on May 11, 2010. After respondent declined to reconsider its rescission, petitioner filed a petition of appeal with the Commissioner of Education claiming petitioner held a right to the leave which vested once respondent granted its approval. Petitioner also filed a request for emergent relief compelling respondent to grant the leave pending the underlying proceeding. It is the emergent request which is currently at hand. The parties agree that all contract based leave was exhausted and the requested leave was for respondent to grant or decline at its discretion. At issue is whether respondent could rescind the leave once it was granted.

The preceding information has not been disputed or contradicted by the parties, and is found as fact.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

In the current matter, petitioner argues that the law is settled that once a Board of Education passes a formal resolution establishing a leave of absence, the board may not unilaterally rescind its decision, thus showing that petitioner is likely to succeed on the merits of the case. Petitioner relies primarily on Oxford v. Pohatcong, 81 S.L.D. 48, OAL Dkt. No. EDU 2711-80 (November 25, 1980), aff'd, Commissioner of Education (January 16, 1981) to support this assertion.

There are, however, several distinctions between Oxford and the matter currently at issue. In Oxford, the respondent Board unilaterally extended the time of a teacher's return date, delaying the date by several months beyond an agreed to return date into the next year. This had the result of effectively reducing that teacher's salary, which, it was determined, implicated the petitioner's rights under the tenure statute. In the current matter, the opposite is true, as respondent is requesting that petitioner return to work sooner than anticipated, therefore not serving to reduce petitioner's salary or affect her compensation at all. The tenure statute, N.J.S.A. 18A:28-5, protects, tenured

teachers from dismissal and reduction in compensation. Granting, denial or rescission of what is agreed to be a discretionary exercise of the Board's power is not a part of the tenure protections.

In Oxford, the petitioner received notice of the Board's action only one week prior to the start of the school year in question, whereas in the current matter the respondent took action nearly four months prior to the effective date of the additional leave, leaving sufficient time to plan. Finally, Oxford dealt with setting the return date for a maternity leave which was mandated and provided for in the collective bargaining agreement between the parties, and it is in that foundation where it took root as a vested right. As earlier noted, the leave requested by petitioner is not a contractual right, nor is it contemplated anywhere in the agreement between respondent and the bargaining unit. The current matter involves what all parties agree is a discretionary act of the board's authority. Accordingly, I **CONCLUDE** Oxford is not a compelling analogy upon which to state that the law governing the current set of facts presented is settled so as to assert that success on the merits is likely, or to provide a basis upon which to grant emergent relief.

Accordingly, I **CONCLUDE** that petitioners have not demonstrated a likelihood of success on the merits of the underlying claim. A full plenary hearing is likely necessary to ascertain whether the discretionary exercise of power involved was arbitrary, capricious or unreasonable before the full merits of their claim can be determined.

Consequently, the petitioners' request for emergency relief is **DENIED**.

DECISION AND ORDER

For the foregoing reasons, I **CONCLUDE** that petitioners are not entitled to the requested emergent relief and that the Petitioners' request for emergency relief is **DENIED**.

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

August 2, 2010

DATE

ELIA PELIOS, ALJ

/eap, mamf

265-10

R.H., on behalf of minor children, A.B. and M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in October 2009. The respondent filed an answer and requested that the petition be dismissed. Petitioner received appropriate notice of a hearing on July 12, 2010, but failed to appear and provided no explanation for her nonappearance. Having received no explanation from the petitioner for her non-appearance, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice.

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

August 11, 2010

OAL DKT. NO. EDU 13096-09
AGENCY DKT. NO. 284-10/09

R.H., on behalf of minor children, A.B. and M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – which includes the advisement of the failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – and the notification sent to the parties by the OAL on July 14, 2010, providing an opportunity to submit an explanation for such nonappearance, has been reviewed. There was no explanation filed by petitioner, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8|11|10
Date of Mailing: 8|11|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.* 6:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, New Jersey 07102

OAL Docket. No.: EDU 13096-2009 N

Agency Ref. No.: 284-10/09

Transmitting Agency: Department of Education

Judge: Leslie Z Celentano
Judge Phone No. (973) 648-6048
****
R.H., ON BEHALF OF MINOR CHILDREN, A.B. AND M.B. — Notice of Return
NEWARK STATE-OPER. SCHOOL DIST., ESSEX CO. — Failure to Appear
****

RH OBO AB & MB VS. ST.-OPER. SCH. DIST. OF NWK failed to appear at a scheduled hearing on 07-12-10. This case is returned to the transmitting agency listed above for appropriate disposition.

The party who failed to appear may send an explanation of the reasons for the failure to appear to the transmitting agency listed above. The agency must receive the explanation within 13 days of this notice. Copies of the explanation must be sent to all other parties.

July 14, 2010 — Deputy Clerk, OAL
Date

M.E.T., on behalf of minor child, K.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought to have the Board pay tuition for K.T. to attend an out-of-district private school, alleging that the District failed to address persistent intimidation, harassment and bullying of her daughter by school administrators and the local police department. The charges stem from the response of the District in the aftermath of a third party call to the Berkeley Heights Police Department regarding the well-being of K.T., following a comment she had written to a friend on Facebook which expressed suicidal thoughts. The Board filed a motion to dismiss because petitioner failed to allege sufficient facts to constitute a cause of action.

The ALJ found that: petitioner failed to allege any particular actions by the school district – which were taken in the context of a police-ordered Division of Youth and Family Services investigation into whether K.T. was in fact at risk of committing suicide – that permit a reasonable inference of harassment, intimidation, or bullying that would establish a claim upon which relief can be granted; petitioner's allegations that both the police and school administrators harassed K.T., that the District failed to adequately address the harassment, and that K.T. suffers emotional distress when she attends school are not supported by the evidence; there is no factual basis for the cause of action presented by the petitioner for the District to provide tuition payments for K.T. to attend the private Interlochen Arts Academy in Michigan; and the Commissioner does not oversee the police department, and cannot enact a remedy grounded in alleged police harassment. Accordingly, the ALJ granted summary decision in favor of the respondent Board, and dismissed the petition.

Upon a comprehensive review of the record in this matter, the Commissioner agreed with the ALJ that summary decision is appropriately granted to the Board. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter, and dismissed the petition.

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

August 11, 2010

266-10

OAL DKT. NO. EDU 13228-09
AGENCY DKT. NO. 231-9/09

M.E.T., on behalf of minor child, K.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, 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 did not file exceptions to the Initial Decision.

Upon his comprehensive review, the Commissioner agrees with the Administrative Law Judge – for the reasons clearly presented in his decision – that summary decision is appropriately granted to the Board.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|11|10
Date of Mailing: 8|11|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 13228-09

AGENCY DKT. NO. 231-9/09

M.E.T., ON BEHALF OF MINOR

CHILD, K.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF BERKELEY HEIGHTS,

UNION COUNTY,

Respondent.

M.E.T., pro se

Marie-Laurence Fabian, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: March 29, 2010 Decided: July 13, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner M.E.T. on behalf of her minor child, K.T., filed a petition with the Commissioner of Education on September 8, 2009, seeking to have the Township of Berkeley Heights Board of Education (District) pay the tuition for K.T. at an out-of-district school. Petitioner alleges that the District has failed to address persistent intimidation, harassment and bullying.

On October 9, 2009, petitioner submitted an amended petition seeking, among other things, placement of K.T. at a private school of petitioner's choice. On October 23, 2009, the District submitted a motion to dismiss for failure to state a claim. The matter was thereafter transmitted to the Office of Administrative Law (OAL) as a contested case. On February 9, 2010, I held a status conference in order to address the issues with the parties. I also provided the petitioner the opportunity to submit a written response to the District's motion to dismiss. Petitioner filed replies on March 1, 2010, and March 18, 2010.

FACTUAL DISCUSSION

The following material facts are undisputed.

M.E.T. is the mother of K.T. K.T. is a general education student enrolled in the District's Governor Livingston High School (Governor Livingston). On October 26, 2008, the Berkeley Heights Police Department received a call from G.M., who was concerned for the well-being of K.T. G.M.'s daughter was a friend of K.T. G.M.'s daughter had shown G.M. a Facebook comment that was written by K.T. The comment read: "and I'm tired of waking up every morning and wishing I hadn't, and wanting to kill myself almost every day, and having to deal with my parents . . . it's not fair." Police officers went to M.E.T.'s home to investigate, and spoke with K.T.

On October 27, 2008, a police officer called M.E.T. to check on the well-being of K.T. After speaking with M.E.T., the officer referred the matter to the Division of Youth and Family Services (DYFS), citing the Facebook comment and the perceived "delusional behavior" of M.E.T. On the same day, M.E.T. went to Governor Livingston and spoke with principal Scott McKinney. M.E.T. told McKinney, among other things, that the police had come to her house the previous day because of Facebook comments made by K.T. McKinney directed Carol Riegel, the school psychologist, and Carolyn Dennerlein, the school counselor, to meet with K.T. and discuss the Facebook comments. Afterwards, McKinney told M.E.T. that K.T. denied ever threatening suicide, and that the school would take no further action at that time.

On October 29, 2008, a DYFS social worker interviewed K.T. at Governor Livingston. Ms. Dennerlein sat in on the DYFS interview. During the interview, K.T. admitted to having suicidal ideations and a plan to carry out her suicide. In light of this information, the District informed M.E.T. that K.T. required a psychiatric evaluation before she could return to school. She was placed on home instruction pending care. Anne Evered, the licensed clinical social worker for DYFS, evaluated K.T. and was of the opinion that K.T. was not a danger to herself. Her evaluation was approved by Dr. Pat Martino, the director of pupil personnel services, and Judith Rattner, the superintendent of schools. A re-entry conference was held on November 5, 2008, to return K.T. to Governor Livingston.

Subsequently, M.E.T. applied to have her daughter admitted to the Interlochen Arts Academy in Michigan. The District submitted recommendation forms to Interlochen as part of its application process. While K.T. continued her studies at Governor Livingston, M.E.T. made numerous requests during the remainder of the 2008–2009 school year to have the District pay K.T.'s tuition at Interlochen. The District refused, citing no basis for the request.

On May 18, 2009, M.E.T. met with school administrators, including Dr. Carmen Centuolo, the executive county superintendent of schools. Two days later, Dr. Centuolo sent a letter to M.E.T. stating that any action taken by the District was to ensure the

safety and health of K.T. Additionally, Dr. Centuolo wrote that he contacted the Union County Prosecutor's Office and relayed M.E.T.'s concerns regarding the Berkeley Heights Police Department.

LEGAL DISCUSSION

Under N.J.A.C. 6A:3-1.5(g), a respondent may file a motion to dismiss in lieu of an answer to a petition. In its motion for summary decision, the District contends that it is entitled to summary decision or dismissal because petitioner has failed to allege sufficient facts to constitute a cause of action.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. Summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). In order to defeat a summary-decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Use of the summary-decision procedure is aimed at "'the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial.'" Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954) (citation omitted).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citation omitted).

Petitioner alleges that school administrators harassed, intimidated, and bullied K.T., causing a substantial disruption in K.T.'s school environment and her ability to learn. Particularly, petitioner alleges that the interview of K.T. by the school psychologist and counselor after learning of the Facebook comment from M.E.T. was an act of harassment. Petitioner alleges that the school district engaged in harassment by permitting DYFS to interview K.T., and by following its recommendations. Particularly, petitioner claims that the police officer who submitted the report to DYFS had a history of harassing petitioner. Thus, the police officer meant to continue his harassing behavior by unleashing a DYFS investigation on petitioner's family.

N.J.S.A. 18A:36-25 requires all school districts to establish policies for the early detection of abused children and to notify the appropriate child-welfare authorities when a potential abused-child situation is detected. Once the school district learned of K.T.'s possible suicidal ideations, it investigated the matter as required for early detection. Indeed, the school district is required to accommodate child-welfare investigators, and provide a school representative during a DYFS investigation. N.J.A.C. 6A:16-11.1(a)(5)(i). Accordingly, the school's counselor was present during DYFS' interview of K.T. Furthermore, the school district has no duty to investigate the source of a DYFS investigation before permitting an interview with a child, especially if that source is a police officer. I **CONCLUDE** that petitioner failed to allege in the amended petition any particular actions by the school district, taken during the DYFS investigation, that permit a reasonable inference of harassment, intimidation or bullying that would establish a claim upon which relief can be granted.

Education regulations require a school district to enact a policy towards "[a]ppropriate consequences and remedial action for any staff member who commits an act of harassment, intimidation or bullying." N.J.A.C. 6A:16-7.9(a)(2)(vi). The statutory authority behind this rule defines harassment, intimidation, or bullying as

> any gesture, any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry,

> national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function or on a school bus and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of harming a student . . . ; or
>
> b. has the effect of insulting or demeaning any student . . . in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.
>
> [N.J.S.A. 18A:37-14.]

Accordingly, the legislative intent of the statute is to provide "a safe and civil environment in school [that] is necessary for students to learn and achieve high academic standards." N.J.S.A. 18A:37-13.

Moreover, "[w]hile their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards." Frugis v. Bracigliano, 177 N.J. 250, 268 (2003). Indeed, "[n]o greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers." Ibid. Accordingly, "a school may be liable in the commission of acts as well as [in] the neglect or failure to act." B.J. and L.F., by their parents and guardians, L.J. and D.F. v. Bd. of Educ. of Teaneck, 93 N.J.A.R.2d (EDU) 424, 428.

The Commissioner of Education has the power "to decide legal controversies and disputes arising under school laws or State Board regulations." N.J.A.C. 6A:2-1.2(a)(1). Petitioner claims that the District failed to implement its harassment and bullying policy against school administrators, as required by N.J.A.C. 6A:16-7.9(a)(2)(vi). Specifically, the regulation requires a school district to develop and implement a policy that provides "[a]ppropriate consequences and remedial action for any staff member who commits an act of harassment, intimidation or bullying." The regulation's language is similar to that of the enabling statute, requiring "consequences

and appropriate remedial action" for harassment, intimidation, or bullying. N.J.S.A. 18A:37-15(b)(4).

The Commissioner of Education also has "the constitutional duty . . . to assure the maintenance and support of a 'thorough and efficient system of public schools.'" M.P. and G.P., parents of R.P. v. Bd. of Educ. of Delran, Burlington County, 1985 S.L.D. 1817, 1830 (citing N.J. Const., art. VIII, § IV, ¶ 1), adopted, 1985 S.L.D. 1834. Thus, the Commissioner has the "'affirmative obligation to see to it that the statutory objectives are met' and that local school boards and governing bodies fulfill their delegated duties." In re Upper Freehold Reg'l Sch. Dist., 86 N.J. 265, 273 (1981) (citing Robinson v. Cahill, 62 N.J. 473, 509 n.9 (1973)).

Assuming Governor Livingston staff members harassed and bullied K.T., the Commissioner may have sufficient power to order the school district to fund K.T.'s education at a private school. The courts "extend substantial deference to an agency's interpretation of its own rules." Sloan ex rel Sloan, 342 N.J. Super. 385, 394 (App. Div. 2001). New Jersey's harassment, intimidation, and bullying statute prescribes "appropriate" remedial actions for violations. N.J.S.A. 18A:37-15(b)(4). The Supreme Court has noted that the ordinary meaning of appropriate "confers broad discretion," and should be applied "in light of the purpose of the Act." Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 395 (1985). Accordingly, the legislative purpose of the harassment and bullying statute is to provide "a safe and civil environment in school," which is "necessary for students to learn and achieve high academic standards." N.J.S.A. 18A:37-13.

Reimbursement of private-school tuition has been ordered in the context of special-needs children. See Burlington Sch. Comm., supra, 771 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1995); P.S. v. Shore Reg'l Bd. of Educ., EDS 4687-99, Final Decision (November 2, 2001) <http://lawlibrary.rutgers.edu/oal/search.shtml>. The Supreme Court has articulated a two-prong test to determine whether reimbursement was proper when parents unilaterally place their children in private schools. "Parents are entitled to reimbursement . . . if the school district has failed to provide a free and

appropriate public education (FAPE) and the placement chosen by the parents is proper." P.S., supra, EDS 4687-99 (citing Burlington Sch. Comm., supra, 771 U.S. at 370–71, 105 S. Ct. at 2003, 85 L. Ed. 2d at 395–96). Alternatively, the applications of this remedy have been extended beyond the special-needs context in very limited circumstances, including harassment. M.P., supra, 1985 S.L.D. at 1831.

In M.P., supra, 1985 S.L.D. 1817, the Commissioner affirmed an administrative law judge's (ALJ's) order to have the school district reimburse, and continue paying, the out-of-district school tuition of a middle-school student. The young student was the target of a campaign of harassment by a group of fellow students. Her mother continuously sought intervention by school administrators, as her daughter became suicidal. The only remedies offered would have further isolated the student from a free and efficient education, and leave her harassers unpunished. Consequently, the mother removed the student from the district, and petitioned for reimbursement. The ALJ cited the district's failure to provide a secure facility as a violation of the student's Constitutional right to a thorough and efficient education. The ALJ analogized the school's failure to create an adequate plan to address the harassment to a school's failure to properly service a special-needs child. Thus, the remedy was reimbursement and continued payment of tuition. However, the continued tuition payment was not indefinite. Payment continued until the district developed a sufficient plan to secure the facility, and reintroduce the student into the school system.

Alternatively, the ALJ in B.J., supra, 93 N.J.A.R.2d (EDU) 424, entertained similar reasoning, but subsequently ruled against reimbursement. The students in that case were continuously harassed and assaulted by a group of teenagers, but never while on the school campus. Accordingly, the ALJ ruled that the students were not entitled to reimbursement of tuition payments after they were unilaterally removed to private school.

The Commissioner has granted reimbursement of tuition payments when a school district has failed to adequately address in-school peer harassment. See M.P., supra, 1985 S.L.D. at 1832. Here, however, petitioner alleged that school

administrators harassed K.T., and the District failed to adequately address the harassment. Petitioner alleges that K.T. suffers from emotional distress whenever she attends Governor Livingston. However, K.T.'s emotional distress was not documented by a diagnosis from a doctor or therapist, unlike in M.P. Indeed, K.T. was evaluated by school officials, DYFS, and a licensed clinical social worker, and found to be of sufficient mental health. Furthermore, K.T. was never unilaterally removed from the District, unlike the student in M.P. Accordingly, I **CONCLUDE** that there is no factual basis for a cause of action presented by petitioner for the District to provide tuition payments for K.T. to attend a private school.

Finally, the Commissioner is not responsible for any acts of harassment committed outside of the school campus, or a school-sponsored function. See B.J., supra, 93 N.J.A.R.2d (EDU) at 429. The Commissioner does not oversee the police department, and cannot enact a remedy grounded in alleged police harassment.

For all of the foregoing reasons, I **CONCLUDE** that summary decision in favor of the District is appropriate.

ORDER

It is hereby **ORDERED** that summary decision is **GRANTED** in favor of the District.

It is further **ORDERED** that this 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.

July 13, 2010
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 7/13/10

Date Mailed to Parties: JUL 14 2010

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

#267-10+

OAL DKT NO.EDU 8965-08
AGENCY DKT. NO. 290-9/08

CORRECTED DECISION

IN THE MATTER OF THE TENURE HEARING OF KIMBERLY GEURDS, EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY	COMMISIONER OF EDUCATION DECISION

The petitioning school district brought charges against tenured teacher Kimberly Geurds, maintaining that her conduct was unbecoming to a sufficient degree to warrant dismissal. No charges of "inefficiency, incapacity, . . . or other just cause" were alleged, pursuant to *N.J.S.A.* 18A:6-10. The first count of the tenure charges alleged several incidents of inappropriate comments and discussions between respondent and her students. The second count alleged improper communications between respondent and various school employees, but petitioner withdrew that count by letter dated October 14, 2009 from petitioner's counsel to ALJ Jeff S. Masin and respondent's counsel.

Upon its transmission to the Office of Administrative Law (OAL), the case was initially assigned to Administrative Law Judge (ALJ) Dennis Blake, who presided over the first two hearing days. The case was subsequently reassigned to ALJ Masin, who reviewed the record – including audio recordings of the testimony given on the above-referenced hearing days. ALJ Masin determined that there was "no need for the re-presentation of the testimony of the several witnesses who testified on those hearing dates." (Letter dated August 25, 2009, from ALJ Masin to counsel for the parties) He was satisfied that the hearing could be "completed without the recalling of such witnesses without any prejudice to the parties." *(Ibid).* No objections having been articulated by the parties, ALJ Masin presided over a third hearing day

and issued an Initial Decision recommending that Geurds forfeit 120 days of salary and one year's increment.

Because petitioner brought no charge of inefficiency or incapacity against respondent, the ALJ correctly focused on the evidence concerning the alleged unbecoming conduct which, in the instant case, appeared to relate to the alleged "use of certain words, phrases and the discussion of certain topics by Geurds with or within the hearing of her students." (Initial Decision at 15) He noted that the evidence had been "geared to prove that Geurds ha[d] spoken and acted inappropriately, most especially in respect to the discussion of matters mostly related to body parts, sex and words inappropriate to a 5th grade, indeed, in some instances, to any classroom perhaps other than in health class." *(Ibid.)*

Certain facts are undisputed. Respondent agrees that she reenacted, for her fifth-graders, an incident that had occurred several years prior, in which she had demonstrated to kindergarten boys – using a hat and a piñata stick – how to urinate into a commode without splattering. According to respondent, this reenactment indirectly resulted from complaints by fifth grade girls that their bathroom was messy. It was additionally, in respondent's view, a reminiscence for the children in her fifth grade class that had been in that kindergarten class. Respondent also agreed that after hearing a couple of fifth-grade boys call each other "douche-bags," she had explained to them – in the presence of the class – what douche-bags are and why they are used. (T3[1] at 100-01) In testifying about these incidents, respondent stated that in retrospect she would have handled them differently, and that her mistakes flowed from the fact that she had just transitioned from teaching kindergarteners to teaching fifth-graders. (T3 at 108-09)

[1] T3 is the transcript from the third day of hearing on November 17, 2009.

While both sides agree that the urination demonstration and the discussion of douche bags did take place, there are discrepancies between respondent's account of these incidents and the descriptions provided by students. In addition, respondent denies the balance of the allegations against her.

To evaluate the discrepancies, the ALJ examined the sources of the evidence against respondent. Of petitioner's seven witnesses, only two could be regarded as having had first-hand knowledge of what transpired in respondent's classroom, *ie.* , the twelve-year-old students A.L. and J.R. Petitioner presented a parent and four school officials, whose testimony about petitioner's classroom discussions was, however, hearsay and valuable only insofar as it could corroborate direct testimony. Petitioner also presented written notes about respondent's behavior (Petitioner's Exhibit P-8), that were taken during interviews with approximately fifty non-testifying students. While the ALJ recognized that the contents of P-8 are also hearsay, he considered them harmonious enough with the direct testimony of A.L. and J.R. – and with respondent's testimony – to accept as corroborating evidence.[2] (Initial Decision at 17-19)

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[2] P-8 consists of handwritten memorializations of interviews with over 50 students, thirty-seven of which reported nothing about inappropriate discussions by Geurds. Of the fourteen who said they noticed something unusual about Geurds' teaching, half of them only referred to the class in which Geurds recounted how she instructed kindergarten boys in bathroom protocol. Four of those students stated that during that incident Geurds used the word "penis." Of the remaining seven students that recalled respondent mentioning body parts:
M.Q. stated that respondent explained body parts after she found some students laughing at a book.
M.O. stated that respondent explained the word "pussy" after it was used by a student. He was not troubled by the incident.
M.G. stated that respondent corrected other students when they used the word "nuts," and told them that if that body part is injured it can't grow back.
S.O. recalled that respondent spoke of girls' body parts and it made him uncomfortable.
M.P. said that respondent had used the "V" word and had explained that "it's just girls' private parts." He thought it was ok for respondent to explain it because "some people don't take it serious and they don't know what the words mean."
N.O. said that respondent gives explanations of what words mean: "It surprises me what it really means." He related that douche-bag "is something to help a girl freshen up . . . a little more of an adult meaning." He was a little uncomfortable during such discussions. N.O. also related that some students looked at respondent's health books which have pictures of body systems.
S.Y. stated that it made her uncomfortable when respondent spoke about body parts – in connection with puberty, childbirth, etc. She was embarrassed "because the boys are looking at us." S.Y. agreed that respondent had spoken to the boys about testicles and called them "balls."

The first student to testify, A.L., recounted the above-mentioned incident in which respondent revisited the way she had instructed kindergarten boys on proper bathroom procedure. (T3 at 23-25) A.L. recalled that respondent had used the word "penis" on that occasion. (T3 at 23) A.L.'s recollection of respondent's above referenced explanation about douche bags was also part of her testimony. (T3 at 29-31) She stated that respondent used the word "vagina" in the course of that incident. (T3 at 30) It was A.L. that remembered respondent saying "s__t" after breaking a beverage bottle. (T3 at 31-32) She also testified that respondent told boys who had pulled their trousers above their waists that they would "get [their] balls in a bunch." (T3 at 33)

Of most concern was A.L.'s testimony that – after a student said to another student: "s__k my d__k," respondent reacted by saying "If you want someone to s__k your c__k, then go home and ask your family to do it for you." (T3 at 33-34) A.L. also testified that respondent – in reaction to a student using the F-word (T3 at 40) – explained the mechanics of sex. (T3 at 26-27)

J.R. testified about the douche-bag discussion – recalling that respondent had used hand gestures in the course of her explanations (T3 at 51-53) – and about the incident in which respondent allegedly told students that they would get their balls in a bunch. (T3 at 53-54) J.R. also maintained that at the beginning of the school year respondent told the students that she was a single parent and not gay. (T3 at 50-51) As to this latter statement, the Commissioner notes that J.R. was the only one of over fifty interviewed students to so testify. By way of contrast, respondent testified that she had mentioned her single status – and the fact that she did not lead an alternative life style – to <u>parents</u> at Back-to-School night, but <u>not</u> to the students. (T3 at 112-

13) Significantly – in the Commissioner's view – J.R.'s hearing testimony disclosed that on the morning of the hearing, her mother had quizzed her about her testimony:

> Q. Did you go over what it was you were going to say?
> A. Yes, but she just asked me if I remember stuff and I would either say yes or no if I remember something.
> . . . .
> Q. What did she say?
> A. She would ask stuff if I remembered, like if she said this or that.
> Q. Can you tell us what those things were?
> A. Gay, balls, cock, and the other one.
>
> (T3 at 58, emphasis added)

When respondent testified at the hearing she denied explaining the mechanics of sex (T3 at 109), making comments about boys' "nuts" or "balls" (T3 at 102-03; T3 at 110), telling her class that she is a single parent but not gay (T3 at 112), and, of most concern, responding to a child's epithet ("s__k my d__k") by saying "if you want someone to s__k your c__k then go home and ask your family to do it for you."[3] (T3 at 103; T3 at 111) Respondent also denied using the word "s__t" in class, but conceded that she might have used the word in exclamation when her vitamin water bottle broke – which would have been in between classes, as opposed to during class. (T3 at 109-10)

Focusing on the testimony of A.L., J.R., and respondent, and the contents of Petitioner's Exhibit P-8, the ALJ concluded that – given respondent's evident propensity for candid discussions with her students about health, sex, and crude language – it would not be surprising if respondent had, as some of the interviewed students had stated, used the names of body parts in the course of discussing urination technique or the purpose of douche bags, and

[3] The Commissioner notes that only one student, A.L., alleged that respondent told a male student to go home and ask his family to s__k his c__k. (T3 at 33-34)

utilized hand gestures while describing douche bag usage.[4] (Initial Decision at 19) Further, in light of respondent's tendency to correct her students' use of vulgarities by explaining the underlying meanings of such words, the ALJ concluded that it was plausible that A.L. reliably reported that respondent had mentioned the mechanics of sex. *(Ibid.)* More specifically, the ALJ accepted the testimony of A.L. that such a discussion was precipitated by respondent hearing a student use the word "f__k."[5] *(Ibid.)*

Thus, the ALJ found, as a matter of fact, that respondent did demonstrate urination technique in her fifth grade classroom, did instruct her class about the purpose of douche bags, did use the words "penis" and "vagina" in the course of those discussions and demonstrations, did "relate something of the mechanics of sex," did on one occasion use the word "s__t" in the classroom upon breaking a bottle, and did on at least one occasion refer to testicles as "nuts" or "balls." (Initial Decision at 19-20) However, the ALJ did not find credible A.L.'s contention that respondent told "a boy that he should go home and have his family perform oral sex." (Initial Decision at 20)

In rejecting the latter allegation, the ALJ explained that while respondent had a clear propensity to "speak freely and explain matters of health and sex to these young and impressionable students, there is in what she has admitted and most of what the students claimed no sense of nastiness, no suggestion of any lurid or prurient element." (Initial Decision at 19) He thus found that while respondent may have reacted to hearing a student say "s__k my d__k," she did not make the crude rejoinder attributed to her by A.L. *(Ibid).*

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[4] The Commissioner notes that J. R. was the only one of the fifty-plus interviewed students who stated that respondent had demonstrated with hand gestures the use of a douche bag (T3 at 52) and that respondent denied that she performed such a demonstration. (T3 at 101)

[5] The Commissioner notes that A.L. was the only interviewed student to say that, in response to a student using the "F word," respondent explained the mechanics of sex to the class, *i.e.,* that a boy puts his penis in a girl's vagina. (Petitioner's Exhibit P-16; (T3 at 26-28; T3 at 40)

Finally, the ALJ made no findings about J.R.'s assertion that respondent disclosed her marital status and sexual orientation to the students early in the school year. The Commissioner does not regard that particular assertion by J.R. as credible but, in any event, would not regard such a disclosure as rising to the level of "unbecoming conduct."

Ultimately, the ALJ found that respondent's approach to dealing with students' use of vulgarities or handling other incidents relating to matters of health and hygiene was well-intentioned but inappropriate. (Initial Decision at 20) He found that the class discussions described in the evidence before the ALJ were outside the boundaries of the curriculum for which she was responsible, that the language she used was unprofessional and insensitive to her students and their parents, and that she acknowledged same. Consequently, the ALJ concluded that petitioner had proven that respondent had manifested unbecoming conduct. (*Ibid.)*

In addressing the appropriate sanction, the ALJ recommended suspension and increment withholding, not removal, as requested by petitioner. Applying the relevant legal standards articulated in *In re Fulcomer*, 93 *N.J. Super.* 404, 420-22 (App. Div. 1967) and other cases for determining penalties for unbecoming conduct, the ALJ concluded that respondent is not "a lost cause." (Initial Decision at 21) Contrary to petitioner's assertions, the ALJ found that respondent had acknowledged the inappropriateness of her comments and actions and would likely not repeat them. (Initial Decision at 20) He was persuaded that respondent could continue to serve as an effective teacher. (Initial Decision at 21)

Further, the ALJ contrasted respondent's misguided attempts to capitalize on "teachable moments" with the behavior of the subjects of prior tenure charges who, *inter alia,* cultivated improper familiarity with students, preyed on students, undermined students' morals and endangered students' health and well-being. *(Ibid.)* The catalyst for each of the

inappropriate class discussions in the present case was an incident of student misbehavior which respondent endeavored to correct; nothing in the record suggests that respondent had a venial or immoral agenda.

Ultimately, the ALJ recommended the forfeit of 120 days of salary and one year's increment, concluding that "[s]uch sanction should assure that [respondent] will conduct herself in the future in an appropriate manner, respecting the limits of her role and the sensibilities of her students." (Initial Decision at 22) This recommendation was based upon his determination that the record, overall, painted a picture of imprudent behavior that did not rise to the level of conduct warranting respondent's removal, loss of tenure and significant career damage. *(Ibid.)* After reviewing the record, the Initial Decision, petitioner's exceptions, respondent's reply exceptions, and relevant case law, the Commissioner adopts the ALJ's recommendation.

Petitioner's exceptions urge that the ALJ was correct in finding unbecoming conduct but erred in declining to uphold the penalty of dismissal: the "only sanction that can be justified on the facts of this case is termination of employment." (Petitioner's Exceptions at 35) While conceding that in the past tenured teachers have received lenient treatment for behavior commensurate with respondent's, petititioner contends that respondent did not show the contrition or awareness of her improper conduct that was necessary to avoid the penalty of termination. (Petitioner's Exceptions at 32-33) More specifically, petitioner argues that respondent's denial of some of the students' allegations suggests that her remorse is shallow and insufficient to support a return to work. (Petitioner's Exceptions at 33-34)

Petitioner apparently made these same arguments in the OAL. The ALJ rejected them, concluding that the most likely explanation for the fact that respondent denied some of the facts that he ultimately found, was that she "simply [did] not remember all that she said."

(Initial Decision at 21-22) He felt that respondent was not willfully obfuscating facts because, *inter alia,* what respondent admitted was similar in character to what she did not recollect. (Initial Decision at 22) Insofar as his opinion on this issue is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *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).

The Commissioner finds that the record does not belie the ALJ's credibility determination, factual findings or conclusions of law. The Initial Decision is thus adopted as the final decision in this case and the petition is dismissed. Accordingly, respondent may continue teaching but will forfeit 120 days of salary and one year's increment.

In addition, to help insure that respondent is able to correct the inappropriate behavior discussed *supra*, the Commissioner orders that respondent – before the end of 2011 – complete coursework in pedagogy that addresses: 1) the differences in the social and psychological needs of children of different age and grade levels, 2) the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control, and 3) professional classroom demeanor. The coursework will be subject to reasonable review and approval by petitioner, who may apply to the Commissioner if respondent fails to comply with the above articulated terms.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 8/27/10
Date of Mailing: 8/27/10

[6] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF THE TENURE HEARING OF KIMBERLY GEURDS, EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY

COMMISIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioning Board filed tenure charges of conduct unbecoming against respondent Kimberly Geurds – a tenured elementary school teacher – for allegedly engaging in inappropriate conversation in her classroom, including speaking to her students about her own personal situation, discussing matters of a private or sexual nature in class, and using words and phrases that were not appropriate for a teacher in such a setting. The petitioning Board sought revocation of respondent's tenure and termination of her employment.

The ALJ found that: the Board met its burden to prove by a preponderance of the credible evidence that respondent did engage in inappropriate conduct for a teacher; although respondent's inappropriate conduct was not of a lurid or prurient nature, she did engage in discussion in the classroom of topics of a private and/or sexual nature which would properly fall under the category of health education rather than the fifth grade curriculum which respondent was responsible for teaching; respondent's conduct was not proper and her choices as to what subjects or language to use or discuss in the classroom were not justified by the circumstances; respondent now recognizes that if it was necessary to address the actions or comments of students that were not proper, she should have done so either privately, or through referral to proper school personnel to deal with the situation, and/or to advise the child's parents of the facts and let them deal with their children; respondent's conduct demonstrated failure to recognize boundaries and the sensitivities of students – especially pre-teenagers – and to respect the prerogatives of parents. The ALJ concluded that, while her conduct was certainly unprofessional, it did not rise to a level that would justify terminating her tenure and career. Accordingly, the ALJ ordered that respondent forfeit 120 days of pay and one year's salary increment.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. Additionally, to enable respondent to correct her inappropriate behavior, the Commissioner ordered Ms. Geurds to complete coursework in pedagogy addressing: the social and psychological needs of different age and grade levels; the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control; and classroom demeanor.

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

August 11, 2010

OAL DKT NO.EDU 8965-08
AGENCY DKT. NO. 290-9/08

IN THE MATTER OF THE TENURE HEARING OF KIMBERLY GEURDS, EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY	:	COMMISIONER OF EDUCATION
	:	DECISION

The petitioning school district brought charges against tenured teacher Kimberly Geurds, maintaining that her conduct was unbecoming to a sufficient degree to warrant dismissal. No charges of "inefficiency, incapacity, . . . or other just cause" were alleged, pursuant to *N.J.S.A.* 18A:6-10. The first count of the tenure charges alleged several incidents of inappropriate comments and discussions between respondent and her students. The second count alleged improper communications between respondent and various school employees, but petitioner withdrew that count by letter dated October 14, 2009 from petitioner's counsel to ALJ Jeff S. Masin and respondent's counsel.

Upon its transmission to the Office of Administrative Law (OAL), the case was initially assigned to Administrative Law Judge (ALJ) Dennis Blake, who presided over the first two hearing days. The case was subsequently reassigned to ALJ Masin, who reviewed the record -- including audio recordings of the testimony given at the above-referenced two hearing days. ALJ Masin determined that there was "no need for the re-presentation of the testimony of the several witnesses who testified on those hearing dates." Letter dated August 25, 2009, from ALJ Masin to counsel for the parties. He was satisfied that the hearing could be "completed without the recalling of such witnesses without any prejudice to the parties." *Ibid.* No objections having

been articulated by the parties, ALJ Masin presided over a third hearing day and issued an Initial Decision recommending that Guerds forfeit 120 days of salary and one year's increment.

Because petitioner brought no charge of inefficiency or incapacity against respondent, the ALJ correctly focused on the evidence concerning the alleged unbecoming conduct which, in the instant case, appeared to relate to the alleged "use of certain words, phrases and the discussion of certain topics by Geurds with or within the hearing of her students." Initial Decision at 15. He noted that the evidence had been "geared to prove that Geurds ha[d] spoken and acted inappropriately, most especially in respect to the discussion of matters mostly related to body parts, sex and words inappropriate to a 5th grade, indeed, in some instances, to any classroom perhaps other than in health class." *Ibid.*

Certain facts are undisputed. Respondent agrees that she reenacted, for her fifth-graders, an incident that had occurred several years prior, in which she demonstrated to Kindergarten boys, using a hat and a piñata stick, how to urinate into a commode without splattering. According to respondent, this reenactment indirectly flowed from complaints by fifth grade girls that their bathroom was messy. It was additionally, in respondent's view, a reminiscence for the children in her fifth grade class that had been in that Kindergarten class. Respondent also agreed that after hearing a couple of fifth-grade boys call each other "douche-bags," she had explained to them – in the presence of the class -- what douche-bags are and why they are used. 3T100-01. In testifying about these incidents, respondent stated that in retrospect she would have handled them differently, and that her mistakes flowed from the fact that she had just transitioned from teaching Kindergarteners to teaching fifth-graders. 3T108-09.

While both sides agree that the urination demonstration and the discussion of douche bags did take place, there are discrepancies between respondent's account of these

incidents and the descriptions provided by students. In addition, respondent denies the balance of the allegations against her.

To evaluate the discrepancies the ALJ examined the sources of the evidence against respondent. Of petitioner's seven witnesses, only two could be regarded as having had first-hand knowledge of what transpired in respondent's classroom, *i.e.,* the twelve-year-old students A.L. and J.R. Petitioner presented a parent and four school officials whose testimony about petitioner's classroom discussions was, however, hearsay and valuable only insofar as it could corroborate direct testimony. Petitioner also presented written notes about respondent's behavior (Petitioner's Exhibit P-8), that were taken during interviews with approximately fifty non-testifying students. While the ALJ recognized that the contents of P-8 are also hearsay, he considered them harmonious enough with the direct testimony of A.L. and J.R. – and with respondent's testimony – to accept as corroborating evidence.[1] Initial Decision at 17-19.

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[1] P-8 consists of handwritten memorializations of interviews with oner 50 students, thirty-seven of which reported nothing about inappropriate discussions by Geurds. Of the fourteen who said they noticed something unusual about Geurds' teaching, half of them only referred to the class in which Geurds recounted how she instructed Kindergarten boys in bathroom protocol. Four of those students stated that during that incident Geurds used the word "penis." Of the remaining seven students that recalled respondent mentioning body parts:
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M.O. stated that respondent explained the word "pussy" after it was used by a student. He was not troubled by the incident.
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S.O. recalled that respondent spoke of girls' body parts and it made him uncomfortable.
M.P. said that respondent had used the "V" word and had explained that "it's just girls' private parts." He thought it was ok for respondent to explain it because "some people don't take it serious and they don't know what the words mean."
N.O. said that respondent gives explanations of what words mean: "It surprises me what it really means."
He related that douche-bag "is something to help a girl freshen up . . . a little more of an adult meaning." He was a little uncomfortable during such discussions. N.O. also related that some students looked at respondent's health books which have pictures of body systems.
S.Y. stated that it made her uncomfortable when respondent spoke about body parts – in connection with puberty, childbirth, etc. She was embarrassed "because the boys are looking at us." S.Y. agreed that respondent had spoken to the boys about testicles and called them "balls."

The first student to testify, A.L., recounted the above-mentioned incident in which respondent revisited the way she had instructed Kindergarten boys on proper bathroom procedure. 3T23-25 A.L. recalled that respondent had used the word "penis" on that occasion. 3T23 A.L.'s recollection of respondent's above referenced explanation about douche bags was also part of her testimony. 3T29-31 She stated that respondent used the word "vagina" in the course of that incident. 3T30 It was A.L. that remembered respondent saying "s__t" after breaking a beverage bottle. 3T31-32 She also testified that respondent told boys who had pulled their trousers above their waists that they would "get [their] balls in a bunch." 3T33.

Of most concern was A.L.'s testimony that -- after a student said to another student: "s__k my d__k," respondent reacted by saying "If you want someone to s__k your c__k, then go home and ask your family to do it for you." 3T33-34 A.L.'s also testified that respondent -- in reaction to a student using the F-word, 3T40, -- explained the mechanics of sex. 3T26-27.

J.R. testified about the douche-bag discussion, recalling that respondent had used hand gestures in the course of her explanations, 3T51-53, and about the incident in which respondent allegedly told students that they would get their balls in a bunch. 3T53-54. J.R. also maintained that at the beginning of the school year respondent told the students that she was a single parent and not gay. 3T50-51. As to this latter statement, the Commissioner notes that J.R. was the only one of over fifty interviewed students to so testify. 3T50-51. By way of contrast, respondent testified that she had mentioned her single status – and the fact that she did not lead an alternative life style -- to <u>parents</u> at Back-to-School night, but <u>not</u> to the students. 3T112-13. Significantly -- in the Commissioner's view -- J.R.'s hearing testimony disclosed that on the morning of the hearing, her mother had quizzed her about her testimony:

Q. Did you go over what it was you were going to say?

A. Yes, but she just asked me if I remember stuff and I would either say yes or no if I remember something.

. . . .

Q. What did she say?
A. She would ask stuff if I remembered, like if she said this or that.
Q. Can you tell us what those things were?
A. Gay, balls, cock, and the other one.

3T58 (Emphasis added.)

When respondent testified at the hearing she denied explaining the mechanics of sex, 3T109, making comments about boys' "nuts" or "balls," 3T102-02; 3T110, telling her class that she is a single parent but not gay, 3T112, and, of most concern, responding to a child's epithet ("s__k my d__k") by saying "if you want someone to s__k your c__k then go home and ask your family to do it for you."[2] 3T103; 3T111. Respondent also denied using the word "s__t" in class, but conceded that she might have used the word in exclamation when her vitamin water bottle broke – which would have been in between classes, as opposed to during class. 3T109-10.

Focusing on the testimony of A.L., J.R., and respondent, and the contents of Petitioner's Exhibit P-8, the ALJ concluded that – given respondent's evident propensity for candid discussions with her students about health, sex, and crude language -- it would not be surprising if respondent had, as some of the interviewed students had stated, used the names of body parts in the course of discussing urination technique or the purpose of douche bags, and utilized hand gestures while describing douche bag usage.[3] Initial Decision at 19. Further, in light of respondent's tendency to correct her students' use of vulgarities by explaining the underlying meanings of such words, the ALJ concluded that it was plausible that A.L. reliably reported that respondent had mentioned the mechanics of sex. *Ibid.* More specifically, the ALJ

[2] The Commissioner notes that only one student, A.L., alleged that respondent told a male student to go home and ask his family to s__k his c__k. 3T33-34.

[3] The Commissioner notes that J. R. was the only one of the fifty-plus interviewed students who stated that respondent had demonstrated with hand gestures the use of a douche bag, 3T52, and that respondent denied that she performed such a demonstration. 3T101 .

accepted the testimony of A.L. that such a discussion was precipitated by respondent hearing a student use the word "f__k."[4] *Ibid.*

Thus, the ALJ found, as a matter of fact, that respondent did demonstrate urination technique in her fifth grade classroom, did instruct her class about the purpose of douche bags, did use the words "penis" and "vagina" in the course of those discussions and demonstrations, did "relate something of the mechanics of sex," did on one occasion use the word "s__t" in the classroom upon breaking a bottle, and did on at least one occasion refer to testicles as "nuts" or "balls." Initial Decision at 19-20. However, the ALJ did not find credible A.L.'s contention that respondent told "a boy that he should go home and have his family perform oral sex." Initial Decision at 20.

In rejecting the latter allegation, the ALJ explained that while respondent had a clear propensity to "speak freely and explain matters of health and sex to these young and impressionable students, there is in what she admitted and most of what the students claimed no sense of nastiness, no suggestion of any lurid or prurient element." Initial Decision at 19. He thus found that while respondent may have reacted to hearing a student say "s__k my d__k," she did not make the crude rejoinder attributed to her by A.L. *Ibid.*

Finally, the ALJ made no findings about J.R.'s assertion that respondent disclosed her marital status and sexual orientation to the students early in the school year. The Commissioner does not regard that particular assertion by J.R. as credible but, in any event, would not regard such a disclosure as rising to the level of "unbecoming conduct."

Ultimately, the ALJ found that respondent's approach to dealing with students' use of vulgarities or handling other incidents relating to matters of health and hygiene was well-

[4] The Commissioner notes that A.L. was the only interviewed student to say that, in response to a student using the "F word," respondent explained the mechanics of sex to the class, *i.e.,* that a boy puts his penis in a girl's vagina. Petitioner's Exhibit P-16; 3T26-28; 3T40.

intentioned but inappropriate. Initial Decision at 20. He found that the class discussions described in the evidence before the ALJ were outside the boundaries of the curriculum for which she was responsible, that the language she used was unprofessional and insensitive to her students and their parents, and that she acknowledged same. *Ibid.* Consequently, the ALJ concluded that petitioner had proven that respondent had manifested unbecoming conduct. *Ibid.*

On the other hand, the penalty that the ALJ recommended was not removal, as requested by petitioner. Applying the relevant legal standards articulated in *In re Fulcomer*, 93 *N.J. Super.* 404, 420-22 (App. Div. 1967) and other cases for determining penalties for unbecoming conduct, the ALJ concluded that respondent is not "a lost cause." Initial Decision at 21. Contrary to petitioner's assertions, the ALJ found that respondent had acknowledged the inappropriateness of her comments and actions and would likely not repeat them. Initial Decision at 20. He was persuaded that respondent could continue to serve as an effective teacher. Initial Decision at 21.

Further, the ALJ contrasted respondent's misguided attempts to capitalize on "teachable moments" with the behavior of the subjects of prior tenure charges who, *inter alia,* cultivated improper familiarity with students, preyed on students, undermined students' morals and endangered students' health and well-being. *Ibid.* The catalyst for each of the inappropriate class discussions was an incident of student misbehavior which respondent endeavored to correct; nothing in the record suggests that respondent had a venial or immoral agenda.

Ultimately, the ALJ recommended the forfeit of 120 days of salary and one year's increment, concluding that "[s]uch sanction should assure that [respondent] will conduct herself in the future in an appropriate manner, respecting the limits of her role and the sensibilities of her students." Initial Decision at 22. This recommendation was based upon his determination that

the record, overall, painted a picture of imprudent behavior that did not rise to the level of conduct warranting respondent's removal, loss of tenure and significant career damage. *Ibid.* After reviewing the record, the Initial Decision, petitioner's exceptions, respondent's reply exceptions, and relevant case law, the Commissioner adopts the ALJ's recommendation.

Petitioner's exceptions urge that the ALJ was correct in finding unbecoming conduct but erred in declining to uphold the penalty of dismissal: the "only sanction that can be justified on the facts of this case is termination of employment." Petitioner's exceptions at 35. While conceding that in the past tenured teachers have received lenient treatment for behavior commensurate with respondent's, petititioner contends that respondent did not show the contrition or awareness of her improper conduct that was necessary to avoid the penalty of termination. Petitioner's exceptions at 32-33 More specifically, petitioner argues that respondent's denial of some of the students' allegations suggests that her remorse is shallow and insufficient to support a return to work. Petitioner's Exceptions at 33-34

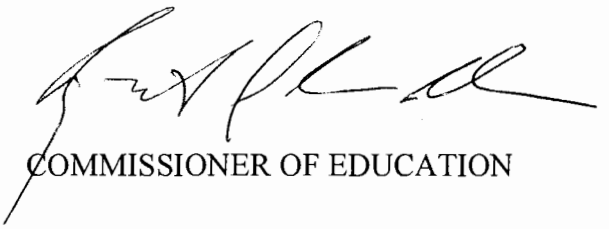
Petitioner apparently made these same arguments in the OAL. The ALJ rejected them, concluding that the most likely explanation for the fact that respondent denied some of the facts that he ultimately found, was that she "simply [did] not remember all that she said." Initial Decision at 21-22. He felt that respondent was not willfully obfuscating facts because, *inter alia,* what respondent admitted was similar in character to what she did not recollect. Initial Decision at 22. Insofar as his opinion on this issue is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *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.* 267, 273 (App. Div. 2004).

The Commissioner finds that the record does not belie the ALJ's credibility determination, factual findings or conclusions of law. The Initial Decision is thus adopted as the final

decision in this case and the petition is dismissed. Accordingly, respondent may continue teaching but will forfeit 120 days of salary and one year's increment.

In addition, to help insure that respondent is able to correct the inappropriate behavior discussed *supra,* the Commissioner orders that respondent – before the end of 2011 – complete coursework in pedagogy that addresses 1) the differences in the social and psychological needs of children of different age and grade levels, 2) the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control, and 3) professional classroom demeanor. The coursework will be subject to reasonable review and approval by petitioner, who may apply to the Commissioner if respondent fails to comply with the above articulated terms.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 8|11|10

Date of Mailing: 8|11|10

[5] 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 08965-08

AGENCY DKT. NO. 290-9/08

IN THE MATTER OF THE TENURE HEARING OF KIMBERLY GEURDS, EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY.

David B. Rubin, Esq., for petitioner East Windsor Regional School District Board of Education[1]

Arnold M. Mellk, Esq., for respondent Kimberly Geurds (Wills, O'Neill & Mellk, attorneys)

Record Closed: March 18, 2010 Decided: April 9, 2010

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

The East Windsor Regional School District Board of Education ("East Windsor" or "Board") filed tenure charges with the Commissioner of Education, alleging that one of its tenured teachers, Kimberly Geurds (Geurds), had engaged in conduct unbecoming a teacher. The Board sought revocation of her tenure and termination of her employment in accordance with the Tenured Employees Hearing Act, N.J.S.A.

[1] The Board of Education was originally represented by Mark J. Blunda, Esq., of Apruzzese, McDermott, Mastro & Murphy, who tried the case before the prior judge and filed the motion for recusal. David B. Rubin, Esq. was then substituted as counsel for the Board and tried the case before this judge and filed the post-hearing briefs for his client.

18A:35-1. The Commissioner certified the tenure charges and transferred the contested case to the New Jersey Office of Administrative Law (OAL) for hearing. The case was originally heard by a judge who, after conducting a partial hearing, was recused from the case on motion of the Board. Thereafter the case was reassigned to this judge, who, after review of the existing record and the positions of the parties, determined that he could continue the hearing to conclusion and render a decision after review of transcripts, exhibits and the additional material produced on a final hearing day held before this judge on November 17, 2009. The parties submitted closing statements and replies and the record closed on March 18, 2010.

The Charges[2]

The tenure charges filed by the Board recite a number of matters regarding Ms. Geurds, all relating to her assignment to teach 5th grade during the 2007-2008 school year at the Perry L. Drew Elementary School (Drew). Importantly, while the recitation of matters in the first count of the charges touches on a number of items that appear to relate more to concerns about job competence and academic concerns, perhaps touching on inefficiency,[3] and while some of the testimony presented early in the matter arguably touched on these concerns, the real thrust of the charges, and indeed of the evidence offered at trial, dealt with allegations that Geurds spoke to her students about her own personal situation and used words and phrases and discussed matters in class that were inappropriate for a teacher in such a setting. The second count dealt with allegations involving certain improper correspondence that the Board alleged Geurds was party to or involved with. In his Statement of Evidence Supporting Tenure Charges, Ronald E. Bolandi, Superintendent of the East Windsor Regional School District, characterized the charges against Geurds as "misconduct and unbecoming conduct." As such, the Board did not seek to prove inefficiency or incompetence. And

[2] It should be noted that prior to the formal institution of tenure charges, the Board insisted on Ms. Geurds undergoing a psychiatric evaluation, which resulted in an opinion that she had no significant or definable psychiatric condition.

[3] During the summer before the start of the school term, several parents presented requests to the school's principal, Darlene Nemeth, asking that their children be assigned to another teacher rather than to Ms. Geurds. They purportedly expressed concerns about lack of structure, control and discipline in Geurd's classroom. During the fall of 2007, additional complaints were received by Nemeth, concerning aspects of Geurd's performance.

the Board ultimately did not pursue the second count, representing that it did not believe that it could proceed due to significant concerns as to the ability of the Board to present necessary proof to meet its burden in respect to that allegation, especially with regard to issues involving the need for expert evidence to prove any misconduct by Geurds. The Board requested that that charge be withdrawn and I concur in that result.

Evidence

As noted, testimony was first presented before the judge previously assigned to the case.[4] Darlene Nemeth, Principal of Drew in 2007-2008 and a teacher for thirty-two years, testified that the school taught kindergarten through fifth grade. She and Ms. Geurds served together at Drew for four years. Geurds had been a kindergarten teacher, but had a chronic illness, advanced Lyme disease, and given that kindergarten required that teachers have a lot of energy, it was thought that fifth grade might be an easier assignment for her to manage. She was advised of this assignment on June 2, 2007. She was allowed to skip staff meetings and go home to rest. She had time in the summer prior to the start of the 2007-2008 school year during which to engage in staff development and prepare for September.

During the summer, Nemeth received e-mails or written requests from parents that their child not be placed in Geurds' class. There were several of these requests and they involved parents whose students had previously been in Geurds' class and felt that the class was not sufficiently structured for their child and that they wanted a different teacher. Nemeth would usually honor such requests if they were specific enough. She did not share these requests with Geurds.

In fifth grade, pupils would be in Geurds' class for home base and would in some instances switch for math and social studies, but always for science. After the start of the school year, Nemeth received "numerous" phone calls from parents, generally

[4] It is the view of this judge that some of this testimony, offered before I sat on the case, might be considered irrelevant to the misconduct charge, as it might better be thought of in regard to any inefficiency issue that the Board most clearly did not identify as the basis of the tenure charge. However, it might also be thought of at least to some degree as preliminary to the evidence of pupil and parental concern about language and topics that is the real thrust of the tenure charges.

complaining about academic issues, such as a lack of sufficient homework and/or a failure to teach how to do the homework or to define what the homework entailed. She maintained a journal of these complaints with documentation of each. It was expected that a teacher would give homework totaling between forty-five minutes and one hour a day. It was reported that Geurds was telling students that if she had to check their homework Geurds would herself then have homework and that she was in bed by 8:30 p.m. Nemeth claimed that whenever she received a complaint she always told the teacher and asked the parent if they had contacted the teacher about the matter.

N.R., the mother of student J.R., first contacted Nemeth about homework issues. She reported that her daughter told her that Geurds said that she was "forced" to give homework, but that Geurds would "whisper" that the amount would lessen. When Nemeth asked Geurds if she had told students that she had to increase homework, Geurds admitted that she did tell students that Nemeth had told her she had to increase homework. N.R. again contacted her on November 13, 2007, very upset that things were still not working and asking that her daughter be assigned to another teacher. She felt that her daughter was learning nothing. She also said that she had other things to tell Nemeth, but that she felt uncomfortable doing so. Nemeth asked R. to be patient, as she was trying to help Geurds.[5]

In November, Nemeth was told about certain incidents that allegedly had occurred in Geurds' classroom. One involved a student using an IPOD, and another involved rubber bands that were shot in class. She spoke to Geurds about these and Geurds told her that she had taken the rubber bands away.

On November 26, Ms. L. reported that profanity had been used in the class, including the "f" word, and there had been references made to the penis and vagina

[5] Nemeth testified that staff developers had been showing Geurds how to administer the Developmental Reading Assessment, which Geurds had not been trained on. Workshops had been offered after the close of school during the summer (the contract year was September 1 to June 30) and at the school all during the year, but Geurds was often ill. As of mid-November, assessments of students' fluency and comprehension had been done with the assistance of the staff developers in order to get the assessment process moving. Nemeth also assisted Geurds with spelling and tried to set her up with a Master Teacher to observe her. This was done in November and it was hoped that such activity would continue. In November, an assistant principal also modeled a reading and vocabulary lesson for her with students.

and card playing had been permitted on the half-day session before Thanksgiving. Geurds had also been aware of IPODs in the room and while such were not permitted, she had allegedly said that as long as she did not see them, the students could keep them.

Nemeth explained that when parents complained about a teacher, she would generally speak to the teacher within twenty-four hours. She did so with Geurds, as "long as she or I was in school", but these were verbal discussions and no memos were prepared about them. She recalled having spoken to Geurds about the use of curse words and about topics that were not appropriate to discuss in class.

On December 6, 2007, Nemeth received another telephone call from Ms. R., who reported that her daughter had come home and wanted to know what "cocks" meant, as she had heard this term used in the classroom. R. also reported that the class had watched an "R" rated video without any notice to parents, that at the beginning of the school year Geurds had told the children that she was single, a mom, had never been married and was not gay, that Geurds had given a "full explanation" of how a douche bag worked when a student called another by that term and a student asked what it was, that Geurds had stated that a boy who had pulled up his pants did not want to get his "balls in a bunch", and that someone has asked Geurds what sex was and she explained the mechanics of sex. Ms. R. wanted Geurds kept as far away from her daughter as possible. Nemeth told her that she would get back to her and contacted Deborah Feaster, the District's Director of Elementary Programs and Personnel.

On December 10, another mother, Mrs. Y., called and reported that Geurds had told students that she was not happy teaching 5th grade and that her daughter did not want to go to school anymore. She came home each day crying. She also expressed concern about a book that students were looking at in class, the "Belly Button Book." This had drawings of breast feeding and woman's body parts and was not a part of the curriculum. Nemeth went to the classroom and found the book. It is a book for three and four year olds about a baby coming into the family.

Ms. Nemeth discussed the interviews she conducted in December 2007, with "any students" who had Geurds in the fall of 2007, whether in her home base or not. These interviews were conducted after Geurds had been administratively suspended pending investigation on December 7, 2007. The students, who did not know why they had been summoned to her office, were interviewed one at a time in Nemeth's office by Nemeth and Lori Stein, an assistant principal at Drew. The students were asked how things were going in school and whether anything had occurred that made them upset or they felt was inappropriate. Stein took notes as Nemeth asked the questions. Several reported the use of curses by other students, references by Geurds to the douche bag, the book with pictures of body parts, references by students and/or Geurds to "balls" and "nuts," and a demonstration by Geurds of how to "aim straight" in the bathroom. Others did not recall anything that made them uncomfortable, or said that they heard nothing or had "nothing to report", or that "everything is okay." J.R. and A.L. were interviewed by Ms. Feaster and Lori Stein.

After December 7, 2007, when Geurds was removed from her classroom, and told not to come to work, Nemeth was directed by the Superintendent to pack up personal items located in Geurds' classroom. She documented these items, many of which were not "standard" items in a classroom. Nemeth had knowledge before December 21 that there were lots of materials in the room. Some things found at the time of their removal were dangerous, such as knives, a sledge hammer, and butane lighters. Others included a crock pot, rake, screwdriver, tool box, drills, toys, sixty rubber ducks, baby blocks, tools, baby food, cleaning supplies, a vacuum cleaner, stepladder, spade, shower curtains, nails, screws, mops, and a tea kettle. These were items that Nemeth would not have in her classroom. She had not seen them in October when she "walked through" the classroom (at which time she did not look into drawers or closets) and had not discussed them with Geurds. Nemeth never had an opportunity to discuss the purported "R" rated video with Geurds.

Nemeth opined that discussions of body parts or the presence of a book such as "The Belly Button Book" was not proper in Geurds' classroom as they were not part of

the curriculum she taught. Some of the items found in the classroom were inappropriate, although she agreed that there was no written requirement for approval of non-instructional items in the classroom.

Lori Stein, a former special education teacher and supervisor of special services and now assistant principal at Drew, testified that she and Deborah Feaster conducted the interviews of J.R. and A.L. Separate interviews of each student were held in a conference room after the students were requested to come there from class. After some small talk to try to make each girl comfortable, they were asked what was going on in class and how things were. There was no written script. They were asked about what words they heard in class. J.R., who was interviewed first, was clearly uncomfortable reciting some of the words she reported hearing. She commented that "we hear things that teachers don't usually say in the classroom." She asked if she had to say the words. She blushed and looked scared and uncomfortable about what she was talking about. A.L. was then interviewed. She exhibited a similar demeanor.

Stern acknowledged that she did not ask the students the context in which the various words and phrases were used. Having heard what these students reported, Stein opined that these were inappropriate comments and words for a teacher and that it was "not our job to teach kids these words." Stein acknowledged that not all of the students interviewed who reported the use of "inappropriate" language were as bothered by them, as some were seemingly more comfortable with foul language.

Deborah Feaster, Director of Elementary School Programs and Personnel for the District, and formerly a school principal at Drew through the 2005 school year, received a call from Ms. Nemeth on December 6 regarding parental complaints and asked that she document them. She interviewed J.R. and A.L., each of whom she knew. She tried to make them comfortable and asked what was going on in the classroom. She found them to be embarrassed by what they reported. The language that they reported was not appropriate in the classroom; the cursing by students should have been addressed by Geurds. Some words could be used in the appropriate setting, such as in sex education class, but that was not part of the curriculum that Geurds was

responsible for. If a student uses a vulgarity, the proper response would not be to teach the whole class about the matter, but to address it privately and call the child's parents.

East Windsor School District Superintendent Ronald E. Belondi, a school superintendent with various districts for a period of over eighteen years, testified that Ms. Geurds' alleged inappropriate comments came to his attention on December 7, when Ms. Feaster e-mailed him. He directed Feaster to investigate. He wanted as many students interviewed as possible that Friday, so as to avoid concerns that could arise if the children went home over the weekend and spoke to each other about the matters. After the interviews were completed, Bolandi developed a series of questions to pose to Geurds at a meeting to be held with her in January. At that meeting, Geurds admitted using some words and denied using others. While in some instances she claimed that the incidents that prompted comments or discussions that she admitted to had arisen in what she deemed to be "teachable moments", in his testimony Belondi opined that instead, when faced with these situations, Geurds should have stopped the discussion, spoken to the students privately and alerted the parents to the matter if necessary.

A.L., who at the time of her testimony was thirteen years old, was a student of Ms. Geurds in kindergarten and later in the 5th grade in 2007-2008, except for science and fine arts. She described the classroom, in which there were both male and female students, as "overwhelming" and "colorful." She recalled that on one occasion in the fall semester, Geurds mentioned that when boys in kindergarten went to the bathroom, they often missed the toilet and deposited urine on the seat. Girls would complain about this. Geurds explained to her fifth grade class that she had explained to the kindergarten boys how they should go to the bathroom. She described how she had used a straw hat as the toilet bowl and a yardstick to demonstrate the proper position of the penis to properly urinate. A.L. reported that none of the fifth grade boys had said that they were having any problem with this function. The single bathroom for the kindergarten class was located in the classroom, while in fifth grade separate boys and girls rooms were located outside of the classroom.

A.L. also recalled that Geurds explained to the class what "sex" meant, referring to a male placing his penis in a female's vagina. She could not recall how this discussion arose, but on cross-examination remembered that some boys had "used the f word" before Geurds explained sex. In fifth grade sex education was conducted separately for boys and girls (except for a movie about reproduction) and was taught by gym teachers. Geurds did not teach sex education and her discussion of the definition of sex was not a part of a lesson. A.L. "felt kind of uncomfortable" with this discussion.

Geurds also told the mixed class what a douche bag was. One of the students had called another student by that term. Geurds asked them if they knew what the term meant. She then explained what it was and how it was used, noting its use in the case of an infection in the vagina. This discussion was also "uncomfortable" for A.L.

A.L. also described how, on one occasion when a vitamin water bottle dropped and cracked during what the witness thought was a math class, Geurds said "shit" loud enough for a few of the students to hear. On another occasion, when A.L. used too much glue on a paper, Geurds told her that she should use only a dot "no bigger than a bugger." Another time, when boys had their pants hiked up, Geurds commented that "you're going to get balls in a bunch." Finally, when a boy said to another boy to "suck my dick," Geurds responded that "if you want someone to suck cock then go home and ask your family to do it for you." This comment was loud enough for everyone to hear. She denied that Geurds had instead only commented that if the boy wanted to talk like that that he had better talk to his parents.

J.R., twelve years old and a member of Geurds' fifth grade class for home base (home room class), language arts and social studies only, said that Geurds used words such as "gay," "balls," "douche bag" and "cock." At the beginning of the year she told the class that she was not married and not gay. The witness did not recall how this came up. She remembered that boys were calling each other douche bags before Geurds explained what it was and how it was used. She made a hand movement between her legs to demonstrate the method. At the time this occurred, some students

were just entering the classroom. Both boys and girls were present. J.R. was "shocked." The comment about "balls" came when two boys were kicking at each other's private areas. Geurds remarked, "You're going to get your balls in a bunch." According to R., "everyone could hear." Again, the student was "shocked" as this sort of comment was not one that a teacher should be saying. The "cock" reference was reported to her by A.L. and was not something that J.R. heard herself. She told her mother about the teacher's comments, but at first her mother just told her to "just do your best."

N.R., J.R.'s mother, testified that her daughter told her about the teacher's "not married, not gay" comment as early as the first day of school in the fall of 2007. She later told of the demonstration of how to douche in response to the students' "douche bag" references. J. appeared to be shocked by her teacher's comments and conduct. She also told her about the boys kicking and Geurds' comments about "balls in bunch," which Ms. R. found a bit funny but nevertheless inappropriate. Then towards the end of the fall term, J. came home and asked what "cock" meant. She told her and asked how this word had come up. When she heard what A.L. had reported about this to J., Ms. R. could not believe what Geurds had said. Her daughter also told her of the discussion of what sex meant, but she did not know the context for this comment.

Ms. R. denied that she was told by school administrators to speak to Geurds about her concerns regarding the class. She also denied that she ever threatened to go to the media. She never wrote a letter of complaint to either Geurds or the board. She never told Geurds about any concerns, although she was in her presence for both Back-to-School night and a parent-teacher conference.

In addition to the testimony of the two students, the Board presented summaries of interviews conducted with many students of Ms. Geurds. As will be discussed below, some said they heard words or comments that appear to agree with the comments of J.R. and A.L., others heard and saw nothing. As these persons did not actually testify at the hearing, the evidential significance of their reported comments will be discussed in the analysis section of this opinion.

Kimberly Geurds has an early childhood education associate's degree, a bachelor's degree in education and a certification for K-8. She testified that she has been employed with the East Windsor school district since 1997, first teaching in a Gifted and Talented program and in kindergarten until the end of the 2007 school year, when she was assigned to teach 5th grade at Drew.

Ms. Geurds denied having any knowledge about any complaints that Ms. R. may have made about her during the fall of 2007. She was not given any written notice of any such complaints.[6]

Geurds acknowledged that there had been an incident, occurring either in the home base or in language arts or social studies class, in which two boys, who she thought were assigned to her home base classroom, were calling each other "douche bags." She was shocked that these fifth graders knew the term. She responded to the boys, asking them if they even knew "what you're talking about." They did not, and she commented, "So you're calling someone something that you don't even know what you're calling them." As she testified, "By now, everyone was looking." She proceeded to explain that there was such an item, that it was a feminine hygiene product found in stores. She told the boys, and the class, "so basically you're calling your friend or each other something that is a piece of garbage that left over. And I don't want to hear it again." She denied that she had graphically shown the class how a douche bag is applied. She did not refer to infection or use, "vagina" or use a hand motion to demonstrate the technique for using the item.

Geurds denied ever referring to "balls in a bunch" or "testicles" or "cock," having never heard these words in her classroom. However, there was an incident where boys were

> being rough . . . roughhousing with each other . . . being physical. And I said - -They were at each others below the

[6] A copy of the collective bargaining agreement between the district and the teacher's union was identified and its provisions will be discussed later in this decision.

> belly button area. I said, You don't need to do that. You don't need to fight and hit at each other there. Private parts are private. Hands off. No more. That's it.

She denied ever using the words "penis" or "vagina."

Ms. Geurds agreed that she had demonstrated the proper technique for boys to urinate to her kindergarten children. This happened due to complaints by girls about the boys "spattering" on the one toilet provided for the boys and girls in the classroom. Geurds would have to clean this up. She discussed this issue with parents, and she also demonstrated the proper technique to the children, utilizing a piñata stick and a straw sun hat. In fifth grade this episode was recalled as a "story of remembering." Many of the fifth graders had been her students in kindergarten. When some of the fifth grade girls complained to her that there was urine on the toilet seats (the boys and girls had separate bathrooms), she responded

> Well, that's something I usually only had to worry about the boys doing in kindergarten, and that was aiming straight. And the children liked when I told them stories about kindergarten because, again, many of them were "I remember that," and "Oh, I remember that."

Geurds added, "So I did exactly what I did in front of the class. And I told them - - I relayed my story of how I taught the boys in kindergarten how to aim straight." She acknowledged that she did in fact repeat her kindergarten demonstration for the fifth grade students, adding

> And the issue was the girls couldn't aim straight because they sit down. And the bottom line was we found out the toilet flushers were not working . . . But that was strictly relaying a kindergarten story to my fifth grade students, of which I did other stories.

Counsel for Ms. Geurds asked her if "knowing what you know now, would that be a repetitive story again?" Geurds replied, "Absolutely not," and repeated this answer to a question as to whether she would repeat her explanation about the douche bag. Instead, if a child called another that, she would "probably at that moment" have them

sit, stop talking and go on with the lesson and then, after class, chat with them and explain the inappropriateness of the name-calling. If asked "what do we call them," she would "probably send them" to guidance or Ms. Nemeth. On cross-examination she explained that she had not given any thought to the possibility that fifth graders were more sensitive about matters such as the urination issue than were younger children and that given this,

> In hindsight, I needed to - - I should have stopped and thought more of the age group of children that I was dealing with. But, again, I say coming from some 20-years of teaching little ones, that it was my natural response. And having never taught fifth grade, getting used to that age group - - I was only with them for a limited amount of time, so I was new to the age group. And in thinking back, I probably would not do it again. I would handle it differently, as I stated before.

Given all this, when asked by counsel for the Board on cross-examination whether she would agree that her handling of the "douche bag" incident was "inappropriate," she responded that "at the time, I thought it wasn't. Yes, now I do. I do agree that it was inappropriate and I would handle myself differently." Even limited to the facts of her own version of the incident, given the age involved, "it most likely was inappropriate. I reacted - - my reaction to the fellow saying that word was, again, a gasp. And I probably should not have reacted like that in fifth grade."

Geurds denied that she told her class about the mechanics of sex. She might have said "shit" at some point, possibly between classes, which would be the only time that she would have gotten a vitamin water. She denied using the phrase, "balls in a bunch," but did tell the boys who were roughhousing that they needed to be "careful with your body." This roughhousing, including the boys hitting below the waist, was "not unusual" for fifth grade boys. She also completely denied ever telling any boys to go tell their parents about sucking a cock.

The witness did not tell her class that she was not gay and that she was a single parent, although she did tell parents at back-to-school night that, as they would be

hearing stories about her son, she was not married or widowed or divorced and did not lead an alternative lifestyle. She did not use the term, "gay."

On cross-examination, Geurds reviewed P-17, a form she filled out as part of the review of this matter at the district level. She gave full and complete answers, however, she did not feel that she had been able to explain the context in which certain matters occurred or were said.

Applicable Standards

Tenured teachers may not be dismissed or have their compensation reduced "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. Pursuant to the Tenured Employees Hearing Act, N.J.S.A. 18A:35-1, a tenured teacher may not be removed from her position unless a school board successfully establishes one or more of these causes by a preponderance of the credible evidence. Matter of Polk, 90 N.J. 550 (1982) "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.

Another expression of the role of the teacher

> 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." In re Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99; see also Parsippany-Troy Hills Bd. of Educ. v. Molinaro, 96 N.J.A.R. 2d (EDU) 268, 276.

Analysis

The Board of Education charges that Ms. Geurds engaged in conduct unbecoming for a tenured teacher. As explained at the opening of this opinion, the gravamen of the Board's complaint really deals with the use of certain words, phrases and the discussion of certain topics by Geurds with or within the hearing of her students. The Board has not pressed any issues of academic performance as grounds for discipline of this tenured employee. The evidence has been geared to prove that Geurds has spoken and acted inappropriately, most especially in respect to the discussion of matters mostly related to body parts, sex, and words inappropriate to a 5th grade, indeed, in some instances, to any classroom perhaps other than in health class. Ms. Geurds has acknowledged that some of the events that allegedly involved inappropriate conduct did occur, while not characterizing what she did in those instances as unbecoming. In the case of the demonstration of how to properly urinate so as to avoid any "splattering," she agrees that there was such a discussion and indeed a demonstration put on for her fifth graders. While she contends that this resulted from a complaint by girls that splattering was occurring in the girls bathroom and that this led to discussion, and indeed a demonstration, remembering a previous

such demonstration in kindergarten which some of the students in her fifth grade might recall as some of the students, but not all, were in her kindergarten class, she acknowledges that, given the age of the students in fifth grade and the prospect that, unlike kindergarteners, these children might be more sensitive to such matters and such talk, what she said and did was "inappropriate."

Similarly, Ms. Geurds does not deny that there was an incident that led to a discussion about douche bags. She agrees that as a result of some boys calling each other by that reference, that she discussed what a douche bag was in front of her entire class. She does not agree that she presented any demonstration of how such an item is used, nor does she admit to having referred to infection. But as with the allegation about discussion of urination in class, she agrees that, in hindsight, her handling of the matter was "inappropriate." It would have properly been handled differently.

While Geurds has admitted both the reality of the discussion of urination and about douche bags, she has denied other allegations made about her language in class. And while a consideration of whether her admittedly inappropriate actions in these two instances might serve as a basis for determining if she engaged in unbecoming conduct, there are other, similar allegations about language and topics that she denies even occurred. Of these, the one comment attributed to her that most definitively would call into serious question the conduct of this tenured teacher is that when a boy said to another boy to "suck my dick," she told the student "if you want someone to suck cock then go home and ask your family to do it for you." While comments about "balls," "nuts", and/or a short explanation of the mechanics of sex, whether taken separately or together, are certainly matters that cannot be overlooked, if Geurds did make this particular comment attributed to her by A.L. then surely her judgment and professionalism are open to serious question and the security of her tenured status most threatened.

In order to assess the credibility of the allegations about the matters that Geurds denies, it is necessary to look at the sources of evidence that claim that she did in fact say or do things other than what she admits. Other than its evidence as to what Geurds herself admitted, the Board presented three witnesses to testify about alleged misconduct arising from things Geurds said. One N.R., the mother of a student, was of

course not present in the class. Her testimony is hearsay, admissible in this administrative proceeding under N.J.A.C. 1:1-15.5, and subject to the need that the District present at a minimum a residuum of competent evidence to support any material fact that is essential to the resolution of the case against Geurds. N.J.A.C. 1:1-15.5; Weston v. State, 60 N.J. 36, 51 (1972).

The two student witnesses, A.L. and J.R., each testified about the douche bag incident, which Geurds has acknowledged she discussed, although not in exactly the same way these students claimed. A.L. also testified about the urination incident. Again, Geurds essentially acknowledges that this conversation and demonstration did occur. Further, A.L. testified to Geurds' use of the word "shit," another matter which Geurds has apparently acknowledged occurred, albeit there is some question as to whether it might have occurred in-between classes. But A.L also testified about the mechanics of sex discussion and the reference to oral sex, matters which Geurds denies. And J.R. testified to Geurds telling the students about not being single, never married and not gay. Geurds denies any such talk in front of students, agreeing only that she did tell parents about being a single mom. The Board also presented hearsay materials that purportedly reflect what other students who were in one or more periods with Ms. Geurds reported during their individual interviews. Again, as these are hearsay, the information contained in any one, or the collection of these interviews, cannot serve as the sole evidence upon which it can be determined that Geurds did in fact speak about these other matters. But combined with the competent evidence of the student witnesses, and with Geurds' own statements and admissions, they can serve to bolster such competent evidence to prove the fact of any such comments.

Review of the interview notes which purport to record what students purportedly said shows that eleven students reported something that arguably involved conduct concerning matters that the District has characterized as inappropriate. While other students either did not report these matters when interviewed, or simply did not hear any of the alleged or admitted matters, there is no question that given the admissions by Geurds, the information offered by the students who did report something cannot be dismissed as not reflective of reality, even if other classmates did not offer any information about these matters. Of the students reporting hearing and witnessing

something about the matters in question, N.A., D.J., L.R., K.S., B.S. and E.S. each mentioned the urination demonstration. Interestingly, N.A., L.R., K.S. and B.S. all recalled some reference during this to the names of body parts; one to the vagina, two to the penis, one only mentioning the use of "names for body parts." Of course, as Ms. Geurds has acknowledged that this discussion and demonstration did occur, these notes merely offer evidence of other recollections of a matter not really at issue, although with the added reference to body part names. Yet, clearly when they spoke to the administrators, they were not making up this incident from whole cloth. There is therefore no doubt that when questioned, at least some of the students were accurately reporting actual events in Ms. Geurds' classroom.

In addition, M.G. seems to recall that Geurds used the word "nuts." Having reported that some kids in the class used the word in "talking about wrong body parts (nuts)," he was asked if Geurds used "those words." The reply is noted as "Sometimes . . . nuts; as a body part. She says if someone hits you there you won't grow them back . . .some kids laughed." S.Y. also reported that Geurds talked "about body parts (puberty . . . How it happens and what happens. Just talks about girls, how mothers give birth to children.") She also reported that boys talked about "balls" and Geurds "talks to the boys. She is referring to the boy's privates." M.P. told of Geurds mentioning that the vagina was "just girls' private parts." While he did not feel that this was a problem, because "some people don't' take it serious and they don't know what the words mean," he added that "Girls say, gross! Why are you talking about that?" And M.P. also noted that he had heard "shit", which suggests that he too was more than likely reporting something real, as Geurds has admitted that she did use this word at least on one occasion. And S.O., while unsure what word was used, recalled that Geurds "talks about the girls body part down there."

Since we know that the allegations of students, including witnesses A.L. and J.R., that Geurds addressed topics such as urination and douche bags are true, there is good reason to believe that additional elements of the information provided by the students are also accurate. There is no reason to believe that these students were making up the events and comments they related. No evidence has suggested that these students had any motive to fabricate, and while not every student heard

everything or even anything, there is enough here to suggest the reports of those who did accurately reflect the general truth of what they said. Ms. Geurds apparently had no compunction about discussing matters with her students about topics relating to health, sex, inappropriate use of words, and the like. Thus, when boys used the term "douche bag" she found it appropriate to openly discuss the actual meaning of the word with the students in class. Given this, it would not be at all surprising that she might have found it appropriate to respond to the use of "fuck" in the classroom by relating what the offensive word connotes and this could well have led to a basic mention of the mechanics of sex. And while the physical demonstration of the mechanics of the use of a douche bag might well have been far from graphic, that Geurds might have gestured as to how it was used is not at all farfetched. Further, given what she admitted and the consistency of her admission with the testimony and statements, I am persuaded that Geurds would have spoken openly about the private body parts, just as several of the students said.

The one most troubling issue is whether Geurds did speak to a boy about oral sex in the manner that A.L. reported. She is the sole witness, either actual or by interview, to relate this disturbing matter. While Geurds showed a propensity to speak freely and to explain matters of health and sex to these young and impressionable students, there is in what she has admitted and most of what the students claimed no sense of nastiness, no suggestion of any lurid or prurient element. If a student were telling another boy to "suck my dick," the evidence would support the likelihood that Geurds might have told the boy, possibly in front of others, to go home and ask his parents what this meant, but for her to say something such as, "if you want someone to suck cock then go home and ask your family to do it for you" is quite another matter. In the absence of any corroborating evidence as to this remark or any such similarly nasty, evil comment, I am unwilling to conclude that the witness properly heard what was said.

Based upon the credible evidence, I **FIND** that Ms. Geurds did instruct her 5th grade students about what douche bags were and how they were used, did discuss and demonstrate how to properly urinate so as to avoid "splattering," did make reference to private parts such as the penis and vagina by those words, did relate something of the mechanics of sex, did on one occasion use the word, "shit" in the classroom, albeit in

disgust at having dropped a bottle, and did refer to boys' testicles by the term "nuts" or possibly "balls." I also **FIND** that she **did not** tell a boy that he should go home and have his family perform oral sex. I **FIND** that although Ms. Geurds may well have felt that some of the incidents occurring in her room provided "teachable moments," none of these comments or references were made in the course of instruction in any part of the curriculum for which Ms. Geurds was responsible. I **FIND** that Ms. Geurds acknowledges that the comments and actions regarding urination and the douche bag were inappropriate. She understands that her approach to the circumstances that arose in her classroom was no proper. Given this, it seems likely that she would agree that some of the other comments would also be inappropriate.

Given the above findings, I **CONCLUDE** that the Board of Education has met its burden to prove by a preponderance of the credible evidence that Ms. Geurds engaged in inappropriate conduct for a teacher. Her behavior in the circumstances was not in accord with what was proper, her choices as to what subjects and language to discuss or use in her classroom was not justified by the circumstances. She herself has recognized that if it was necessary to address the actions or comments of students that were themselves not proper, that the way to do so was, depending upon the event, either to do so privately, or to refer the student to the proper school personnel to deal with the situation, and/or to advise the child's parents of the facts and let them deal with their children. Open discussion of these topics in the classroom by a teacher not detailed to teach health or to otherwise address these delicate subjects as a part of the curriculum was not professional conduct. It demonstrated a failure to recognize boundaries, to realize the sensitivities of students, especially within the pre-teen age group, and also to respect the prerogatives of parents.

Sanctions

The Board contends that the sole remedy for Ms. Geurds' misconduct is removal. Even, as here, in the absence of any prior disciplinary history, removal can be ordered where the misconduct is sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). Factors to be considered in assessing the proper sanction include the "nature and circumstances of the proven violations of rules, statutes, policies, responsibilities, standards and the like, as well as the underlying policy

concerns implicated by the violations, and the prior employment and disciplinary history of the employee," I/M/O/ Tenure Hearing of Getty, EDU 8750-06, Initial Decision, (June 4, 2009), adopted Comm'r. (July 17, 2009)http://lawlibrary.rutgers.edu/oal/search.html citing In the Matter of the Tenure Hearing of Frederick, L. Ostergren, 1966 S.L.D. 185, 188. Additionally, as the Fulcomer court noted, the impact upon a teacher's career, and the effect on the maintenance of discipline and the proper administration of the school system, are additional factors to be considered. Fulcomer, supra, at 420-422.

The Board agrees that in cases where the proven misconduct of a tenured teacher has involved the use of inappropriate language in class and/or discussions of subjects of a sexual nature or some other such inappropriate topic, that the penalty of removal has sometimes been imposed and sometimes has not. Each counsel in this case has cited some of these prior cases. Examples of cases ending in removal or a lesser sanction could be listed here ad nauseum. However, the Board, acknowledging the differing results as to removal, argues that consideration of these prior cases suggests that a significant factor in determining between removal and a lesser sanction has been whether the respondent has acknowledged wrongdoing and appears sincerely contrite. It claims that Ms. Geurds' expressions of belated understanding of the impropriety of her conduct ring hollow and should be ignored. But despite the Board's dire assessment of Geurds, I am not persuaded to any significant degree that Ms. Geurds is a lost cause and that she cannot continue to serve as an effective teacher despite her failures as found here.[7] Importantly, there is nothing in this case that would suggest that she is a predator, or that she sought to start conversations on clearly inappropriate topics without there having been some incident that she did not herself cause that led her to address a word, a phrase, a topic. There is no element of inappropriate familiarity with any student, whether in words or physical actions. There is a lack of understanding of verbal boundaries, of the limits of teaching responsibilities and of a teacher's role in regard to some topics, but no suggestion of venality or moral turpitude. That she only belatedly realizes that she should not have said some of what she admits is not surprising, or we probably would not have a case to decide. And while she denied some of what I have found she said, there is no suggestion that these

[7] Once again, it is necessary to recall that despite the limited testimony as to what might be seen as efficiency issues, the Board has proceeded here as to inappropriate conduct, and my conclusions as to the sanction are in connection with that issue only.

comments were very different in quality or in the genesis of their occurrence from those she admits. Perhaps she simply does not remember all that she said. I do not believe that she purposely and knowingly denied matters that she in fact recalled. But even with the items that she denied added to those she acknowledged, I do not see enough here to justify terminating her tenure, and effectively, her career. And in this regard, the fact that I have found that she did not tell a student to go home and request oral sex from his family is very important, for that kind of remark, if proven, would strongly weigh against Geurds retaining her tenure.

Based upon the above considerations, I **CONCLUDE** that Ms. Geurds should forfeit 120 days of salary and one year's increment. Such sanction should assure that she will conduct herself in the future in an appropriate manner, respecting the limits of her role and the sensibilities of her students. 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.

April 9, 2010
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: April 9, 2010

Date Mailed to Parties April 9, 2010

mjm

WITNESS LIST

FOR THE PETITIONER:

A.L.

J.R.

N.R.

Darlene Nemeth

Lori Stein

Deborah Feaster

Ronald E. Belondi

FOR THE RESPONDENT:

Kimberly Geurds

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Letter dated June 21, 2007 from J.B. to Darlene Nemeth

P-2 Letter dated July 10, 2007 from J.K. to Principal Nemeth

P-3 E-mail dated July 11, 2007 from D.N. to Darlene Nemeth

P-4 E-mails dated July 26, 2007 between I.C., Joyce Elorza and Darlene Nemeth

P-5 Handwritten notes and messages dated between October 9, 2007 and December 27, 2007

P-6 E-mail dated November 15, 2007 from Darlene Nemeth to Ronald Bolandi

P-7 E-mail dated December 7, 2007 from Darlene Nemeth to Deborah Feaster

P-8 Drew School Student Interviews (Ms. Geurds's class) December 10, 2007

P-9 Email dated December 19, 2007 from Kimberly Geurds to PLD Staff; WCB Staff; EMK Staff; GNR Staff

P-10 Twenty pages of E-mails From May 9, 2007 to November 29, 2007

P-11 K. Geurds List of Non-Teaching Items (three pages)

P-12 E-mails dated March 7, 2008 July 21, 2008 & October 4, 2008 (four pages)

P-13 Handwritten notes, J.R.

P-14 Handwritten notes, A.L.

P-15 Interview with J.R. on December 7, 2007

P-16 Interview with A.L. on December 7, 2007

P-17 Confidential Superintendent's Interview Questions

P-18 Not in evidence

P-19 Not in evidence

P-20 Not in evidence

P-22 Not in evidence

P-23 Not in evidence

P-24 E-mail dated November 29, 2007 from Kimberly Geurds to A. Holmes & A. Corsi

P-25 E-mail dated November 30, 2007 from Kimberly Geurds to Deborah Feaster

FOR THE RESPONDENT:

R-1 Formative Evaluation of Kim Geurds dated January 15, 1998

R-2 Agreement by and Between the East Windsor Regional Board of Education and the East Windsor Education Association July 1, 2006-June 30, 2009

268-10

OAL DKT. NO. EDU 2048-10
AGENCY DKT. NO. 356-12/09

LINDA J. GATER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW	:	DECISION
RESPONDENT.	:	

The record of this matter and Consent Order transmitted by the Office of Administrative Law have been reviewed. Because the agency is a party to this matter, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the settlement agreement is deemed to be the final decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/10

Date of Mailing: 8/11/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2048-10

AGENCY DKT. NO. 356-12/09

LINDA J. GATER,

Petitioner,

v.

NEW JERSEY STATE
DEPARTMENT OF EDUCATION,
OFFICE OF CRIMINAL HISTORY REVIEW,

Respondent.

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, attorneys)

Jennifer L. Campbell, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General for New Jersey)

Record Closed: July 9, 2010 Decided: July 13, 2010

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 21, 2010, 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.

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.

July 13, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

/bdt

PAULA DOW
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
New Jersey Department of Education,
Criminal History Review Unit
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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Linda J. Gater, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOT 02048-2010S **CONSENT ORDER**

WHEREAS, Petitioner, Linda J. Gater ("Gater") and Respondent, New Jersey Department of Education, Criminal History Review Unit, (the "Department") have mutually agreed to settle the above-captioned matter, with Paula T. Dow, Attorney General of New Jersey, by Jennifer L. Campbell, Deputy Attorney General, appearing on behalf of the Department, and Michael C. Damm, Esq., appearing on behalf of Gater; and

WHEREAS, this matter arose from Gater's appeal of the Department's determination respecting an incident that occurred on

February 25, 2009, in which an unattended child was found on the school bus to which Gater was assigned; 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. Gater acknowledges that she is the holder of a commercial driver's license, with a school bus endorsement.

2. As reflected in her Affidavit, the terms of which are incorporated herein by reference, Gater agrees to a six-month suspension of the school bus endorsement on her commercial driver's license, pursuant to N.J.S.A. 18A:39-29(a).

3. The aforesaid suspension of Gater's school bus endorsement shall be imposed retroactively for the six-month period from March 1, 2009 through August 31, 2009.

4. Gater agrees that the aforesaid suspension shall constitute a "first offense" for purposes of N.J.S.A. 18A:39-28 et seq.

5. Upon full execution of this Consent Order, the Department shall notify the New Jersey Motor Vehicle Commission ("MVC") of the aforesaid retroactive suspension, and same will be reflected on Gater's MVC records.

6. Upon full execution of this Consent Order, the Petition of Appeal in the matter of Linda J. Gater. v. State of New Jersey, Department of Education, Criminal History Review Unit, Agency Docket No.

356-12/09, OAL Docket No. EDUOT 02048-2010S, is hereby dismissed with prejudice.

7. Both parties have entered into this Consent Order for the purposes of settlement only.

8. The parties have read the terms of this Consent Order and acknowledge that they have had an opportunity to discuss it with legal counsel or a representative of their choosing. The parties further acknowledge that they are executing this Consent Order of their own volition with a full understanding of its terms and effects, and without any coercion. Both parties acknowledge that they have entered into this Consent Order with a full understanding of their rights.

9. By consenting to the aforesaid suspension of her school bus endorsement, Gater agrees to waive any and all hearings to which she may be entitled in this matter.

10. The parties agree that this Consent Order may be executed in one or more counterparts, each of which shall be deemed an original and part of one in the same Consent Order and that facsimiles of signatures shall have the same force and effect as original signatures.

11. The parties acknowledge that this Consent Order is subject to the approval of the Commissioner of Education.

Michael C. Dawson

Date: 7-1-10

Michael C. Damm, Esq.
Attorney for Petitioner

Jennifer L. Campbell
Deputy Attorney General

Date: 7-7-10

Linda J. Gater
LINDA J. GATER

7-1-10
DATE

RECEIVED

2010 JUL -9 A 11:21

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PAULA DOW
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
New Jersey Department of Education,
Criminal History Review Unit
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Jennifer L. Campbell
Deputy Attorney General
(609) 292-8572

Linda J. Gater, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOT 02048-2010S **AFFIDAVIT OF LINDA J. GATER**

Linda J. Gater, of full age, being duly sworn upon her oath, deposes and says:

1. I am the holder of a New Jersey Commercial Driver's License with a school bus endorsement.

2. I did not utilize the school bus endorsement on my commercial driver's license for the six-month period from March 1, 2009 through August 31, 2009.

3. I agree to a six-month suspension of the school bus endorsement on my commercial driver's license, to be imposed retroactively for the six-month period from March 1, 2009 through August 31, 2009.

4. I understand that the suspension of my school bus endorsement will be reflected upon the records of the New Jersey Motor Vehicle Commission as a "first offense" for purposes of N.J.S.A. 18A:39-28 et seq.

5. In consenting to the suspension of my school bus endorsement, I agree to waive any and all hearings to which I may be entitled in this matter.

6. I acknowledge that in signing this agreement I have secured the advice of an attorney and I understand the terms of this agreement.

Linda J. Gater

Linda J. Gater

Sworn and Subscribed
before me this 1st day
of JULY, 2010

Erika Bridget Zieger

ERIKA BRIDGET ZIEGER
A Notary Public of New Jersey
My Commission Expires OCTOBER 19, 2010

269-10

OAL DKT. NO. EDU 7820-09
AGENCY DKT. NO. 134-6/09

DONNA CLANCY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN 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: 8/11/10

Date of Mailing: 8/11/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07820-2009
AGENCY DKT. NO. 134-6/09

DONNA CLANCY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN COUNTY
Respondent.

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

Thomas Scapoli, Esq. for respondent (Fogarty and Hara, attorneys)

Record Closed: July 29, 2010 Decided: July 30, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 20, 2009 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 on the attached settlement agreement. The Woodcliff Lake Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated July 22, 2010, and has authorized its Board President to execute the agreement on its behalf.

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

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

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

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

July 30, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 8-3-10

Mailed to Parties:

AUG 3 2010
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/rr

WOODCLIFF LAKE BOARD OF EDUCATION
REGULAR PUBLIC BUSINESS MEETING
JULY 22, 2010 **MINUTES**

RESOLUTIONS FOR ADOPTION

8) MOTION BY Mrs. Bae, seconded by Mrs. Abene, as follows:

BE IT RESOLVED that the Woodcliff Lake Board of Education (hereinafter referred to as the "Board") hereby adopts and approves the **Settlement Agreement** by and between the Board and **Donna Clancy**, which is incorporated herein by reference, and agrees to be bound thereby, and;

BE IT RESOLVED that the Board President and School Business Administrator/Board Secretary are hereby authorized and directed to execute the attached Settlement Agreement and any other documents necessary to effectuate said Settlement Agreement.

ROLL CALL VOTE:

"AYES" - Mrs. Abene, Mrs. Bae, Mrs. Eichenlaub, Mr. Nathin, Mr. Piantino, Ms. Starr.
"NOES" - None.
"ABSTAIN" - None.

SETTLEMENT AGREEMENT

This AGREEMENT made this _____ day of May, 2010 between the Woodcliff Lake Board of Education, which has offices located at 134 Woodcliff Avenue, in the Borough of Woodcliff Lake, County of Bergen and State of New Jersey 07677 (hereinafter referred to as the "Board"), Donna Clancy, residing at 992 Blanche Avenue, in the Borough of Norwood, County of Bergen, State of New Jersey 07648 (hereinafter referred to as "Clancy") and the Woodcliff Lake Education Association, which has offices located at 134 Woodcliff Avenue, in the Borough of Woodcliff Lake, County of Bergen and State of New Jersey 07677 (hereinafter referred to as the "Association").

WITNESSETH:

WHEREAS, the Association, on behalf of Clancy, filed a charge letter with the Public Employment Relations Commission dated June 19, 2009, bearing Docket No. CO-2009-473 (hereinafter referred to as the "Charge"), asserting that the Board committed an unfair labor practice when it eliminated the part-time secretarial position held by Clancy; and

WHEREAS, Clancy filed a Petition with the Commissioner of Education bearing Docket No. EDUOA-07820-2009N (hereinafter referred to as the "Petition") alleging that the Board violated her tenure and seniority rights when it separated Clancy from her employment with the Board; and

WHEREAS, the Board has filed responses denying the allegations raised by the Association and Clancy and asserting legal and factual defenses to each of the actions; and

WHEREAS, the parties are desirous of resolving the claims raised by the Association and Clancy without having to resort to further litigation;

NOW, THEREFORE, based on the forgoing premises and mutual promises and covenants contained herein, the parties agree to the following as the terms and conditions of the Settlement Agreement:

1. The Board shall provide to Clancy, within thirty (30) days of receipt of a fully executed copy of this Settlement Agreement, a check in the amount of Four Thousand Five Hundred Dollars ($4,500), less applicable taxes and withholdings.

2. The Association shall withdraw the Charge pending before the Public Employment Relations Commission, with prejudice.

3. Clancy shall withdraw the Petition pending before the Commissioner of Education, with prejudice.

4. This settlement shall not be deemed an admission by either party and shall not constitute evidence of any fact in any proceeding, except as may be necessary to enforce the terms herein.

5. Each party shall be responsible for the payment of their respective costs and attorney fees and neither party shall be entitled to costs or disbursements as against the other parties.

6. The undersigned represents that they have the requisite authority to bind the respective party to the terms of this Settlement Agreement.

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

WITNESS:

Matthew Lynaugh

MATTHEW LYNAUGH
Business Administrator/Board Secretary

Dated: 6-25-10

WOODCLIFF LAKE BOARD OF EDUCATION

BY: _____

ROBERT NATHIN
Board President

Dated: 6-24-10

WITNESS:

Lynda Bassani

Dated: 7/6/10

WOODCLIFF LAKE EDUCATION ASSOCIATION

BY: _____

JOSEPH CANCRO
President

Dated: 7/1/10

WITNESS:

Doreen Mosiej

Dated: 6/15/10

BY: _____

DONNA CLANCY

Dated: 6/15/10

#270-10

OAL DKT. NO. EDU 6254-08
AGENCY DKT. NO. 109-4/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC 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: 8/13/10

Date of Mailing: 8/16/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6254-08
AGENCY DKT. NO. 109-4/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,
Petitioner,
V.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC COUNTY,
Respondent.

John D. Wade, Esq., for petitioner (Wade, Long, Wood & Kennedy, attorneys)

Howard E. Drucks, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: July 26, 2010 Decided: July 26, 2010

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 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.

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.

7-26-10
DATE

W. TODD MILLER, ALJ

JUL 27 2010

Date Received at Agency:

JUL 27 2010

Date Mailed to Parties:

/sd

William S. Donio, Esquire
Howard E. Drucks, Esquire
COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
File No.: 50696-268/647
Attorneys for Board of Education of the Town of Hammonton

RECEIVED

2010 JUL 26 P 11:39

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Respondent, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1705-09T3 ON APPEAL FROM: NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION, LUCILLE E. DAVY AGENCY DOCKET NOS. 204-7/07, 235-8/07 COMMISSIONER DECISION NOS. 132-08 AND ON REMAND 356-09R OAL DOCKET NOS. 6798-07, 8091-07 (Consolidated) SAT BELOW: The Honorable Lillard E. Law, ALJ, T/A, J.S.C.
BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY, Respondent, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Appellant.	

Civil Action

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 6254-08 AGENCY DOCKET NO. 109-4/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 4432-09 AGENCY DOCKET NO. 68-4/09

BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 2899-09 AGENCY DOCKET NO. 79-4/09

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE relates to and arises from the above captioned matters (the "litigation"). At all times herein, the Appellant/Respondent Hammonton Board of Education ("Hammonton") has been represented by Cooper Levenson April Niedelman Wagenheim & Levenson, P.A., William S. Donio, Esquire appearing; Respondent/Petitioner Waterford Township Board of Education ("Waterford") has been represented by Wade, Long, Wood & Kennedy, L.L.C., John D. Wade, Esquire appearing; and Respondent/Petitioner Borough of Folsom Board of Education ("Folsom") has been represented by William Cappuccio, Esquire, and it appearing Hammonton, Waterford and

Folsom (from time to time, referred to collectively as the "parties") have resolved all claims and issues arising from and limited to the litigation; and

WHEREAS, Hammonton, Waterford and Folsom, following good faith negotiations, counseled at all time by their respective attorneys, and without admitting fault or conceding liability of whatever kind arising from the claims and/or defenses advanced in the litigation, have amicably resolved their disputes as asserted by this Settlement Agreement and General Release (the "Agreement"); and

WHEREAS, Hammonton, Waterford and Folsom wish to memorialize the Agreement and move to withdraw and/or file appropriate pleadings to otherwise terminate, withdraw and/or discontinue the litigation; and

WHEREAS, Hammonton, Waterford and Folsom enter into this document voluntarily, in good faith, and represented by their respective counsel at all relevant times, hereto memorialize the Agreement and now express the full, complete and exclusive terms of the Agreement; and

WHEREAS, Hammonton, Waterford and Folsom acknowledge that the Agreement is intended only to resolve the claims and issues arising from and pertinent to the litigation as captioned above and stipulated below, and does not encompass or imply any agreement with respect to any issue not referenced below; and

WHEREAS, Hammonton, Waterford and Folsom agree to duly vote upon, ratify and adopt the Agreement at appropriately scheduled and noticed meetings, and to take whatever other actions are necessary to be in full compliance with Federal and New Jersey statutory and regulatory law; and

WHEREAS, in furtherance of the implementation of the Agreement, Hammonton, Waterford and Folsom agree that their duly authorized representatives shall execute the Agreement.

NOW THEREFORE, In consideration of the above and the promises set forth below, Hammonton, Waterford and Folsom hereby agree to the following:

1. To resolve the issues arising from the retroactive billing of Waterford and Folsom by Hammonton for the use of Hammonton's resource room by Waterford's students and Folsom's students in schools years 2004-2005; 2005-2006 and 2006-2007, Waterford hereby agrees to forward payment of Two Hundred and Fifty ($250,000.00) Thousand Dollars to Hammonton, and Folsom hereby agrees to forward payment of Twenty-Five Thousand Nine Hundred and Fifty-Six Dollars and Ninety Cents ($25,956.90) to Hammonton. It is understood that the payment by Waterford of the sum of Two Hundred and Fifty ($250,000.00) Thousand Dollars is to be issued from the resource room reserve that Waterford set aside in its budget during the course of the litigation. The dates upon which such payments shall be made by Waterford and Folsom shall be subject to respective agreements with Hammonton.

(a) In consideration of the payments by Waterford and Folsom as stated herein above, Hammonton agrees to waive any and all other past fees or charges alleged or understood to be due and owing from Waterford and Folsom for the use of Hammonton's resource room for the years 2004-2005; 2005-2006; 2006-2007, by Waterford's and Folsom's students as have been retroactively billed by Hammonton. Hammonton further agrees to withdraw or dismiss the Appeal encaptioned "*Board of Education of the Township of Waterford, Respondent v. Board of Education of the Town of Hammonton, Appellant and Board of Education of the Borough of Folsom v. Board of Education of the Town of Hammonton, Appellant under Docket No: A-1705-09T3.*"

(b) In further consideration of the payments by Waterford and Folsom as stated herein above, Hammonton hereby agrees to waive and withdraw any and all claims for charges that have been calculated by Hammonton as assessments to be imposed upon Waterford and

Folsom arising from the formation and/or rescission of the Interlocal Services Agreement between Hammonton and the Town of Hammonton.

(c) In exchange for Hammonton's agreement as set forth in (a) and (b) above, Waterford and Folsom agree to concurrently withdraw and dismiss any and all Petitions addressing, in whole or in part, the tuition assessments retroactively billed by Hammonton for the use of Hammonton's resource room by Waterford's and Folsom's students for the years 2004-2005; 2005-2006; and 2006-2007. These Petitions include the following:

(1) Waterford's Petitions encaptioned "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU-6798-07, Agency Reference No. 204-7/07*"; "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 6254-08, Agency Reference 109-4/08,*" and "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09, Agency Reference 68-4/09,*" in their entirety; and

(2) Folsom's Petitions encaptioned "*Board of Education of the Borough of Folsom v. Board of Education Town of Hammonton, Docket EDU 8091-07, Agency Reference 235-8/07*" and "*Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,*" in their entirety.

(d) Waterford and Folsom also agree to concurrently withdraw and dismiss any and all Petitions addressing, in whole or in part, the formation and/or the rescission of the Interlocal Agreement between Hammonton and the Town of Hammonton. These Petitions include the following:

(1) Waterford's Petition encaptioned *"Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09, Agency Reference 68-4/09,"* in its entirety; and

(2) Folsom's Petition encaptioned *"Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,"* in its entirety.

2. Hammonton, Waterford and Folsom agree that in exchange for the payment of the sum of $250,000.00 by Waterford and the sum of $25,956.90 by Folsom, all such retroactive billings for the use of Hammonton's resource room by Waterford's and Folsom's students for the school years 2004-2005; 2005-2006; and 2006-2007, as having been raised as issues in the litigation, will be waived and/or deemed discharged. Such waiver and/or discharge shall be operative only as to the resource room charges retroactively billed for the school years 2004-2005; 2005-2006; and 2006-2007. Hammonton, Waterford and Folsom agree that for all subsequent years, Hammonton shall have the right to charge Waterford and Folsom for the use of Hammonton's resource room by Waterford's and Folsom's students as permitted and authorized under Federal and New Jersey statutory and regulatory law governing the relationships between sending districts and receiving districts pursuant to appropriate tuition contracts; and

3. Hammonton, Waterford and Folsom agree that Hammonton shall nullify that portion of the Maintenance Reserve account that was included in the tuition calculations for school year 2009-2010. Hammonton, Waterford and Folsom further agree that all such tuition calculations henceforth shall not include any funds held in the Maintenance Reserve account, except as may be specifically authorized by law or agreed to by the parties. Hammonton, Waterford and Folsom further agree that Waterford shall withdraw and/or dismiss Count III of Waterford's Petition encaptioned *"Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09,*

Agency Reference 68-4/09," and Folsom shall withdraw and/or dismiss Count II of Folsom's Petition encaptioned "*Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,*" in its entirety; and

4. Hammonton, Waterford and Folsom acknowledge that they have had the opportunity to review the terms of this Agreement with their respective counsel and are fully satisfied with the representation provided and the terms of the Agreement. Hammonton, Waterford and Folsom enter into this Agreement and Release knowingly, without coercion or other improper influence. Hammonton, Waterford and Folsom shall be responsible only for their respective legal fees.

5. In exchange for the payment and other consideration referenced in paragraph 1 of this Agreement the parties agree as follows:

(a) Hammonton agrees to release, remise, acquit and forever discharge Waterford and Folsom, their members, employees, representatives, agents, predecessors, successors, and assigns, for liabilities retroactively charged by Hammonton for the use by Waterford's and Folsom's students of the Hammonton resource room for the years 2004-2005; 2005-2006; and 2006-2007. Waterford and Folsom hereby release, remise, acquit and forever discharge Hammonton its members, employees, representatives, agents, predecessors, successors, and assigns, from any claims of impropriety or wrongdoing with respect to Hammonton's retroactive billing of Waterford and Folsom for the use of the Hammonton resource room by Waterford's and Folsom's students for the years 2004-2005; 2005-2006; and 2006-2007; and

(b) Hammonton hereby agrees to release, remise, acquit and forever discharge Waterford and Folsom, their members, employees, representatives, agents, predecessors, successors, and assigns, for any liability associated with the formation and/or rescission of the Interlocal Contract with the Town of Hammonton. Waterford and Folsom hereby release,

remise, acquit and forever discharge Hammonton, its members, employees, representatives, agents, predecessors, successors, and assigns, of any impropriety or wrongdoing with respect to the formation and/or rescission of the Interlocal Agreement with the Town of Hammonton.

6. This Agreement is not meant to be construed as an admission of liability by Hammonton, Waterford and Folsom regarding any claim by any party to the litigation.

7. The Agreement sets forth and represents the entire agreement reached by Hammonton, Waterford and Folsom. No other agreements, promises, commitments have been reached by Hammonton, Waterford and Folsom to which Hammonton, Waterford and Folsom are bound other than those explicitly referenced herein.

8. Any modification of the terms and commitments set forth in this Agreement must be in writing and executed by authorized signatories respectively representing Hammonton, Waterford and Folsom, all acting in compliance with Federal and New Jersey statutory and regulatory law as a condition to such modification.

9. The Agreement shall be construed and interpreted in accordance with the law of the State of New Jersey. If any provision of this Agreement and Release or any portion of this Agreement and Release is declared null or void or unenforceable by any court having jurisdiction, such provision or such portion of a provision shall be considered separate and apart from the remainder of this Agreement and Release, which shall remain in full force and effect.

10. Hammonton, Waterford and Folsom agree that the Agreement has been negotiated and drafted by all parties and there shall be no construction of this Agreement that favors or disfavors any party based upon the drafting of this Agreement.

11. Hammonton, Waterford and Folsom agree to cooperate fully and to execute any and all supplementary documents and to take all actions which may be necessary or appropriate under Federal and New Jersey statutory and regulatory law to give full force and effect to the basic terms and intent of this Agreement.

12. Hammonton, Waterford and Folsom understand and agree to the terms of this Agreement. The signatories to this Agreement have full authority and have executed this release after consultation with counsel of their choosing, all pursuant to Federal and New Jersey statutory and regulatory law.

THE PARTIES HEREBY AGREE WITH THE TERMS OF THIS AGREEMENT:

FOR APPELLANT/RESPONDENT HAMMONTON
BOARD OF EDUCATION:

Joseph Giralo, President Hammonton
Board of Education — DATED: 7/21/10

COOPER LEVENSON APRIL NIEDELMAN WAGENHEIM, P.A.

BY: _____ DATED: 7/22/10
William S. Donio, Esquire, Solicitor
Hammonton Board of Education

FOR RESPONDENT/PETITIONER TOWNSHIP
OF WATERFORD:

Francis J. DiRocco, President
Township of Waterford Board of Education — DATED: 7/14/10

Wade, Long, Wood & Kennedy, L.L.C.

BY: _____ DATED: 7/13/10
John D. Wade, Esquire, Solicitor
Township of Waterford Board of Education

FOR RESPONDENT/PETITIONER BOROUGH OF
FOLSOM:

BY: _____ DATED: 7/16/10
Margaret Veneziani, President Board of Education
Borough of Folsom

BY: _____ DATED: 7/16/10

William Cappuccio, Esquire, Solicitor
Borough of Folsom Board of Education

CLAC; 457984.1

#280-10

KATHRYN A. BLACKSTONE,	:	
	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner appealed the determination of the State Board of Examiners (Board) to deny her a standard Teacher of Elementary School certificate. Petitioner contends that the coursework and teaching experience required for her Master of Education degree from Rutgers University – awarded in 2004 – is equivalent to the requirement for 200 hours of formal instruction under the alternate route to teacher certification in New Jersey; she requested an evaluation of her educational background and experience to determine whether she could be given credit for some portion of her educational coursework, and whether such credit could be applied to an application for a teaching certificate. Respondent State Board of Examiners (Board) contends that the petitioner has satisfied requirements toward certification, except for completion of a teacher preparation program culminating in student teaching and accompanying fulfillment of provisional requirements. The Board asserted that it is entitled to prevail as a matter of law, and filed a motion for summary decision.

The ALJ found that: the respondent, in a decision dated October 16, 2008, did address the issue of whether petitioner's educational background and teaching experience is equivalent to the requirement for 200 hours of formal instruction, and concluded that it was not; petitioner chose to enroll in the alternate route program and as such is obligated to fulfill the requirements set forth in *N.J.A.C.* 6A:9-8.3, which specifically states that the required 200 hours of instruction in professional education must be completed concurrently with the provisional teaching requirement; petitioner admitted that she did not complete 200 hours of formal instruction while she was provisionally teaching. Accordingly, the ALJ concluded that the respondent is entitled to prevail as a matter of law, granted the Board's motion for summary decision, and dismissed the petition.

Upon review, the Commissioner concurred that the Board is entitled to summary decision. Accordingly, the petition of appeal was dismissed.

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

August 19, 2010

OAL DKT. NO. EDU 2719-09
AGENCY DKT. NO. 67-4/09

KATHRYN A. BLACKSTONE, PETITIONER, V. NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Board of Examiners is entitled to summary decision. Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/19/10
Date of Mailing: 8/20/10

* 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 2719-09
AGENCY DKT. NO. 67-4/09

KATHRYN A. BLACKSTONE,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,

Respondent.

Kathryn A. Blackstone, petitioner, pro se

Susan M. Huntley, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey)

Record Closed: June 10, 2010 Decided: July 13, 2010

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed a petition of appeal seeking a review of the decision by the State Board of Examiners in which the Board denied her application for

issuance of the standard Teacher of Elementary School (N-8) certificate. The matter was transmitted to the Office of Administrative Law (OAL) on April 27, 2009, for hearing as a contested case.

The case was assigned to me and I scheduled a series of telephone conferences with petitioner and counsel for respondent. As a result of these conferences, both parties agreed that no testimony would be necessary because there are no facts in dispute, and the matter could be decided by motion.

Upon the filing of the motion for summary decision by attorney for the respondent, additional conferences were held in an effort to explain to petitioner the purpose of a motion for summary decision and to assist petitioner in setting forth her position in this case. In response to this, petitioner verbally acknowledged that she did not engage in student teaching concurrent with the educational coursework in question. She also explained that she never requested the issuance of a teaching certificate. Rather, all she asked was whether she could be given credit for some portion of her educational coursework and whether such credit could be applied to an application for a teaching certificate. In all other respects she agreed with the factual discussion contained in the motion submitted by the Deputy Attorney General. These verbal responses and acknowledgements by the petitioner were confirmed in writing. (C-1 and C-2.)

FACTUAL DISCUSSION

Based upon the documentary evidence and submissions by the parties, I **FIND** that there are no material facts in dispute. I **FIND** that the facts in this case are as set forth in the paragraphs which follow.

On or about July 31, 2008, petitioner Kathryn A. Blackstone requested that the New Jersey Department of Education, Office of Licensing and Credentials,

review her educational credentials, specifically a Masters degree in Elementary and Early Childhood Education from Rutgers University. She requested that those credentials be deemed equivalent to the 200 hours of formal instruction required for the issuance of a Teacher of Elementary School (N-8) Certificate. (R-1, Exhibit A.) Pursuant to N.J.A.C. 6A:9-17.13, respondent reviewed this request and on October 22, 2008, issued a decision, noting that it was unclear from the documentation provided by the applicant whether she had completed the requirements under the provisional certificate issued to her in January 2008. (R-1, Exhibit B.) The respondent found that the petitioner's experience and study did not establish a "one-to-one correspondence of experience/alternate education" to her licensing deficiencies. (R-1, Exhibit B.)

The petitioner then submitted a Petition of Appeal to the Bureau of Controversies and Disputes, asking the Commissioner of Education to review respondent's decision. (R-1, Exhibit C.) On April 8, 2009, an answer was filed on behalf of the respondent. (R-1, Exhibit D.) The matter was then transmitted to the OAL as a contested case. On or about August 21, 2009, respondent served requests for discovery upon the petitioner. (R-1, Exhibit E.) Petitioner provided responses to respondent's discovery requests on or about October 7, 2009. (R-1, Exhibits F and G.)

Petitioner is the holder of a Certificate of Eligibility (Elementary N-8), issued by respondent in July 2007. (R-1, Exhibit F, Admission 1.) Petitioner also held a Provisional Teaching Certificate (Elementary) issued by respondent from January 2008 until its expiration in July 2009. (R-1, Exhibit F, Admission 2.) Since petitioner did not complete a traditional college teacher preparation program culminating in a student teaching experience, she sought to fulfill the requirements to obtain a standard teaching certificate through the Alternate Route program. (R-1, Exhibit F, Admissions 3 and 4.) In an effort to fulfill the requirements for certification through this program, petitioner obtained employment as a long-term substitute in the Readington School District, and

while teaching there she was evaluated periodically by a mentor teacher. (R-1, Exhibit F, Admission 7; Exhibit G, Answer 4; Exhibit H; Exhibit I.) However, petitioner did not complete 200 hours of formal instruction in professional education at a regional training center or in a college/university alternate route education program during the same time period she was being mentored and evaluated in the Readington School District. (R-1, Exhibit F, Admissions 8 and 9.)

LEGAL DISCUSSION AND ANALYSIS

Respondent requests that I grant its motion for summary decision because no genuine issue of material fact exists, and respondent argues that it is entitled to prevail as a matter of law. The standard of review on a motion for summary decision is set forth in N.J.A.C. 1:1-12.5(b), which provides:

> The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.
>
> [N.J.A.C. 1:1-12.5(b)].

This standard is essentially the same as that which governs a motion for summary judgment in the Superior Court. In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the Supreme Court held that;

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540]

In this case, based upon the discovery responses provided by petitioner, I have found that there are no material facts in dispute. Therefore, this case is ripe for summary disposition.

N.J.A.C. 6A:9-8.8 sets forth the requirements for a standard teaching certificate. First, the candidate must possess a provisional teaching certificate pursuant to N.J.A.C. 6A:9-8.2. Additionally, the candidate must successfully complete a State-approved district training program pursuant to N.J.A.C. 6A:9-8.3 and -8.4 while being employed provisionally by a school district. The requirements for State-approved district training programs include on-going mentoring and evaluations by a mentor teacher over a period of at least thirty weeks as well as a minimum of 200 hours of formal instruction in professional education to be completed concurrently with the thirty or more weeks of mentored teaching. N.J.A.C. 6A:9-8.3(b)(1) and (3). According to N.J.A.C. 6A:9-2.1, "formal instruction" as used in N.J.A.C. 6A:9-8.3(b) (3) means,

> a Department-approved planned program of professional preparation for holders of certificates of eligibility which is located at a regional training center site operated by a school district, school district consortium or institution of higher education.
>
> [N.J.A.C. 6A:9-2.1]

In this case, the petitioner holds a certificate of eligibility and held a provisional teaching certificate from January 2008 to July 2009. (R-1, Exhibit F, Admission 2.) Petitioner admits that she was subject to the above requirements. (R-1, Exhibit F, Admissions 4, 5, 6.) Petitioner also admits that she did not complete the 200 hours of formal instruction in professional education at a regional training center during the same period she was teaching provisionally in the Readington School District. (R-1, Exhibit F, Admissions 8, 9.)

As was stated above, petitioner's position is that she never requested the

issuance of a teaching certificate and only asked whether she could be given credit for some portion of her educational coursework which could be applied to an application for a teaching certificate. Petitioner's letter of appeal filed on March 5, 2009 (R-1, Exhibit C), also stated that she was not requesting issuance of a certificate, but was requesting reconsideration of her educational background and teaching experience as equivalent to the requirement for 200 hours of formal instruction. Petitioner's position appears to be that the Board of Examiners failed to address the issue whether her educational background and teaching experience is equivalent to the requirement for 200 hours of formal instruction. After reviewing the respondent Board of Examiner's decision of October 16, 2008 (R-1, Exhibit B), I **CONCLUDE** that the Board did address this issue.

In its decision, the Board of Examiners notes that N.J.A.C. 6A:9-17.13 allows an applicant to provide the Board with materials the applicant considers evidence of alternative education warranting issuance of an appropriate license. The decision goes to state that the Board made "a careful review of the documents submitted by Ms. Blackstone" and specifically states:

> Ms. Blackstone documentation of experience and study does not provide a compelling one-to-one relationship with her licensure deficiency. The board is not satisfied that her program of study coupled with the requirements to be fulfilled through a district training program for first year teachers is sufficient to issue a standard certificate.
>
> [R-1, Exhibit B at 2.]

Based upon the foregoing, I **CONCLUDE** that the decision of the Board of Examiners did address the issue whether petitioner's educational background and teaching experience is equivalent to the requirement for 200 hours of formal instruction, and concluded that it did not. The petitioner's request for relief in her letter of appeal was to seek reconsideration by the Board of Examiners of her

request. The request for reconsideration is a discretionary matter best addressed by the Board of Examiners.

In this case, the respondent recognized that petitioner attained a Master's degree in Early Childhood/Elementary Education. However, petitioner chose to enroll in the alternate route program and as such she was obligated to fulfill the requirements set forth in N.J.A.C. 6A:9-8.3. This regulation specifically states that the required 200 hours of instruction in professional education must be completed concurrently with the provisional teaching requirement. Petitioner has admitted that she did not complete 200 hours of formal instruction in professional education while she was provisionally teaching. Accordingly, I **CONCLUDE** that respondent is entitled to prevail as a matter of law and its motion for summary decision should be granted.

DECISION AND ORDER

For the reasons stated above, the motion for summary decision of the respondent, Board of Examiners, is **GRANTED,** and petitioner's appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 13, 2010
DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency: 7/13/10

JUL 14 2010

Date Mailed to Parties:

mph

APPENDIX

LIST OF EXHIBITS

By ALJ:

C-1 ALJ letter to petitioner dated January 11, 2010

C-2 Petitioner letter to ALJ dated June 4, 2010

For petitioners:

None

For respondents:

R-1 Letter Brief/Motion for Summary Decision, dated November 2, 2009, with the attached exhibits:

A. Petitioner's letters dated April 27, 2008, and July 31, 2008

B. State Board of Examiners' decision, issued October 22, 2008

C. Petitioner's letter of appeal, dated March 19, 2009 (without attachments)

D. Respondent's Answer to Petition of Appeal

E. Deputy Attorney General Susan M. Huntley letter, dated August 21, 2009

F. Petitioner's response to First Request for Admissions

G. Petitioner's answers to first set of Interrogatories

H. Provisional Teacher Program evaluation, dated June 2008

I. Provisional Teacher Program evaluation, dated December 2008

#281-10

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDALL N. KAVET,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF NEW BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

The petitioning Board certified tenure charges of inefficiency, incompetence, and conduct unbecoming against respondent – a tenured special education teacher employed by the district since 1987 – for allegedly failing to: follow lesson plans; substantiate student grades, and meet the goals of multiple sixty-day improvement plans. Respondent denied the charges as alleged.

The ALJ found that: the petitioning Board bears the burden of proving the tenure charges brought against respondent by a preponderance of the competent and credible evidence; the Board failed to comply with the procedural requirements set forth at *N.J.S.A.* 18A:6-11 and *N.J.A.C.*6A:3-5.1(c) regarding the tenure charges of inefficiency and further failed to substantiate the charges of incompetency and conduct unbecoming. Accordingly, the ALJ ordered that all tenure charges brought against respondent be dismissed.

Upon a comprehensive and independent review of the record, the Commissioner determined to adopt the decision of the ALJ recommending that the charges against respondent be dismissed. In so doing, he found that the Board failed to sustain its burden of establishing its charges of unbecoming conduct by a preponderance of the credible evidence. With respect to the charges of inefficiency, the Commissioner found that as the petitioning Board failed to comply with the procedural requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.*6A:3-5.1(c), the charges of inefficiency are dismissed for failure to satisfy the statutory and regulatory requisites attendant to their certification. Finally, the Commissioner agreed with the ALJ that the Board has failed to sustain its charges of incompetency. The Commissioner ordered that respondent be reinstated to his tenured position and reimbursed for back pay and emoluments.

This synopsis is not part of 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 19, 2010

OAL DKT. NOS. EDU 13695-09 AND EDU 1539-10
AGENCY DKT NOS. 339-11/09 AND 14-1/10
(CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDALL N. KAVET,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF NEW BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The District's exceptions and respondent's reply thereto – submitted in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.[1]

The District's exceptions – although acknowledging the technical correctness of the Administrative Law Judge's (ALJ) analysis on the issue of the District's charges of inefficiency – cite extensively to the testimony of its witnesses, which it avers was essentially unrebutted and amply supports its contention of Respondent's incompetency, insubordination and unprofessional conduct. It alleges, *inter alia,* that such testimony establishes that respondent:

- Could not produce student grades when requested by the principal and failed to enter grades in the computer.
- Failed to complete documentation requested by the Department of Youth and Family Services in connection with its investigation involving a specific student.

[1] It is noted that by letter dated July 7, 2010 – filed with the Agency on July 8, 2010 – the District attempted to file a response to Respondent's Reply Exceptions. As there is no regulatory provision for such a submission, it was not considered herein.

- Claimed a writing sample with inappropriate content was authored by a student, while the District Superintendent concluded that such sample couldn't have been done by a student because it was adult in manner, prose and composition.
- Was absent on days of regularly scheduled weekly meetings with the principal.
- Missed a meeting with the Superintendent to discuss the potential seriousness of denial of increments for the 2007-08 and 2009-10 school years and the lack of change in his performance.
- Complied at a very minimum level with code requirements of teacher assessments.
- Performance evaluation from his supervisor evidenced no student writing samples as required; showed that he regularly used videos in place of classroom instruction and he failed to utilize textbooks.
- Was repeatedly unprepared for IEP meetings, notwithstanding repeated directives from his superiors to correct that deficiency.
- Was given seven 60-Day Improvement Plans but did not improve.

It additionally cites to certain of respondent's own testimony which it claims further buttresses the charges asserted against him:

- When asked about his failure to maintain student folders he said he was not a "paperwork guy."
- He admitted he failed to maintain student grades consistent with Board policy and instructions of his supervisors.
- He admitted his classroom environment was disheveled, and further admitted that he is messy by nature.

(District's Exceptions at 1-8)

The District next excepts to the ALJ's Finding of Fact, #5. It maintains that although respondent testified that he posted some grades, the unrebutted testimony of the District's witnesses demonstrate that no such grades were regularly found in the respondent's grade book or on the Real Time Computer System used by the District. Moreover, it proffers this same testimony established that even when grades were posted, no back verification such as student classwork, homework, quizzes or tests could be found, therefore raising a serious concern as to the validity of his grade posting. (District's Exceptions at 6)

In conclusion, the District maintains that the evidence and unrebutted testimony clearly demonstrate that it has met its burden of proving the tenure charges against respondent and urges the Commissioner to reverse the decision of the ALJ. (*Id.* at 8)

In reply, respondent asserts it is important to note that, although evidence on many issues was introduced at the hearing in this matter, the only relevant issues are those relating to the charges advanced in the District's two sets of tenure charges. Although the District claims to have presented witnesses whose testimony was "essentially unrebutted," respondent does not necessarily concur that such is the case but, notwithstanding, cautions that it must be recognized that although evidence may be unrebutted, unless such testimonial evidence is probative of a specific charge against him, the fact that it may be unrebutted is of no consequence. As an example, respondent notes that there is no reference in any of the District's charges against him as to his teaching style or how he conducted himself in the classroom, other than that he had model writings in his classroom that were inappropriate. (Respondent's Reply Exceptions at 1-2)

Respondent proceeds to analyze the actual incompetence and unbecoming conduct charges against him – which he charges the District's exceptions failed to do – and, in great detail, presents testimony and evidence in defense of the appropriateness of the ALJ's dismissal of all of them as unproven. He maintains that it was the District's burden to provide specific fact – rather than mere conclusionary testimony and evidence – to support the charges against him which, he asserts, it failed to do. (Respondent's Reply Exceptions at 1-17)

Upon a comprehensive review of the record in this matter – which included transcripts of the hearing conducted on February 19, March 11, and March 18, 2010 – the Commissioner, finding the District's exceptions unpersuasive, determines to adopt the decision of the ALJ recommending that the charges against respondent be dismissed.

As noted by the ALJ, the within District certified two sets of tenure charges against respondent, alleging inefficiency, incompetence and unbecoming conduct. Initially, the

Commissioner concurs with the ALJ's determination that the inefficiency charges must be dismissed as a consequence of the District's failure to comply with the procedural requirements attendant to the certification of such charges. Specifically, it is well-established that when a board provides an individual with written notice that it is bringing tenure charges of inefficiency against him or her, the district is required to: provide that individual with a 90-day period in which to correct and overcome the inefficiencies (*N.J.S.A.* 18A:6-16); provide the individual with a modified professional improvement plan (PIP) which addresses the specific charges of inefficiency and comports with the timelines established for correction (*N.J.A.C.* 6A:3-5.1(c)4); and render positive assistance to the individual during the 90-day remediation period in an effort to help him or her overcome the 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)). It is uncontested that such legal prescriptions were not undertaken in the instant matter.

Turning to the District's charge of incompetence which alleges "for several years Mr. Kavet has regularly made up grades for students and placed them in his grade book, as documented by students' work folders in comparison to Mr. Kavet's grade book," (Initial Decision at 9), based on past case law on this particular charge, the Commissioner is in full agreement with the ALJ – for the reasons presented on pages 9-10 of his decision – that the District has failed to sustain this charge.

Finally, after full consideration of the District's tenure charges of unbecoming conduct and the proofs advanced in support of them, the Commissioner agrees – for the reasons presented by the ALJ on pages 10-11 of his decision – that the District has failed to sustain its

burden of establishing these charges by a preponderance of the credible evidence, necessitating their dismissal.

Accordingly, the recommended decision of the OAL dismissing the instant tenure charges is adopted as the final decision in this matter. It is hereby ordered that Randall N. Kavet be reinstated to his tenured position and reimbursed for back pay and emoluments withheld, less mitigation, as a consequence of these charges.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/19/10
Date of Mailing: 8/20/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)
OAL DKT. NO. EDU 13695-09
AGENCY DKT.NO. 339-11/09
AND
OAL DKT. NO. EDU 01539-10
AGENCY DKT. NO. 14-1/10

IN THE MATTER OF THE TENURE HEARING OF RANDALL N. KAVET, SCHOOL DISTRICT OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY.

George F. Hendricks, Esq., for petitioner, City of New Brunswick School District (Hendricks and Hendricks, attorneys)

Nancy I. Oxfeld, Esq., for respondent, Randall N. Kavet (Oxfeld Cohen, attorneys)

Record Closed: May 3, 2010 Decided: June 14, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The School District of the City of New Brunswick (District), brought tenure charges against Randall N. Kavet, a special education teacher, on October 9, 2009, alleging inefficiency (failure to follow lesson plans), incompetence (failure to

substantiate student grades), and behavior unbecoming (failure to meet the goals of multiple sixty-day improvement plans). On November 17, 2009, the District suspended Kavet without pay, in accordance with N.J.S.A. 18A:6-14. On December 12, 2009, additional tenure charges of incompetence and behavior unbecoming a professional for the period of September 4, 2009, through November 16, 2009, were brought against Kavet by the District. On January 19, 2010, Kavet was again suspended without pay. Through his counsel, respondent filed an Answer on November 30, 2009, and January 26, 2010, respectively, denying the charges as alleged and raising several affirmative defenses.

Upon receipt of Kavet's Answer on November 30, 2009, the Director of the Bureau of Controversies and Disputes referred the tenure charges to the Office of Administrative Law (OAL) on December 1, 2009, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I established a discovery and hearing schedule in accordance with N.J.S.A. 52:14B-10.1. Upon receipt of Kavet's Answer on January 26, 2010, the Director of the Bureau of Controversies and Disputes referred the additional tenure charges to the OAL on February 18, 2010. The hearing commenced on February 19, 2010, and continued on March 11, 2010, and March 18, 2010. The record closed on May 3, 2010, after the receipt of transcripts and post-hearing briefs.

FACTUAL DISCUSSION

Jeremiah Clifford testified on behalf of the District. Prior to his current position as principal of the District's Woodrow Wilson School, he held both teaching and supervisory positions at the District's Livingston Elementary School. From the time that Kavet was transferred to the Livingston School in 2005 until the 2008-2009 school year, Clifford was his supervisor. Clifford's duties included the observation and evaluation of staff including Kavet. Clifford evaluated Kavet and found his evaluations were "not good." Specifically, Clifford found Kavet to be "deficient in instruction, in planning and in classroom management areas." Kavet was given sixty-day improvement plans detailing areas that "he was to work on."

Clifford testified that Kavet failed to comply with the District's student-grading policy, which required that students' grades be entered in a grade book on a "weekly or bi-weekly basis." Clifford stated that as principal, he allowed teachers to use either an electronic or paper grade book. Beginning with Kavet's March 24, 2006, evaluation, a specific recommendation for improvement noted that a "grading key" was not available. The December 13, 2006, evaluation indicated that Kavet "did not have a grade book" for the first quarter and also failed to provide documentation for his use of an "alternate assessment." Kavet's April 26, 2007, evaluation notes that his "grade book is insufficient." Specifically, "there is no correlation between grades in book and lesson plan assessment." Clifford's June 11, 2007, and October 12, 2007, memos regarding sixty-day improvement plans note that Kavet "did not meet" the respective improvement plan. These two memos similarly highlight various "areas of priority" for the next sixty days; "3. Grade book will be current and submitted on a weekly basis." Clifford stated that by the February 4, 2008, evaluation, Kavet "got worse." Clifford added that Kavet "put grades in" but could not produce the "back up documentation, the actual exams" for student assessments.

Clifford also testified that Kavet had problems performing the student assessment for the individual education plan (IEP). These problems included a failure to submit paperwork in a "timely fashion" prior to an IEP meeting and a failure to provide documentation for the paperwork that he did submit. Clifford stated that during the eligibility meeting for one of his fifth grade students, N.F., Kavet indicated that the child was using a phonics workbook. Clifford noted that the phonics workbook was not part of the fifth-grade curriculum. Clifford maintained that Kavet failed to read his students' IEPs at the start of the school year. This was specifically exemplified by Kavet's failure to mainstream student K.A. for language arts literacy, though K.A.'s IEP, according to Clifford, required such mainstreaming.

Additionally, Clifford recalled a classroom observation he made of Kavet on December 13, 2006. Clifford noted various "writings" on the classroom wall with references to "water balloon bombs," "guns," "alcohol to soothe toothaches." He believed that these writings were not appropriate for "second, third and fourth grade students."

Kathryn Schneekloth, principal of the Livingston School since September 2008 and former vice-principal of the same school since 2005, testified on behalf of the District. Schneekloth stated that the Livingston School has one special education self-contained class. Her responsibilities included training the teachers on any new curricula and technology. She would also provide support to the teachers in order to address any individual improvement plans. In this regard, she had direct involvement with Kavet.

Schneekloth stated that Kavet did not produce lesson plans or grade books during her tenure as vice-principal. She developed a sixty-day improvement plan for Kavet in September 2008 in light of his previous evaluations. This improvement plan required Kavet to read the students' IEP, complete lesson plans in accordance with District policy, maintain and submit grade books on a weekly basis. Schneekloth indicated that during this period, the students' IEPs were placed in the "RealTime database." This database "integrates all student data including individual instructional plans, the attendance and the grade book." RealTime also records every time a teacher views the database. Schneekloth testified, "I believe I have documentation somewhere to show that he didn't go into it until . . . mid-October to see what-how-where he was supposed to be instructing his students on the IEP." As to the requirement to complete lesson plans, Schneekloth indicated that Kavet was required to submit online lesson plans to her. Kavet "did submit them as required, but they were not up to standard . . . ." She elaborated by noting that Kavet's lesson plans did not "differentiate" the instruction or what "levels" the individual students were on. Kavet also did not "show the follow-up or how his paraprofessionals were engaged with the students."

In addition to the student IEPs, student grade books were also part of the District's RealTime database. Kavet also failed to enter grades into the RealTime database for "weeks at a time." When grades did appear, Kavet could not provide the "documentation" to Schneekloth to substantiate those grades. She advised Kavet as to the priority of maintaining an accurate and updated grade book in both the December 3, 2008, and February 9, 2009, sixty-day improvement plans. She also noted in her January 7, 2009, and April 27, 2009, sixty-day improvement plan reviews that Kavet's maintenance of an updated student grade book was not satisfactory. Although there

was an occasion when Kavet did enter student grades in the computer for the period September 25, 2009, through mid-November 2009, she was unable to match the grades to the lesson plans. Without any "matching documentation," Schneekloth believed the grades were "fictitious."

Schneekloth stated that she had scheduled meetings with Kavet every Wednesday at 9:45 a.m. during the 2008-2009 school year in order to address his improvement plans and evaluations. She added that Kavet was absent for sixteen of those meetings. Because of Kavet's lack of effort in meeting the requirements of the sixty-day improvement plans and his lack of significant progress, Schneekloth recommended the withholding of his increment for the 2009-2010 school year.

Mary Egan, assistant superintendant for curriculum and instruction, testified on behalf of the District. She became involved with Kavet in March 2009 at the request of Principal Schneekloth. Since the District was using a new grading system to input grades into the interim reports and report cards, one of Egan's responsibilities was to insure that principals were able to verify the report cards. Egan learned that Kavet had failed to use the grading-system technology and provide documentation for the grades he submitted. On March 17, 2009, Egan memorialized her conversation with Kavet, specifically noting the absence of grades in the grade book for the third quarter and no documentation of student assessment. Egan stated that Kavet did not advise her of any problems with the RealTime grading-system technology.

Richard Kaplan, superintendant of the New Brunswick School District, testified that he was involved in Kavet's reassignment as a special education tenured teacher to the Livingston School. He initially became aware of Kavet's poor performance from the teacher evaluations that he read. Kaplan stated that he observed poster board with content dealing with "drugs, alcohol, and even perhaps weapons" in Kavet's fourth or fifth grade classroom on one occasion. Kaplan stated that the poster's content was "inappropriate." After numerous other complaints of Kavet's performance from Clifford, a withholding of increment was approved for the 2007-2008 school year by the District.

Mary Miskewitz, supervisor of child study teams, testified for the District. She is responsible for monitoring the child study teams and their respective development of IEPs. Miskewitz stated that teachers have direct input in the development of a child's IEP. In the case of student, J.B., Miskewitz indicated that Kavet participated in the child's IEP meeting but provided a "minimal assessment" of the child. She stated that the complaints from child study team members were that Kavet "came to the meeting, he didn't have a lot of information about kids." Miskewitz testified that she did not sit on any of the IEP meetings that Kavet attended. She does, however, "read and review every IEP" that goes through her office.

Randall Kavet testified on his own behalf. Kavet began his employment with the District on September 1, 1987, as a special education teacher. He has a master's degree in elementary education/special education from Adelphi University in New York and possesses teaching certificates in New York, in the area of special classes of the emotionally handicapped, and in New Jersey, for teacher of the handicapped.

Kavet stated that at the time he was assigned to the Livingston School in 2004-2005, he was assigned to teach a self-contained special education class consisting of grades three, four and five. He was responsible for teaching language arts, math, science and social studies with the assistance of one or two paraprofessional teaching aides. He would also participate in IEP meetings. Kavet maintained that "tasks were completed" and that classwork was checked, graded and assessed. When questioned, he acknowledged problems with the way his grades were maintained;

> A. I am not as you could probably attest – I am not a paperwork person to be kind. I am really not a paperwork person. Sometimes I would record, for an example, I would grade an assignment, but I would not log in appropriately to the computer system so the grade – so the date that the grade would be posted would not connect to the grade of the particular test and similar things.
>
> Q. And how about maintaining paperwork of your students, was there ever any issue about that?
>
> A. Periodically, yes.

Q. And what was that?

A. Addressing basically organization. There might have been some papers that were not placed in the appropriate folder and – and things along those lines.

Kavet stated that he had problems with the RealTime computer program. He had grades "disappear" and, at times, he could not "open" RealTime to complete daily attendance.

Kavet testified that he would send the child study team "survey requests" and observations of student classroom performance. He did not receive any complaints from either the child study team or the director of pupil personnel or the director of special education that he was not providing student assessments for the IEP. Kavet also indicated that he would read the students' IEPs at the beginning of the school year. When the IEP became part of the RealTime database, Kavet stated that he could access the IEP in "two or three different ways."

Kavet recalled the "water balloon bomb" poster as an effort to brainstorm with his students so that they "feel that writing as a form of expression is good, it's interesting, it's riveting, it's something that is a fun thing to do." He also recalled a writing sample that he wrote for a language arts presentation. Kavet acknowledged that the writing sample may not have been appropriate in terms of mentioning a gun; however, "we had some very street savvy kids in that room and it was to make the writing exercise riveting, to make it interesting, to make it real."

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. Kavet is a tenured special education teacher in the School District of the City of New Brunswick and has been employed by the District since September 1, 1987.
2. During the 2004-2005 school year, Kavet taught students in grades three, four and five in a special education self-contained classroom at the Livingston School.
3. On or about December 13, 2006, Kavet had "model writings" and posters in his classroom containing references to water-balloon bombs, guns and alcohol.
4. Beginning with a March 24, 2006, evaluation through an April 27, 2009, sixty-day improvement plan, Kavet was given numerous notices related to grading; no grading key available (March 24, 2006), no grade book for first quarter and failure to provide documentation for alternate assessments (December 13, 2006), insufficient grade book with no correlation between grades and lesson-plan assessment (April 26, 2007), need to keep grade book current and submit on a weekly basis (June 11, 2007, and October 12, 2007), back-up documentation could not be produced for grades (February 4, 2008), need to maintain accurate and updated grade books (December 3, 2008, and February 9, 2009), unsatisfactory maintenance of updated grade book (January 7, 2009, and April 27, 2009).
5. Kavet posted student grades for the period September 25, 2009, through mid-November 2009.
6. Kavet was absent for sixteen regularly scheduled meetings with Principal Schneekloth during the 2008-2009 school year.
7. Kavet received increment withholding for the 2007-2008 and 2009-2010 school years.

LEGAL ANALYSIS AND CONCLUSION

The District has brought tenure charges against Kavet alleging inefficiency, incompetence and behavior unbecoming. Under N.J.S.A. 18A:6-10, tenured teaching staff members may be dismissed for inefficiency, incapacity, unbecoming conduct, or other just cause. Where, as here, the charge is inefficiency, the District shall inform the

employee with specificity of the allegations and that, unless such inefficiencies are corrected within a minimal ninety-day period, it intends to certify those charges of inefficiency with the Commissioner of Education. N.J.A.C. 6A:3-5.1(c)(1) and (3). The District must also provide a modification of the individual professional improvement plan to the employee at the commencement of the ninety-day probation period to assure that such plan addresses the specific charges of inefficiency. N.J.A.C. 6A:3-5.1(c)(4). In this case, the District did not present any evidence that it complied with the dictates of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(c) as it relates to the charge of inefficiency. I therefore **CONCLUDE** that the District has failed to comply with the procedural requirements as to the tenure charges of inefficiency.

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). 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). The statutory status of a tenured employee may not be lightly removed. 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 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 District also asserts that the tenure charges of incompetence should be upheld because "for several years Mr. Kavet has regularly made up grades for students and placed them in his grade book, as documented by students' work folders in comparison to Mr. Kavet's grade book." As the Commissioner and State Board of Education has indicated:

> 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 . . . would be a useless exercise . . . . 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.
>
> [In re Bradley, 191 S.L.D. 2521, 2522 (citing E. Brunswick Bd. of Educ. v. Sokolow, 182 S.L.D. 1358, 1362).]

As indicated in the Findings of Fact, Kavet was given numerous notices related to grading. However, I **CONCLUDE** that the District did not present any evidence to substantiate that Kavet's problems with grading impacted his ability or capacity to be an effective teacher. In addition, the District's contention that Kavet "regularly made up grades" should be evidenced by poor-student-test scores or a lack of learning by Kavet's students. I **CONCLUDE** that the District failed to substantiate either.

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 or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974). For this purpose, the Commissioner considers the nature and gravity of 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 tenure charges of behavior unbecoming, as referred to by the District, are primarily based on the District's assertion that Kavet failed to meet the goals outlined by "numerous 60-day improvement plans." The October 9, 2009, tenure charge of behavior unbecoming notes that Kavet is "habitually unprepared" at IEP meetings. The charge also indicates that "model writings" on chart paper in Kavet's classroom were inappropriate. The December 12, 2009, tenure charge for behavior unbecoming includes the District's assertion that Kavet was "habitually absent" on the days that meetings were scheduled with Principal Schneekloth.

I have carefully considered the nature and gravity of these charges, any extenuating or aggravating circumstances, and the effect on the maintenance of discipline and the proper administration of the school system. I **CONCLUDE** that the evidence presented by the District regarding the sixty-day improvement plan lacks sufficient specificity to determine whether any itemized goal listed in the plans has been

accomplished by the time of any subsequent improvement plan. In addition, the fact that Kavet did not attend sixteen scheduled meetings with Schneekloth during the 2008-2009 school year or had certain "model writings" and posters in his classroom on December 13, 2006, fails to indicate, without additional evidence, any harm or injury to discipline and the proper administration of the school system. The assertion that Kavet is habitually unprepared at IEP meetings and lacks student-work samples was also not substantiated by any evidence. I therefore **CONCLUDE** that the District has not substantiated, by a preponderance of the credible evidence, the charge of unbecoming conduct.

ORDER

It is hereby **ORDERED** that all tenure charges brought against Randall N. Kavet on October 9, 2009, and December 12, 2009, 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, 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 14, 2010
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 6/14/10

Date Mailed to Parties: JUN 15 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Jeremiah John Clifford
Kathryn Schneekloth
Mary Egan
Richard Kaplan
Mary Miskewitz

For Respondent:

Randall N. Kavet

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Memo from Clifford to Kavet dated May 18, 2007
P-2 Evaluation dated March 24, 2006
P-3 Evaluation dated December 13, 2006
P-4 Evaluation dated April 26, 2007
P-5 Evaluation dated February 4, 2008
P-6 Graphic organizer referring to alcohol for a toothache
P-7 Writing sample developed from P-6
P-8 Writing sample referring to water balloons
P-9 Memo from Clifford to Kaplan dated May 11, 2007, with writing sample attachment
P-10 Sixty-day Improvement Plan dated October 12, 2007
P-11 Sixty-day Improvement Plan dated June 11, 2007
P-12 Letter to Kavet regarding increment withholding
P-13 Letter to Kavet regarding substitute folder
P-14 Memos regarding failure to complete DYFS forms
P-15 RealTime grade entries

P-16 RealTime grade entries
P-17 Memo from Schneekloth to Kavet dated March 20, 2007
P-18 Memo from Clifford to Kavet dated March 5, 2007
P-19 Memo from Clifford to Kavet dated May 15, 2008
P-21 Schneekloth's C.V.
P-22 Memo from Schneekloth to Kaplan dated September 29, 2008
P-24 Lesson plans for week of October 14, 2008
P-25 School District calendar
P-26 Evaluation dated April 3, 2009
P-27 Sixty-day Improvement Plan dated December 3, 2008
P-28 Sixty-day Improvement Plan dated January 7, 2009
P-29 Sixty-day Improvement Plan dated February 9, 2009
P-30 Kaplan letter to Kavet dated March 31, 2009
P-31 Sixty-day Improvement Plan dated April 27, 2009
P-32 Additional executed copy of April 27, 2009, Improvement Plan
P-34 Memo from Egan to Kavet dated March 17, 2009
P-35 Evaluation dated June 16, 2009
P-36 Schneekloth's timeline for September 2009–November 2009
P-38 Redacted IEP dated May 7, 2009, for J.B.
P-39 Redacted IEP dated November 12, 2008, for E.L.

For Respondent:

None

#282-10

OAL DKT. NO. EDU 6487-09 AND 14106-09 (CONSOLIDATED)
AGENCY DKT. NO. 191-8/09 AND 306-11/09

GREGORY ALLEN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY AND JOHN J. DESERABLE, STATE-APPOINTED MONITOR,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	
AND	:	
GREGORY ALLEN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY AND JAMES REIHMAN, INTERIM STATE-APPOINTED MONITOR,	:	
	:	
RESPONDENTS.	:	

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: 8/19/10

Date of Mailing: 8/20/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

GREGORY ALLEN,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY AND JOHN J. DESERABLE, STATE-APPOINTED MONITOR,
Respondents,

OAL DKT. NO. EDU 6487-09
AGENCY DKT. NO. 191-8/09

And

GREGORY ALLEN,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY AND JAMES REIHMAN, INTERIM STATE-APPOINTED MONITOR,
Respondents,

OAL DKT. NO. EDU 14106-09
AGENCY DKT. NO. 306-11/09

Beth L. Finkelstein, Esq., for petitioner

Raymond L. Hamlin, Esq., and **Sarah E. Jones**, Esq., for respondent, Pleasantville Board of Education (Hunt, Hamlin & Ridley, attorneys)

Sidney A. Sayovitz, Esq., for respondent, James Reihman, Interim State-Appointed Monitor (Schenck, Price, Smith & Kind, attorneys)

Record Closed: July 21, 2010 Decided: July 22, 2010

BEFORE **W. TODD MILLER,** ALJ:

This matter docketed at OAL Docket No. EDU 6487-09 was transmitted to the Office of Administrative Law on September 2, 2009, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

This matter docketed at OAL Docket No. EDU 14106-09 was transmitted to the Office of Administrative Law on December 21, 2009 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 settlement is in accord with the requirements of N.J.A.C. 1:1-19.1 and of In re Cardonick, 1990 S.L.D. 842, 846 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.

7-22-10
DATE

W. TODD MILLER, ALJ

Date Received at Agency: JUL 26 2010

Date Mailed to Parties: JUL 26 2010

/sd

The Law Firm of

HUNT, HAMLIN & RIDLEY

COUNSELORS AT LAW
MILITARY PARK BUILDING
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Vielka Velazquez

*Also admitted in PA
†Also Admitted in NY

July 15, 2010

RECEIVED
2010 JUL 21 A 10:16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Honorable W. Todd Miller, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Building 7
Quakerbridge Road, P.O. Box 049
Mercerville, New Jersey 08625-0049

Re: **Gregory Allen v. Pleasantville Board of Education**
OAL Docket Number: EDU-6487-09
Agency Ref. No: 191-8/09

Gregory Allen v. Pleasantville Board of Education and James Reihman, Interim State Appointed Monitor
OAL Docket Number: EDU-14106-09
Agency Ref. No: 306-11/09

Dear Judge Miller:

As per our telephone conference on this date, enclosed please find an original executed copy of the Settlement Agreement and General Release. In addition, I have also enclosed a copy of the Certified Resolution which was e-mailed to my office yesterday via PDF. As discussed, the Certified Resolution does not contain a raised seal obviously since it was sent via e-mail. However, if Your Honor needs a copy with a raised seal please advise so that I can have a copy sent.

If you have any questions regarding this matter please do not hesitate to contact my office.

Respectfully submitted,

HUNT, HAMLIN & RIDLEY

RAYMOND L. HAMLIN

cc: Beth Finkelstein, Esq.
Sidney A. Sayovitz, ESq.

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2010 JUL 21 A 10: 16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT

AND GENERAL RELEASE

The Settlement Agreement and General Release ("Agreement") is made and entered into between the Board of Education of the Pleasantville School District (the "Board"), James Riehman, State Monitor (the "Monitor") and Gregory Allen ("Mr. Allen"). This Agreement is made in resolution of the matters captioned as *Gregory Allen v. Pleasantville Board of Education,* OAL Dkt. No. 6487-09, Agency Ref. No. 191-8/09; and *Gregory Allen v. Pleasantville Board of Education and James Riehman, Interim State-Appointed Monitor,* OAL Dkt. No. EDU 14106-09, Agency Ref. No. 306-11/09. This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about September 6, 2004, Mr. Allen became employed by the Board pursuant to a contract of employment in the position of Assistant Board Secretary/Director of Special Projects; and

WHEREAS, on or about July 25, 2006, Mr. Allen began serving in the position of Assistant Superintendent; and

WHEREAS, on June 2, 2009, the Superintendent of Schools sent a letter to Mr. Allen advising him that his employment with the Pleasantville School District would not be renewed for the 2009-2010 school year;

WHEREAS, on August 11, 2009, the Board voted to reinstate Mr. Allen for the 2009-2010 school year, but said action by the Board was vetoed by the Monitor on August 25, 2009;

WHEREAS, Mr. Allen filed a Petition of Appeal in *Gregory Allen v. Pleasantville Board of Education and John J. Deserable, State-Appointed Monitor*, OAL Dkt. No. EDU #6487-09 on or about August 10, 2009 challenging Mr. Allen's non-renewal; and

WHEREAS, Mr. Allen filed a second Petition in *Gregory Allen v. Pleasantville Board of Education and James Reihman, Interim State-Appointed Monitor,* OAL Dkt. No. EDU 14106-09, on or about November 2, 2009; and

WHEREAS, the two matters were consolidated by order of the Honorable W. Todd Miller, ALJ, dated February 3, 2010; and

WHEREAS, Mr. Allen filed a charge with the Equal Employment Opportunity Commission, on or about January 13, 2010, EEOC Charge No. 17E 2010 00111 (the "EEOC Complaint"); and

WHEREAS, the parties have decided 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, Mr. Allen, and the Monitor deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; 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 Pleasantville 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.

2. "Mr. Allen", as used herein, shall mean Gregory Allen, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors in-interest.

3. The Monitor, as used herein, shall, at all times, mean all State-Appointed Monitors who have served in Pleasantville and their successors, assignees of any whether in their official or individual capacities.

4. Mr. Allen shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as OAL Dkt. No. EDU 6487-09 and OAL Dkt. No. 14106-09, subject to the approval of this Settlement Agreement and General Release by the Office of Administrative Law and the Commissioner of Education.

5. Mr. Allen shall cause to be filed a withdrawal, with prejudice, the EEOC Complaint.

6. Within thirty (30) days after approval of this Settlement Agreement by the Honorable W. Todd Miller, ALJ, and the Commissioner of Education, the Board shall pay Mr. Allen the lump sum of one hundred and thirty-three thousand and one hundred and twenty dollars ($133,120.00).

7. In consideration of the foregoing, Mr. Allen hereby waives, releases and forever discharges the Board and the Monitor from any and all actions, causes of action, suits, claims, charges or complaints which Mr. Allen 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. Mr. Allen acknowledges that this Settlement Agreement and General Release also includes, but is not limited to, claims for additional wages, back pay, unused vacation or sick leave, reimbursement for any other employee benefit, claims arising under federal, State, and local laws prohibiting employment discrimination, claims 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., and all claims or rights arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000(e), 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. Specifically excluded from this General Release are Mr. Allen's rights upon cessation of employment with the district to obtain medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1976 (COBRA).

8. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.

9. This Settlement Agreement and General Release contains the full agreement of Mr. Allen, the Monitor, and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Mr. Allen, the Monitor, and the Board, which consent must be signed by all of the parties or their duly authorized agents.

10. The waiver by Mr. Allen and/or the Board and/or Monitor 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.

11. 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 enforce ability of any other provision, term or condition of this Settlement Agreement and General Release.

12. Mr. Allen, the Monitor, and the Board agree to cooperate in good faith and execute any and all supplementary documents, and to take all additional actions which may be necessary to provide full force and effect of the basic terms and interests of this Settlement Agreement and General Release.

13. 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.

14. In entering into this Settlement Agreement and General Release, Mr. Allen has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Mr. Gregory Allen, The State-Appointed Monitor and the Pleasantville Board of Education have hereunder set their hands.

GREGORY ALLEN

Gregory Allen

Date: 6/23/10

WITNESS:

Ann L. Cahill

Date: June 23, 2010

ANN L. CAHILL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/1/2014

BOARD OF EDUCATION OF THE PLEASANTVILLE SCHOOL DISTRICT

Doris Graves

STATE-APPOINTED MONITOR

Date: July 13, 2010

Date: 7/13/10

Pleasantville Public Schools

Mr. Dennis Mulvihill
Business Administrator/Board Secretary
E-mail: mulvihill.dennis@pps-nj.us

(609) 383-6800 - Ext. 2527
Fax: (609) 677-8118
Cell: (609) 517-4722

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

July 14, 2010

I Certify, that this is an approved resolution from the Pleasantville Board of Education Minutes, dated March 23, 2010.

BE IT RESOLVED, that the Board of Education in the City of Pleasantville, New Jersey voted to approve the resolution to approve the settlement of the matter entitled Gregory Allen v. Pleasantville, OAL Docket Number 6487-09, which is currently pending in the office of Administrative Law. The approval of this resolution is subject to ratification and approval by the fiscal monitor. It is further subject to terms and conditions contained in an executive settlement which shall be filed with the Board Secretary office.

Motion to approve the settle of the matter entitled Gregory Allen v. Pleasantville was made by Mrs. Bey-Blocker and seconded by Mrs. Jackson.

Roll Call	
Ms. Jackson	Yes
Mrs. Bey-Blocker	Yes
Ms. Graham	Yes
Mr. McClellan	Yes
Mr. Moore	Yes
Ms. Griffin	Yes
Mr. Royal	Yes
Mrs. Vazquez	Yes
Mrs. Graves	Yes

Mr. Dennis Mulvihill
Business Administrator/Board Secretary

NICOLE J. BISHOP
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 12, 2012

7/14/10

#283-10

OAL DKT. NO EDU 1543-10
AGENCY DKT. NO. 11-1/10

IN THE MATTER OF THE TENURE	:	
HEARING OF RAMIRO BORJA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record of this matter, the parties' Settlement Agreement and Release of Claims along with 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: 8/19/10
Date of Mailing: 8/20/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01543-10
AGENCY REF. NO. 11-1/10

IN THE MATTER OF THE TENURE HEARING OF RAMIRO BORJA, SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

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

Robert M. Schwartz, Esq., for respondent

Record Closed: July 8, 2010 Decided: July 23, 2010

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

On January 19, 2010, the School District of the City of Paterson ("the District") certified tenure charges against the respondent, Ramiro Borja, a tenured principal employed by the District. Borja filed an answer denying the charges on February 1, 2010. The New Jersey Department of Education transmitted the charges to the Office of Administrative Law ("OAL") on February 4, 2010, having deemed the charges sufficient, if true, to warrant dismissal or reduction in salary.

The Board filed charges of unbecoming conduct (Misuse of District Teaching Staff Members Instructional time utilizing instructional assistants in non-instructional capacities; falsifying documents; inappropriate use of substitute teachers; misappropriation of District funds; using instructional aides to cover classes without certified teachers and other just cause against Borja. These charges pertained to the discharge of his duties as a principal.

On the date that the hearing was to commence, April 16, 2010, the parties engaged in settlement discussions and reached an agreement, which was filed with me on July 13, 2010, at which time the record was closed. The Superintendent of the State Operated School District approved the settlement terms.

Based upon a review of the attached settlement agreement, I **FIND** as follows:

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

2. Pursuant to the settlement agreement, Mr. Borja will resign from his position of employment effective on the day that the settlement is approved by the Commissioner of Education.

3. Mindful that the Paterson School District is an Abbott District with stringent budget limitations, it is in the best interests of the parties and the public to resolve this matter without risking an uncertain conclusion after protracted and costly litigation. The settlement is financially prudent. Although Mr. Borja will receive the equivalent of one year of salary, he was suspended effective January 19, 2010. In accordance with law, he would have resumed a fully paid status after 120 days of suspension.

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

5. By the terms of the proposed settlement agreement, Mr. Borja has entered into this agreement with a full understanding of his rights.

6. Furthermore, the agreement stipulates that Mr. Borja fully acknowledges that he understands that additional proceedings may occur before the State Board of Examiners.

7. The agreement does not contain any provisions which restrict public access under the Open Public Records Act.

I therefore **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of this settlement is in the public interest.

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

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

7/23/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

July 26, 2010
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUL 26 2010
db

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the State Operated School District of Paterson

In the Matter of Tenure Charges Against RAMIRO BORJA	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 01543-10 AGENCY DKT. NO. 11-1/10 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 Ramiro Borja (hereinafter referred to as "Respondent"), 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,

WHEREAS, the Respondent has agreed to resign as a tenured principal with Petitioner, effective upon approval of this Agreement by the Commissioner of Education;

WHEREAS, with Petitioner's resignation, Petitioner will not need to prosecute seven tenure charges (containing eighteen counts in the aggregate),;

WHEREAS, Petitioner anticipated calling ten to twenty witnesses to testify at a tenure hearing;;

WHEREAS, Petitioner is uncertain as to whether witnesses no longer employed at the District will testify at the hearings;

WHEREAS, with approval of the settlement, Petitioner will not have to devote the substantial time and public expense attendant to a hearing which was scheduled for ten hearing dates and was expected to involve many witnesses on behalf of both the Respondent and the Petitioner;

WHEREAS, the parties are uncertain as to the outcome of these proceedings; and

WHEREAS, the parties have agreed to fully and finally settle and/or release all claims between them arising out of Respondent's employment and separation from employment with District, subject to approval of the Administrative Law Judge and the Commissioner of Education;

The parties do hereby agree as follows:

1. Respondent has executed and supplied an irrevocable letter of resignation, which is attached to this Agreement, said resignation to become effective on the date that this Agreement is approved by the Commissioner of Education.

2. Petitioner shall reinstate the Respondent's salary and health insurance benefits effective May 1, 2010 and continuing through the effective date of his resignation or the date of any decision by the Commissioner of Education to reject the within Settlement Agreement and Release of Claims, whichever is first. Petitioner shall not be credited with vacation days or sick leave beginning May, 1, 2010.

3. In the event the Commissioner approves this Settlement Agreement and Release of Claims, Petitioner shall pay the Respondent, within thirty days after the approval of the Commissioner

of Education, the sum of $119,000.00 (the equivalent of one year's salary), with the understanding that if the Commissioner does not approve this Agreement by June 30, 2010 thereby resulting in the continuation of salary payments to the Respondent for the period after July 1, 2010, then such gross amounts paid to the Respondent for such period shall be subtracted from $119,000.00.

4. Petitioner shall withhold from any payments to be made to Respondent under this Agreement all required federal and state withholdings.

5. Petitioner shall reimburse Respondent for any COBRA premiums that he has paid for health insurance coverage for a period of up to six months beyond Respondent's resignation date.

6. Following the approval of this Agreement by the Administrative Law Judge and the Commissioner, Respondent will cease his employment with the District and shall not participate in any program, event or activity which is sponsored by the Paterson Public Schools.

7. In consideration of the foregoing and upon approval of this Agreement by the Administrative Law Judge and the Commissioner, the Petitioner agrees to withdraw the tenure changes it certified against the Respondent.

8. In consideration of the foregoing, the Respondent hereby waives, releases and forever discharges Petitioner 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 the Respondent 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. The Respondent acknowledges that this waiver and general

release also includes, but is not limited to, claims for additional wages, back pay, unused vacation or sick leave, reimbursement for any other employee benefit, claims arising under federal, State, and local laws prohibiting employment discrimination, claims 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., and all claims or rights arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000(e), 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. Respondent also acknowledges that he understands that notwithstanding this agreement additional proceedings may occur before the State Board of Examiners on the State Board of Examiners own motion and/or upon the referral of the Commissioner of Education.

9. 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.

10. The terms of this Agreement shall be kept confidential, but shall be subject to the Open Public Records Act. The Respondent agrees not to disclose the terms thereof to any person other than his immediate family, accountant, attorney, income tax preparer or similar professional, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction. The District agrees not to disclose the terms or amount thereof to any person other than its Board of Education members,

necessary administrators and clerical staff, accountants, auditors, attorneys, tax preparers, or other persons on a need-to-know basis, or unless otherwise ordered by a court of competent jurisdiction or required by a government agency.

11. This Agreement shall be binding upon and inure to the benefit of Respondent, the District, 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. The Respondent 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 the District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

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. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

15. The Respondent 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 reasonable period of time to consider the terms hereof, and that he enters into this Agreement voluntarily and with the advice of counsel.

16. 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 tenure dismissal action.

17. The parties recognize that if this Agreement is not approved by the Commissioner of Education, the tenure dismissal proceeding will resume before Judge Cohen until completion.

WITNESS

RAMIRO BORJA
Date: 6-24-2010

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

WITNESS

By: Donnie W. Evans
Dr. Donnie W. Evans
State District Superintendent
Date: June 28, 2010

OFFICE OF STATE COMPTROLLER
RECEIVED
2010 JUL 2 P 4:00

285-10

OAL DKT. NO. EDU6490-09
AGENCY DKT. NO. 189-8/09

GARY GOLDBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM AND AMIOT PATRICK MICHEL,	:	DECISION
RESPONDENTS.	:	

This controversy arose in March 2009, when respondent Amiot Patrick Michel – the Superintendent of the respondent Salem Board of Education's district – advised petitioner that his position, Director of Programs and Projects, would be eliminated and his employment would be terminated at the end of the school year. This advisement was repeated in letters from Michel dated May 5, 2009 and May 14, 2009, respectively.

It appears undisputed, however, that the respondent board of education never acted to eliminate the position. The Administrative Law Judge (ALJ) was therefore correct in determining that, as a matter of law and pursuant to *N.J.S.A.* 18A:28-9, petitioner's position was never abolished. *See,* Initial Decision at 15-16. Similarly, the Commissioner agrees with the ALJ that since petitioner was a tenured administrator in respondent's district and no tenure charges were brought against him, his employment was not, as a matter of law, terminated. *See,* Initial Decision at 16.

Accordingly, the Commissioner concurs with the ALJ's recommendation that petitioner be returned to the position of Director of Programs and Projects, with back pay and benefits. Further, if the Director of Programs and Projects position is eliminated, petitioner, as a tenured administrator in the district, will be entitled to other administrative positions – such as International Baccalaureate Program Director – where those positions are held by untenured individuals or individuals with less seniority within the categories of positions that petitioner has held in the district.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/23/10

Date of Mailing: 8/24/10

[1] In responding to petitioner's contention that he is eligible for certain supervisory positions, the ALJ found that he may be eligible for the position of Supervisor of Mathematics and Science. A challenge to that finding is the only issue raised in respondent's exceptions. The Commissioner need not reach this specific issue, as it is resolved by his holding in the instant case.

[2] This decision may be appealed to the Appellate Division of Superior Court pursuant to *P.L. 2008, c. 36.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6490-09
AGENCY DKT. NO. 189-8/09

GARY GOLDBERG,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF SALEM AND AMIOT PATRICK MICHEL,
Respondent.

Sidney L. Gold, Esq., for petitioner (Sidney L. Gold & Associates, attorneys)

Adam S. Weiss, Esq., for respondents (Methfessel & Webel, attorneys)

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

Record Closed: June 24, 2010 Decided: July 7 2010

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

STATEMENT OF THE CASE

Petitioner appealed the termination of his employment with respondent's school district.

PROCEDURAL HISTORY

The appellant requested a fair hearing and the matter was transmitted to the OAL on June 1, 2009, 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 heard on June 10, 2010, and the record remained open until June 24, 2010, for final submissions from the parties.

FACTUAL DISCUSSION

This case involves the alleged reduction in force (RIF) of a tenured administrator in the Salem City school system.

Petitioner testified on his own behalf. Petitioner has thirty-two years experience as a teacher and an administrator in various New Jersey school systems. He holds a Bachelor's Degree in mathematics and education from Rutgers University and a Masters Degree from Rowan University.

In 1999, petitioner returned to his alma mater as Director of Curriculum, Instruction and Technology. In that capacity, he was charged with multiple duties. He helped develop curriculum and coordinated the process of its implementation. He mentored teaching staff members in professional development. He was also in charge of all instructional technology. He supervised a staff of fifteen people. His specific duties were more particularly set forth in his job description (P-3).

In 2007, Amiot Patrick Michel was hired as the new Superintendent of respondent Salem Board of Education's school district (Board). Shortly thereafter, Michel assumed the duties of Curriculum Coordinator and transferred petitioner to the position of Director of Programs and Projects. At trial, no one testified how that transfer was effectuated.

Petitioner's job description reveals his duties as Director of Programs and Projects were as follows (P-2):

1. Develop and implement a comprehensive multi-year strategic plan, which addresses all components of school district operations and functions deemed appropriate for the plan from the outset and for the annual review of the district strategic plan and subsequent plans to guide the district's priority work.

2. Plan and implement a performance review component, which connects administration and staff in meeting benchmarks of the strategic plan.

3. Coordinate the process of submitting progress reports on the Strategic/Corrective Action Plan to the appropriate agency.

4. Seek and apply for grants with input from the Principals, and other administrative staff. Oversee all grant programs, e.g., NCLB, Perkins, Reading First, etc...in the district and complete each corresponding projects and reports for each of the grants.

5. Contribute to County Curriculum Consortium projects.

6. District Test Coordinator.

7. Responsible for maintaining files of records to support all federal, state, county and local reports associated with the responsibilities of the position.

8. Coordinate updating and ongoing three-year cycle review of all existing Board policies and Board Policy Book and maintain the existence of current policies and the inclusion of new policies on the districts shared drive.

9. Disseminate information to staff including: policy for dispensing of medicine for maintaining a drug-free environment. Prepare information for parents including: notification of pupil rights, Salem Nuclear Generating Center possible emergency procedures and family life education.

10. Responsible for district calendar coordination and communication, as well as, in coordination with administrative team, PD/in-service days.

11. Responsible for coordination of private school participation and application process for support programs such as Title I, Title II, Title IV, Title VI and PX 192-193.

12. Responsible for coordination of articulation between the district's school nurses regarding the district's health services.

13. Responsible for the reporting and for the contracting for the disposition of medical waste.

14. Responsible for the Impact Aid Application/Federal Aid Surveys.

15. Responsible for the Homeless Program.

16. Responsible for maintenance and recording of Home Schooling and Home-Bound Instruction.

17. Coordinate Violence and Vandalism reporting for state purposes.

18. Assist principals in the development of school-level plans, which guide the priority work of the schools. These plans should meet the requirements of other programs such as QSAC and CAPA.

19. Responsible for a minimum of 10 newsletters throughout the year.

20. Prepare reports for the Strategic Plan/CAPA process. Present an annual report to the Superintendent of Schools.

21. In collaboration with the administrative team, the compilation and submission of the ASSA, Fall Report, School Register Summary and Certificated Staff Report.

22. Responsible for reporting statistical information for the Safe and Drug Free Communities Act (SDFSCA) and ATOD program impact information.

23. District School Uniform Coordinator.

24. Mentor/Novice Teacher Program and Local Professional Plan Development Plan Coordinator.

*Any other duties as may be assigned by the Superintendent for the good of the district.

In his testimony, petitioner emphasized that as Director of Programs and Projects, he was involved in the coordination of State interactions, including all State-audited programs. He served as the District Compliance Officer. He applied for grants for the District, including the ARRA Grant recently created by the Federal government. Petitioner stated the first purpose of the ARRA Grant was to save or create jobs.

On March 28, 2009, petitioner received a letter from Superintendent Michel advising him that his employment with the District would be terminated at the end of the school year because of economics and change in administrative responsibilities. Petitioner was dismayed by the letter and sought a meeting with the Board of Education. That meeting occurred in early April 2009. Petitioner presented his position to the Board, but nothing came of the meeting.

On May 7, 2009, petitioner received another letter from Superintendent Michel dated May 5, 2009 (P-4). That letter again stated that:

> Please be advised at the board of Education meeting on May 13, 2009, which will be held in the Salem High School Library at 6 p.m., the Salem City School District, unfortunately cannot offer you an employment contract in your current position for the 2009-2010 school year.

The letter went on to say:

> At this time, due to financial constraints it is necessary to exercise a reduction in force of staff. As such I will be recommending that the Board eliminate your current position.

In his capacity as an administrator, petitioner attended all Board meetings. Consequently, he was present at the May 13, 2009, meeting of the Salem City Board of Education. He heard no action taken terminating his employment, and left the meeting relieved.

A review of the Board minutes for that meeting (P-6) confirms petitioner's testimony. Nowhere do the minutes reflect a Resolution abolishing the position of Director of Programs and Projects.

Notwithstanding the failure of the Board of Education to take any action abolishing the position of Director of Programs and Projects at its May 13 meeting, on May 14, 2009, Superintendent Michel sent petitioner another letter (P-5) which stated as follows:

> I regret to inform you that in accordance with N.J.S.A. 18A:28-9 and formal action taken by the Board of Education at a meeting on May 13, 2009, the Board of Education has deemed it advisable to abolish your position for reasons of economy, reduction in the number of pupils, change in the administration or supervisory organization and/or other good cause. Pursuant to N.J. 18A:28-12 you shall be and remain upon a preferred eligible list in the order of seniority whenever a vacancy occurs in a position for which you are qualified and you shall be reemployed if and when such vacancy occurs. If I can be of any assistance during this difficult time, please do not hesitate to contact me at either extension 4220 or via email Michel@salemnj.org. I will also be available to meet with you at any time to discuss any concerns that you may have.

Petitioner compared the statement of reasons contained in the May 14 letter to the statute, and determined that Dr. Michel had "cut and paste" the language in the letter directly from N.J.S.A. 18A:28-9.

Petitioner was aware that Dr. Michel was in the process of creating a position called International Baccalaureate Programe Coordinator. Petitioner met with Dr. Michel and asked that he be considered for the position, as he believed the duties to be substantially similar to those he was currently performing. According to petitioner, Dr. Michel stated, "Why would I appoint you to that. I am trying to get rid of you." Petitioner testified that Dr. Michel then told him, "You're not working here next year." He instructed petitioner that if he was found on school property on July 1, Dr. Michel would have him arrested.

Petitioner testified that Dr. Michel then hired Patricia Null for the position of International Baccalaureate Programe Coordinator. The job description for that position (P-17) sets forth the following duties:

> • Advise candidates, families, teachers, and administrators of all services provided by the IBO – Liaisons with IBNA, IBCA, IBO and MARC. Reviews the Vade Mecum, IB Coordinator Notes, IBNET, and OCC/Coordinator sites for relevant information and updates.
>
> • Market the IB Programme to all stakeholders in the community through information meetings, college fairs, open houses, mailings to schools and students, student shadows, newspaper advertisements, press releases, and community programs.
>
> • Inform teachers about current IB curriculum and assessment requirements and provide access to relevant resource material and training/meets.
>
> • Establish and manage the IB budget.
>
> • Maintain accurate data records/files for all IB students with the IBO.
>
> • Disseminate international examination information to all stakeholders.
>
> • Fulfill all conditions for the conduct of the IB examinations.
>
> • Create and publish IB calendars for students, parents, and teachers; complete all IB forms and meet submission deadlines for externally assessed and moderated IB work; confirm delivery of all documents.
>
> • Convey exam results to students, teachers, parents, and district personnel and counsel all stakeholders for potential challenges.
>
> • Act on behalf of students to report adverse circumstances that may affect candidate performance.
>
> • Supervise the Extended Essay and Creativity, Action, and Service component of the IB Programme for all diploma candidates.

- Arrange for all necessary examiners for IB components assessed, in the community.

- Train Extended Essay supervisors and teachers as noted.

- Work with the IB Parents' Network to facilitate support services for the IB Programme.

- Prepare reports and develop programs for Parents' Network Meetings.

- Conduct recognition programs for IB students.

- Establish honor boards and address honor code violations for IB students.

- Implement the IB application process including data base management; creating, administering, and scoring applicant writing assessments; evaluating applications; interviewing candidates; and determining admission offers.

- Schedule and supervise all IB oral components.

- Manage choice applications for the IB Programme.

- Facilitate the IB summer Extended Essay Institute.

- Create the master schedule for IB classes, revise the course catalog, and schedule all IB students for courses.

- Maintain the IB web site.

- Maintain accurate academic records for IB students, including grade reports and transcripts, and protect confidentiality.

- Manage 504 plans for IB candidates.

- Disseminate relevant information and nominate IB students for scholarships/awards.

- Counsel IB students academically.

- Facilitate the college application process for IB students including writing letters of recommendation, supervising student essay writing, conducting classroom guidance, and meeting individually with parents and students.

- Monitor graduation requirements for all IB students.

- Conduct exit interviews with all IB students and work with teachers to improve delivery of instruction.

- Work with IB students with personal, social, health and academic issues.

- Develop statistical reports for the building principal, district office, and Department of Education.

- Responsible for monitoring the NCLB program and the Perkins Grant.

- Perform other duties as assigned by superintendent.

Petitioner reviewed the list of duties and testified that as Director of Curriculum and Director of Programs and Projects, he had performed all but three of the listed functions. The three which he had not performed were:

- Train Extended Essay supervisors and teachers as needed.

- Establish honor boards and address honor code violations for IB students.

- Manage 504 plans for IB candidates.

Petitioner did note that his own son had a 504 plan, so he has some familiarity with that process. He also stated that although he had never dealt specifically with an International Baccalaureate Programe, the program was conceptually similar to any number of programs he had handled in his capacity of Director of Programs and Projects. Petitioner testified that most of the tasks in this job description were curriculum based, a function which he performed when he was Director of Curriculum and Instruction.

Petitioner identified the Report of Certificated Staff as of October 15, 2008, issued by the New Jersey Department of Education (DOE) (P-20). He testified that the District must annually submit a list of all personnel to the Department by October 15,

and that the DOE then memorializes the list. According to the October 15, 2008 report (P-20), petitioner was listed as an administrator by virtue of the code "A" set forth at the extreme right-hand side of the report. His job code was "0500." According to the job code listing issued by the Department of Education (P-22), code 0500 stands for Director of Curriculum and Instruction. It is instructive to note that despite petitioner's transfer to the position of Director of Programs and Projects, as of October 15, 2008, the Board was still listing him as Director of Curriculum and Instruction. That designation raises the question as to whether the Board ever took formal action transferring petitioner to the position of Director of Programs and Projects. The failure of the Board to take formal action abolishing the position at its May 13, 2009, meeting only heightens that concern.

Petitioner then identified the Report of Certificated Staff Personnel as of October 15, 2009. According to that report, the International Baccalaureate Programe Coordinator, Patricia Null, was also listed as an administrator. Her job code was "0399." A review of the job code list (P-22) reveals that "0399" is not the job code for International Baccalaureate Programme Coordinator, but rather is the job code for Supervisor of Special Projects.

Petitioner stated that Dr. Michel advised him that the basis for his termination was a letter from the County Superintendent advising that the Salem school district had an inappropriate ratio of administrators to pupils. Given that Dr. Michel then hired Patricia Null, petitioner questioned how his termination had alleviated that problem. The hiring of Null resulted in the District maintaining the same number of administrators after his termination as it had employed before his termination.

Petitioner argued that, aside from the position of International Baccalaureate Programe Coordinator, he had seniority over other administrators in the system and should not have been the person RIFed. The District maintains three supervisory positions dealing with academic concerns: Mathematics Supervisor K-12; Language Arts and Literacy Supervisor 5-12; and Language Arts and Literacy Supervisor Pre-K–4. He noted that the only qualifications for these positions set forth in the job description

(P-13) are a Masters Degree in Curriculum or School Administration, a valid New Jersey Certificate as a Supervisor, at least five years experience in public schools, and such other qualifications as the Board of Education may find appropriate and acceptable. Petitioner testified that he has a Teaching Certificate in mathematics (P-14). The present Supervisor of Mathematics, George Franks, was appointed to the position on August 10, 2006 (P-12). Accordingly, petitioner has seniority over Franks.

Petitioner conceded that he does not hold a state certification in any of the disciplines involved with language, arts and literacy, although he contended that he meets the criteria set forth in the job description (P-13). Petitioner further argued that he should have bumping rights for the position of Director of Special Services. That position was only filled in 2008, and petitioner met the stated requirements of a Masters Degree and a New Jersey Principal or Supervisor Certificate (P-10). Petitioner admitted he had no first-hand experience in teaching or supervising special education, although he contended that he had assisted from time-to-time in the classroom.

On cross-examination, petitioner agreed that he has never been employed in the Salem City School District as a principal, vice-principal, supervisor, or teacher. He also acknowledged that he has no certification in special education.

Petitioner was shown a page from a document attached to a letter from counsel for respondent (R-20). This page contained a list of four names, all of whom were non-tenured administrators. Petitioner's name did not appear on the list. Petitioner stated he did not know what the list was. No witness for the Board ever identified or explained the nature of this document.

On cross-examination, petitioner was asked if he believed Dr. Michel had a vendetta against him. Petitioner responded he thought he made Dr. Michel uncomfortable. Petitioner had been a leader within the District. He did not always agree with Dr. Michel's actions. He believed Dr. Michel felt challenged when petitioner did not agree with him.

The Board presented Dr. Michel as its only witness. Dr. Michel previously served as Director of Curriculum and Instruction in the Haddon Heights School District for a period of two and one-half years. On February 28, 2007, he was appointed Superintendent of the Salem School District. Upon taking office, he also took control of curriculum, and transferred petitioner to Special Programs and Projects. He did not specify how he effectuated that transfer.

Dr. Michel testified he was interested in upgrading the educational level of the Salem School District. He introduced the International Baccalaureate Programe in order to facilitate that process. The program had its genesis in Sweden, where it was used to education the children of diplomats. Dr. Michel created the position of International Baccalaureate Programe Coordinator and personally wrote the job description (P-17). He asserted that the International Baccalaureate Programe Coordinator had no responsibilities outside of that program.

Dr. Michel testified he determined to eliminate the position of Director of Programs and Projects upon his receipt of a letter from the Salem County Superintendent of Schools dated February 20, 2009 (R-16). That letter stated that the County Superintendent had identified areas of excess administrative and non-instructional expenditures. Dr. Michel particularly noted Indicators 8 and 18, which stated:

> • Indicator 8 Administrative cost per pupil is greater than the State median
>
> * * *
>
> • Indicator 18 Ratio of Students to Administrative Personnel is less than the State average

Under threat of administrative penalty from the County Superintendent, Dr. Michel determined to reduce the size of the administrative staff. As a result, he decided to eliminate the position of Director of Programs and Projects held by petitioner.

Dr. Michel asserted that the International Baccalaureate Programe Coordinator position was not an administrative position, but only a "coordinator." He argued that "coordinators" do not count as administrators for purposes of assessing an administrative penalty against the District pursuant to the County Superintendent's letter (R-16). He offered no evidence other than his own opinion to support his contention that a "coordinator" is not an administrator.

Dr. Michel admitted that the State of New Jersey offers no certification for a "coordinator." He also conceded that Patricia Null holds an administrator's certificate, but he insisted that Null was working as International Baccalaureate Programme Coordinator under her teacher's certificate, despite the fact that, as he conceded, Null is a twelve-month employee. Dr. Michel could not explain why Null was denoted as an administrator on the Report of Certificated Staff as of October 15, 2009 (P-21).

Dr. Michel identified an organizational flow chart for the Salem City School District (R-24). He opined that the flow chart showed the International Baccalaureate Programe Coordinator to be on the same level as a teacher. He claimed the chart demonstrated that said position is not administrative in nature.

What the chart actually shows is five positions that are directly answerable to the Superintendent: School Business Administrator, Principals, Supervisors, Director of Special Services, and International Baccalaureate Coordinator. The International Baccalaureate Coordinator is located on the chart at a level lower the other positions, with a longer line running down from the Superintendent of Schools to make it appear that the position is on the same level as the teaching staff. If this subterfuge is ignored the chart clearly shows that International Baccalaureate Coordinator is on the same level as the other administrators.

Dr. Michel offered no explanation of the methodology he used to abolish the position of Director of Programs and Projects. He admitted that the May 13, 2009 minutes reflect no resolution abolishing that position. He offered no other explanation for how the elimination of the position was effectuated.

On cross-examination, Dr. Michel admitted that he knew Patricia Null prior to his employment by the Salem School District. She previously worked in programming at Camden Technical High School. Dr. Michel had a relationship with her from attending county curriculum meetings.

On cross-examination, Dr. Michel continued to insist that Null was not an administrator. Although he admitted she was denoted as an administrator on the Department of Education Report of Certificated Staff as of October 15, 2009 (P-21), he contended that she was listed as a coordinator in the school budget and asserted that the school budget was the controlling document. He further conceded that for the 2009-2010 school year, Null was paid a salary of $99,950. He offered no evidence placing Null's salary on the teacher's salary guide.

Dr. Michel admitted that despite the statement contained in his letter to petitioner of May 14, 2009 (P-5), he did not maintain a re-eligibility list in accordance with the provisions of N.J.S.A. 18A-28-12. He further admitted that petitioner was qualified to perform any administrative job. He did not address petitioner's qualifications for the coordinator positions or the child study team position.

LEGAL DISCUSSION

The Board's case is premised on two arguments: that it abolished petitioner's position for economy, and that he has no bumping rights into any other position. The Board's case fails on both counts.

FAILURE TO ABOLISH THE POSITION

First and foremost, nothing in the record proves that petitioner's position as Director of Programs and Projects was abolished pursuant to N.J.S.A. 18A:28-9. The Board of Education never passed a resolution abolishing the position; the only

document indicating the elimination of petitioner's position is Dr. Michel's letter of May 14, 2009 (P-5).

The proper procedure for abolishing a position under tenure protection was considered in the matter of Marsh v Atlantic City Board of Education, EDU 8582-98, Initial Decision (October 20,1999), modified on other grounds, Comm'r (December 21, 1999), St. Bd. (October 4, 2000) <http://lawlibrary.rutgers.edu/oal/search.shtml> wherein the Court held:

> [t]he Board is required to abolish positions under tenure protection when the position is subject to a RIF. The statute, N.J.S.A. 18A:29-9, provides that:
>
> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, *in the judgment of the board, it is advisable to abolish any such positions for reasons of economy* or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. (emphasis supplied).
>
> Reading these two statutes together, N.J.S.A. 18A:27-1 and N.J.S.A. 18A:29-9, it can only lead to the logical conclusion that where a board of education is required to appoint a teaching staff member by a recorded roll call vote of its full membership it, therefore, must vote to abolish a position before it may subject an employee to a RIF.

In short, when he wrote the letter of May 14, 2009 (P-5) terminating petitioner's employment, Dr. Michel engaged in a unilateral action that was outside the scope of his authority. Dr. Michel is not a voting member of the Board of Education and does not have the authority to act in the stead of the Board. Abolishing the Director of Programs and Projects position required action by the Board of Education. Based upon the record, no such action occurred.

Accordingly, petitioner's position was never abolished, and the Board never terminated petitioner's employment.

In its brief, the Board argued that the failure of the Board to rehire petitioner at its May 13, 2009, meeting constituted a termination of his services. Such is not the case. It is undisputed that petitioner has tenure rights in the district as an administrator. His tenure entitles him to perpetual employment until his position is eliminated, he reaches mandatory retirement age, or he engages in conduct that warrants his removal under the tenure law.

In this case, none of the above has occurred. Accordingly, petitioner remains employed as an administrator with the Salem City Board of Education to the present time.

REASONS OF ECONOMY

Given that no reduction in force has occurred in this case, it is not necessary to determine whether the Board has established reasons of economy necessitating the elimination of the Director of Programs and Projects position. Nevertheless, in order to provide a complete record, I will address the issue.

Dr. Michel premised his action on the letter from the Salem County Superintendent of Schools dated February 20, 2009 (R-16). In that letter, the County Superintendent identified "excess administration" in the Salem City school system. The County Superintendent cited two indicators:

> • Indicator 8 Administrative cost per pupil is greater than the State median
>
> * * *
>
> • Indicator 18 Ratio of Students to Administrative Personnel is less than the State average

The Board offered no statistical data proving that the administrative cost per pupil had improved as a result of the elimination of petitioner's position. Nor did the Board provide any statistical data showing that the ratio of students to administrative personnel had improved as the result of petitioner's departure from the school system.

The Board's failure to produce such information is understandable, given that the termination of petitioner's employment did not reduce the size of the administrative staff. Dr. Michel attempted to eliminate petitioner's administrative position, but then hired a new administrator, Patricia Null, and created the position of International Baccalaureate Programe Coordinator. In his testimony Dr. Michel contended that the International Baccalaureate Programe Coordinator was not an administrator, but rather a "coordinator," a position which, he asserted, did not fall under the heading of "administrator." Although he admitted that the new employee, Patricia Null, held an administrator's certification, and that she worked twelve months per year for a salary of $99,950, Dr. Michel insisted that Null was working under her teacher's certification.

Dr. Michel offered no basis for his argument, and the documentation proves otherwise. The report of Certificated Staff as of October 15, 2009 (P-21), a document generated by the New Jersey Department of Education, shows conclusively that Patricia Null is considered an administrator by the State. If the State considers her to be an administrator, then her hiring left the ratio of students to administrative personnel unaffected.

Accordingly, I **CONCLUDE** that the Board has failed to prove the District derived any economic benefit from petitioner's termination. Further, I **CONCLUDE** that, given the subsequent hiring of Ms. Null to an administrative position, petitioner's removal from the District had no impact on the excess administration identified by the Salem County Superintendent of Schools in his February 20, 2009, letter.

REEMPLOYMENT RIGHTS

Next, assuming a proper RIF did occur here, I **CONCLUDE** that petitioner had re-employment rights and should have been afforded the position of International Baccalaureate Programe Coordinator.

The law regarding reemployment following a reduction in force is set forth in N.J.S.A. 18A:28-12, which states in pertinent part:

> 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...

In Francey v. Board of Education of City of Salem, Salem County, 286 N.J. Super. 354 (App. Div. 1996), the Appellate Division has interpreted the statute to mean the following (360):

> As we perceive them, the tenure protections afforded by the Act are designed to apply to, and protect, a teacher's employment efforts over a period of time with a particular school board of education. Thus, on the one hand, when a teacher is RIF'd, but, during employment with the school board, has earned tenure rights within the scope of a teaching certificate and all endorsements thereon, the teacher is entitled to preferred reemployment only to positions within that certificate and endorsements.

Petitioner was a tenured administrator in the District. Notwithstanding Dr. Michel's assertion to the contrary, the Report of Certificated Staff as of October 15, 2009 establishes beyond question that the International Baccalaureate Program Director is an administrative position requiring an administrator's certification. Accordingly, petitioner's credentials meet the requirements for reemployment under N.J.S.A. 18A:28-12, provided he is "qualified."

The Appellate Division, in Francey, supra, went on the define "qualified" as follows (358):

> "Qualified," in its ordinary sense, means: "[to have] complied with the specific requirements or precedent conditions. . . ." *Webster's Third New International Dictionary Unabridged* 1858 (3d ed. 1981). It is, moreover, well evident that possession of the appropriate certification deems one "qualified" for a vacancy within the context of N.J.S.A. 18A:28-12. See Mirandi v. Board of Educ. of West Orange, 1989 S.L.D. 3057, 3062; Bodine v. Board of Educ. of Burlington, Burlington County, 1989 S.L.D. 1053, 1058, aff'd *by* State Bd. of Educ., 1989 S.L.D. 1064. It is, further, by now clear that "qualified" within the scope of tenure rights means qualified as to the particular position in which a teacher has attained tenure and all other positions within the scope of the teacher's teaching certificate and endorsements thereto, Dennery v. Board of Educ. of Passaic County, supra, 131 N.J. at 634, 638, 622 A.2d 858; Ellicott v. Board of Educ. of Frankford, Sussex County, 251 N.J. Super. 342, 348, 598 A.2d 237 (App.Div.1991), regardless of whether one has actual experience in that area, id. at 348-50, 598 A.2d 237; Capodilupo v. Board of Educ. of West Orange Tp., Essex County, 218 N.J. Super. 510, 513-15, 528 A.2d 73 (App.Div.), certif. denied, 109 N.J. 514, 537 A.2d 1300 (1987).

Therefore, since petitioner was both tenured and certified in the appropriate area at the time of the purported reduction in force, he must be reemployed regardless of whether he has actual experience in that area.

But in fact petitioner has experience in the field. At the time he was removed, he held the position of Director of Programs and Projects. A review of that job description shows conclusively that the International Baccalaureate Programe Coordinator would have fallen within the parameters of petitioner's duties.

The job description for the position of Director of Programs and Projects (P-2) shows the duties of that position to be many and varied. Twenty-four duties and responsibilities are listed in the job description, most of which are unrelated. Those unrelated job duties are in keeping with the title - Director of Programs and Projects.

The position was clearly designed as a catchall, a position to fulfill the numerous administrative duties that fall outside the job descriptions of the more traditional administrative positions such as principal, vice-principal, business administrator, and child study team head. Indeed, at the end of the list of duties, the job description states as follows:

> *Any other duties as may be assigned by the Superintendent for the good of the district.

The International Baccalaureate Programe is just such a miscellaneous program/project. It would logically fall within the parameters of the job description of the Director of Programs and Projects. If the Director of Programs and Projects was to be eliminated, then petitioner should have been afforded re-employment rights in the new administrative position of International Baccalaureate Programe Coordinator.

But Dr. Michel did not offer the position to petitioner. Instead, he brought in Ms. Null, who, by his own admission, was a former colleague. Dr. Michel offered no coherent reason for his failure to offer the position to petitioner, thereby lending credence to petitioner's assertion that Dr. Michel sought to rid himself of a possible rival.

Regardless of Dr. Michel's motivation, petitioner unquestionably has reemployment rights in the International Baccalaureate Programme Coordinator position.

Under the standard set forth in Francey, supra, petitioner also has reemployment rights in the Supervisor of Mathematics and Science position. That job requires an administrator's certificate (P-13), but additionally, petitioner holds a certification as a teacher of mathematics. That combination renders him well qualified to perform that position. He is significantly less qualified for the positions of Supervisor of Language Arts and Literacy and Director of Special Services.

CONCLUSION

Petitioner's employment with the Board's school district was never legally terminated. Consequently, I cannot order him reemployed. Instead, I order him reinstated in the position of Director of Programs and Projects, together with retroactive pay. In the event the Commissioner subsequently deems his employment to have been properly terminated, then he must be reemployed as International Baccalaureate Programme Director or, if that position is likewise abolished, Supervisor of Mathematics and Science.

ORDER

I **ORDER** that petitioner be reinstated to the position of Director of Programs and Projects.

I **ORDER** that petitioner receive retroactive pay from the date of his separation from the school district to the date of his reinstatement.

I **ORDER** that in the event the Commissioner subsequently deems his employment as Director of Programs and Projects to have been properly terminated, that he be reemployed as International Baccalaureate Programme Director or, if that position is likewise abolished, Supervisor of Mathematics and Science.

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

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

7-7-10
DATE

Bruce M. Gorman
BRUCE M. GORMAN, ALJ

Date Received at Agency: 7-7-10

Date Mailed to Parties: 7-7-10

/sd

WITNESSES

For petitioner:

Gary Goldberg

For respondent:

Amiot Patrick Michel

EXHIBITS

For petitioner:

P-1 Stipulations of Fact
P-2 Job Description for Director of Programs and Projects
P-3 Job Description for Director of Curriculum
P-4 Letter from Superintendent Michel to Gary Goldberg, May 5, 2009
P-5 Letter from Superintendent Michel to Gary Goldberg, May 14, 2009
P-6 Meeting Minutes for Board of Education Meeting, May 13, 2009
P-7 Agenda for board of Education Meeting, May 13, 2009
P-8 Petition for Appeal
P-9 List of Non-Tenured Administrators
P-10 Not introduced
P-11 Supervisor of Special Services Job Description
P-12 Recommendation to appoint George Franks as a Supervisor
P-13 Job Description for Supervisor
P-14 Math Teacher Certification
P-15 Not introduced
P-16 Not introduced
P-17 International Baccalaureate Coordinator Position
P-18 Master of Arts Degree

P-19 Principal/Supervisor Certification

P-20 Report of Certificated Staff of October 2008

P-21 Report of Certificated Staff of October 2009

P-22 State Board of Education Job Codes

P-23 Not introduced

P-24 Notification of ARRA Grant Money

P-25 Not introduced

P-26 Not introduced

P-27 Not introduced

P-28 Not introduced

P-29 Not introduced

P-30 Not introduced

P-31 Not introduced

P-32 Not introduced

P-33 Not introduced

P-34 Not introduced

P-35 Not introduced

P-36 Not introduced

P-37 Not introduced

P-38 Not introduced

P-39 Not introduced

P-40 Not introduced

P-41 Not introduced

P-42 Not introduced

P-43 Not introduced

P-44 Not introduced

P-45 Not introduced

P-46 Not introduced

P-47 Department of Education Comparative Spending Guide

For respondent:

R-1	Not introduced
R-2	Not introduced
R-3	Not introduced
R-4	Not introduced
R-5	Not introduced
R-6	Not introduced
R-7	Not introduced
R-8	Not introduced
R-9	Not introduced
R-10	Not introduced
R-11	Not introduced
R-12	Not introduced
R-13	Not introduced
R-14	Not introduced
R-15	Not introduced
R-16	Salem County Superintendent Letter, February 20, 2009
R-17	Not introduced
R-18	Not introduced
R-19	Not introduced
R-20	Agenda Packet, May 13, 2009
R-21	Not introduced
R-22	Not introduced
R-23	Not introduced
R-24	Organizational Chart
R-25	Proof of Publication – IB Coordinator Position
R-26	Executive Session Minutes, April 1, 2009
R-27	Sunbeam Interview

OAL DKT. NO EDU 811-10
AGENCY DKT. NO. 40-3/10

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN PRICKETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
BRIDGETON, CUMBERLAND COUNTY.	:	

This is a tenure matter that was forwarded to the Commissioner by the Office of Administrative Law (OAL) as a Failure to Appear. Upon review, the Commissioner determines that this matter should be remanded to the OAL for a recommended decision addressing the circumstances surrounding the respondent's failure to appear, and the effect of same on the pending tenure charges. Due to the circumstances of this matter, an Initial Decision should be issued on an expedited basis.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/24/10
Date of Mailing: 8/24/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAILURE TO APPEAR

OAL Dkt. No. EDU 811-10

Date of Failure to Appear: July 12, 2010

ALJ: Bruce M. Gorman, ALJ

Party or parties who did not appear:

Brian Prickett

Sharon J. Danks

SHARON J. DANKS (7/14/10)
Secretary for Judge Bruce M. Gorman, ALJ

#333-10E

AGENCY DKT. NO. 344-8/10

IN THE MATTER OF THE APPROVAL OF HATIKVAH INTERNATIONAL ACADEMY CHARTER SCHOOL	COMMISSIONER OF EDUCATION DECISION ON MOTION

For Movant, Board of Education of East Brunswick Township: Scarinci Hollenbeck (Matthew J. Giacobbe, Esq.)

For Respondent, Hatikvah International Academy Charter School: Porzio, Bromberg & Newman P.C., (Thomas O. Johnston, Esq.)

Participant: New Jersey Office of the Attorney General, Department of Law & Public Safety, Division of Law (Shannon M. Ryan, DAG)[1]

This matter was opened by way of a motion for emergent relief filed on August 11, 2010,[2] by the Board of Education of East Brunswick Township ("Board"). Therein, the Board seeks a stay of the Commissioner of Education's July 6, 2010 determination – currently on appeal to the Appellate Division of the Superior Court – to grant a charter to Hatikvah International Academy Charter School ("Hatikvah") pursuant to the authority granted him by *N.J.S.A.* 18A:36A-1 *et seq.*, pending resolution of the appeal. Upon full review of the Board's moving papers and the responsive filings,[3] the Commissioner is compelled to deny the Board's motion.

[1] After the Office of the Attorney General was served in connection with the appeal of this matter on its underlying merits to the Appellate Division of the Superior Court, DAG Ryan requested and was granted participation status on the Board's Motion for Stay.

[2] The Commissioner finds it somewhat incongruous that, notwithstanding the Board's claim that it knew on June 30, 2010 that Hatikvah did not have the requisite enrollment pursuant to *N.J.A.C.* 6A:1-2.1(i)(14), it did not file its Motion for Stay until August 11, 2010 – some 36 days after the Commissioner's July 6, 2010 grant of a charter to Hatikvah.

[3] It is noted that subsequent to the close of business on August 24, 2010, the Board faxed a reply to the responsive filings to its motion in this matter. No such submission having been requested, it was not considered herein.

The essence of the Board's underlying appeal to the Appellate Division is that in order to be awarded a final grant of a charter, a charter school must submit certain documentation by June 30 (*N.J.A.C.* 6A:11-2.1(l)) which includes, *inter alia*, "[e]vidence of enrollment of at least 90 percent of approved maximum enrollment, as verified by student registrations signed by parent/guardian(s)." (*N.J.A.C.* 6A:11-2.1(i)(l4)). Hatikvah's approved maximum enrollment is 108; 90% of this number is 97 students. The Board charges that Hatikvah did not have on June 30th – nor does it have to-date – the requisite number of registered students to satisfy this legal requirement. As such, the Board contends that the Commissioner's July 6, 2010 grant of a charter to Hatikvah was premature, unauthorized, and detrimentally prejudices the Board. The Board maintains that the Commissioner must stay his grant of final approval to Hatikvah pending resolution of this appeal.

The standards for granting injunctive relief are well established. (*See Crowe v. DeGioia*, 90 *N.J.* 126 (1982); incorporated into regulations at *N.J.A.C.* 6A:3-1.6) The party seeking such relief must demonstrate the existence of **each** of four separate conditions: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. (*N.J.A.C.* 6A:3-1.6(b)) Each of these criteria will be addressed below.

The Board argues that it will suffer irreparable harm absent a stay here because the Board – which is responsible for providing transportation to not only its own students but those of the charter school – is immobilized with respect to sending out bids for transportation absent a finalized number of students for both the District and the charter school. Without these final enrollment figures, arrangements for transportation are impossible to conclude. It urges that, at this late date, disruption in instruction of students and special education services can be contemplated.

Upon review, the Commissioner finds that the reason set forth by the Board does not constitute a demonstration of irreparable harm. According to its filing, East Brunswick has a total enrollment of approximately 9,000 students. Hatikvah students comprise no more than 1 percent of the Board's resident student population, hardly a sufficient number to cause immobility to this District. Moreover, Hatikvah contends that the Board has already submitted 75 student transfer cards to it and, therefore, is fully aware that at least these pupils will require transportation to Hatikvah, yet – according to Hatikvah – they have done nothing to prepare for these students. Based on the foregoing, the Board has failed to demonstrate that it will be irreparably harmed if the grant of a charter to Hatikvah is not stayed.

With regard to the second and third criterion, the probability that it will succeed on the merits of its appeal before the Appellate Division and that the legal right underlying its claim is settled, the Board argues that – as the entity responsible for ensuring the education of students domiciled in the District – any issue which impedes the timely delivery of educational services in the District falls under its purview. Additionally, it maintains, the grant of a charter to Hatikvah renders this charter school eligible for money in excess of $1.2 million. As the entity also responsible for the finances of the District, it is incumbent on the Board before releasing such a sum to this school that it ensures that this charter school is legally eligible for such taxpayer funds. The Board asserts that the facts surrounding this matter are undisputed. The law requires that prior to receiving final approval, a charter school must demonstrate that they have enrolled 90% of their minimum approved student enrollment. It contends that there is no exception to this requirement. In that Hatikvah's current student enrollment is far below the requisite number, the Board urges that the legal right in support of its claim is settled and it will ultimately prevail on the merits of this matter.

The Commissioner finds the Board's arguments in this regard to be without merit. Hatikvah's papers clearly indicate that the material facts in this matter are, indeed, disputed. Hatikvah's enrollment, which comprises the total factual basis for this action, is at issue. The Board

claims that the enrollment is 62 pupils and Hatikvah contends that – as of the submission of its materials here – total student enrollment is at least 99 students. The Commissioner, therefore, concludes that the existence of such a material factual dispute precludes the Board from demonstrating a likelihood of success in this matter. Additionally, the legal right underlying the Board's claim is not at all settled. As observed by participant, there is no case law which addresses the 90% of maximum enrollment nor has the Department ever been presented with a challenge to *N.J.A.C.* 6A:1-2.1(i)14, nor has it ever had a challenge by a school district to the Commissioner's grant of a final charter based on the student enrollment of a charter school. Consequently, the Board cannot establish that there is a settled legal right which entitles it to prevent the opening of a school which has a validly authorized and issued charter.

Finally, as to the balancing of the equities, the Board offers that – absent a stay – it will suffer far more hardship than any experienced by Hatikvah. While Hatikvah will continue its efforts to satisfy its 90% enrollment requirement, the Board – with 9,000 students – will be unable to finalize plans for the 2010-11 school year. It maintains that the inconvenience caused to Hatikvah's approximately 65 enrolled students pales in comparison with the 9,000 student challenge facing the Board. Moreover, the funds allocated by the Department of Education to Hatikvah were for the education of 108 students, thereby allowing Hatikvah to receive funding for more students than actually enroll in the school. The financial harm which would be incurred by the Board in releasing unwarranted funds to a charter school with such a low enrollment far exceeds that incurred by any other party.

The Commissioner finds the Board's arguments in this regard spurious at best. Pursuant to *N.J.S.A.* 18A:36A-12, the Board is only required to pay Hatikvah for the actual number of East Brunswick students enrolled in Hatikvah. It bears no financial responsibility either for students who are not enrolled in Hatikvah or students outside of the East Brunswick School District who attend that school. Finally, it is the public policy of the State and the Department of Education to facilitate

and encourage the establishment of charter schools. The Department has been working with Hatikvah since early 2009 with the expectation of Hatikvah opening its school for the 2010-11 school year. Should the Board's request for a stay of the Commissioner's grant of a charter to Hatikvah be granted, it is unlikely that the school would be able to open for the upcoming school year. The educational opportunities offered to its students and supported by the Department would, therefore, be foreclosed. For these reasons, a balancing of the equities in this matter clearly weighs in favor of Hatikvah.

In that the Board has failed to establish any of the requisites in support of its application for stay of the Commissioner's July 6, 2010 grant of a charter to Hatikvah International Academy Charter School, its motion is hereby DENIED.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 8/25/10

Date of Mailing: 8/26/10

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

#347-10

QUANDA FUDD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE TRENTON COMMUNITY CHARTER SCHOOL, MERCER COUNTY, EDWIN LLOYD AND LENORA GREEN,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner challenged the abolishment of her position as school director and non-renewal of her employment during a reorganization, alleging bad faith and violation of tenure and due process rights. Respondent Board asserted that petitioner's appeal was not timely filed, and filed a motion for summary decision.

The ALJ found that: there are no genuine issues of material fact and the matter is ripe for summary decision; petitioner had sufficient notice by May 19, 2009 of the Board's intent to eliminate her position at the close of the 2008-2009 school year; pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition of appeal must be filed no later than 90 days from the date of receipt of notice of a final action of the Board, which in this case would be August 17, 2009; and petitioner did not file her appeal until October 7, 2009. Accordingly, the ALJ granted the Board's motion to dismiss the appeal for failure to comply with the 90 day rule.

Upon review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that counsel for petitioner failed to submit exceptions to the ALJ's decision despite being granted two extensions of time to submit same.

This synopsis is not part of 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 27, 2010

OAL DKT. NO. EDU 12067-09
AGENCY DKT. NO. 279-10/09

QUANDA FUDD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE TRENTON COMMUNITY CHARTER SCHOOL, MERCER COUNTY, EDWIN LLOYD AND LENORA GREEN,	:	DECISION
RESPONDENTS.	:	

Upon review of the record and Initial Decision in this matter the Commissioner adopts the Initial Decision as the final decision, for the reasons set forth therein.[1]

Accordingly, respondent's motion for summary decision is granted and the petition is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/27/10

Date of Mailing: 8/27/10

[1] Pursuant to *N.J.A.C.* 1:1-18.4(a), the parties have 13 days from the mailing of the Initial Decision to file exceptions. In the present case exceptions were due by July 27, 2010. On that date, petitioner's counsel asked for an extension to August 10, 2010 to file exceptions, and same was granted. On August 9, 2010, petitioner's counsel asked for a further extension of one week to file extensions. An extension to August 17, 2010 was granted, but no exceptions were filed on that date.

[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 GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 12067-09

AGENCY DKT. NO. 279-10/09

QUANDA FUDD

Petitioner,

v.

EDWIN LLOYD, LENORA GREEN, JERRI MORRISON AND BOARD OF TRUSTEES OF TRENTON COMMUNITY CHARTER SCHOOL,

Respondents.

Patricia Atkins, Esq., for petitioner

Michael Heron Esq., for respondent (Lenox, Socey, Formidoni, Brown, Giordano, Cooley & Casey, attorneys)

Record Closed: July 7, 2010 Decided: July 12, 2010

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

In this matter, Quanda Fudd (petitioner) appeals the elimination of her position by the Board of Trustees of the Trenton Community Charter School (Board) pursuant to a reorganization of the school. The Board contends that Petitioner's petition of appeal was not timely filed, and seeks an order dismissing the petition.

PROCEDURAL HISTORY

On October 7, 2009, petitioner filed a Verified Petition contesting the elimination of her position. On November 23, 2009, the case was transmitted to the Office of Administrative Law where it was filed as a contested case. A Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5, was filed by the Board on June 1, 2010. Petitioner filed a brief in opposition to the motion on July 2, 2010. The Board waived its right to a reply brief and Oral argument was held on July 7, 2010. The record closed on that date.

STATEMENT OF FACTS

The material **FACTS** are not in dispute, and I **FIND** as follows:

Petitioner has been employed by the Board since School Year 2004-2005, first as Assistant School Director, and, since August, 2006, as School Director. On May 5, 2009, the Executive Director of the Board informed petitioner that the Board would receive a recommendation to not renew her contract at its May 12, 2009 meeting (R-2, Exhibit E). On that May 12, 2009 meeting, the Board approved a reorganization of the School which eliminated petitioner's position at the close of the school year.

The Executive Director notified petitioner of this action by letter dated May 13, 2009 sent via certified mail (R-2, Exhibit F). The Board's Manager of Human Resources contacted petitioner via email on May 19, 2009 regarding the Board's action and petitioner replied on that date. Petitioner made a number of requests for the vote count

and a written determination stating the reasons for the non-renewal. The vote count was provided on May 27, 2009 (R-2, Exhibit J).

On June 20, 2009, petitioner wrote the President of the Board again requesting a written explanation and requesting to address the Board at the June 23, 2009 meeting (R-2, Exhibit K). On June 22, 2010, the Board President replied via email that he would be available to meet with petitioner the following day. Petitioner again reiterated her desire for a written explanation and a meeting with the full board. On June 23, 2009, the Board President wrote petitioner a letter (R-2, Exhibit M) indicating that no written explanation would be supplied and that petitioner was not on the agenda for the Board meeting later that day. He indicated that he did remain available to meet with petitioner.

Petitioner states that she did not receive the June 23, 2009 letter until July 6, 2009, and that it was in an envelope bearing a postmark of July 2, 2009. However, as will be more fully set forth below, any dispute regarding when the June 23, 2009 letter was actually received by Petitioner is immaterial to a resolution of the Board's motion.

CONCLUSIONS OF LAW

The facts involving this motion are not in dispute. This motion is based entirely on the timeliness of the filing of petitioners petition challenging the Board's reorganization pursuant to N.J.A.C. 6A:3-1.3(i). While the parties disagree as to whether petitioner was tenured in her position, this fact is not material as to the applicability of the timeline requirements of N.J.A.C. 6A:3-1.3(i) to challenge the Board's reorganization. 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.

Petitioner has filed her appeal pursuant to N.J.A.C. 6A:3-1.1, et. seq. which establishes the procedures for the filing of petitions of appeal before the Commissioner of Education. See: N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3 (i), which provides that a petition of appeal before the Commissioner shall be filed "no later than the 90th day from the date of receipt of the notice of a final order,

ruling or other action by the district board of education ... which is the subject of the requested contested case hearing."

Adequate notice has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate."Kaprow v. Board of Education of Berkley, 131 N.J. 572, 587 (1993). The record reflects that respondents sent a letter, via certified mail, dated May 13, 2009 (R-2, Exhibit F) indicating that the Board had approved the reorganization of the school and had eliminated petitioner's position. Although proof of receipt was not provided, the record does include email correspondence, dated May 19, 2009, between petitioner and the Board's Manger of Human Resources and & Enrollment Services (R-2, Exhibit I) which make clear that petitioner was aware of the Board's action. Accordingly, I **CONCLUDE** that petitioner had notice "sufficient to inform [her] of some fact that ... she ha[d] a right to know and that the communicating party has a duty to communicate," by May 19, 2009. This would require that her petition be filed by August 17, 2009. Petitioner's appeal was filed October 7, 2009 (Petition affixed to transmittal, date stamped by office of Controversies and Disputes), 52 days after the deadline. Petitioner argues that the 90 days should run from the date petitioner was advised that the Board did not intend to further discuss her employment, in a letter dated June 23, 2010 (R-2, Exhibit M). Petitioner states that this correspondence was received by her on July 6, 2009, in an envelope postmarked July 2, 2009 (envelope not provided). Although I have **CONCLUDED** that this is not the appropriate date to run the 90 days, as petitioner had notice of the Board's actions significantly earlier, it is noted that if this date were utilized, petitioner's appeal would still need to have been filed by October 5, 2009.

It is well established that the ninety day rule is to be strictly applied. See: Kaprow, supra.; Morris-Union Jointure Commission v. Board of Education of the Borough of South River, 92 N.J.A.R. 2d (EDU) 453; Markulin and the Neptune Education Association v. Board of Education of the Township of Neptune, 92 N.J.A.R. 2d (EDU) 406. The rationale for this requirement was articulated by the Kaprow court as follows:

> The [ninety day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between teachers and the administration. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be file promptly so that the local board can anticipate any back-pay requirements. Kaprow at 582.

Petitioner argues that relaxation of the 90-day rule would be appropriate. While the Commissioner has the discretion to relax the rule, N.J.A.C. 6A:3-1.16, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. Portee v Board of Education of the City of Newark, 94 N.J.A.R. 2d (EDU) 381,384. Cordell Wise v Board of Education of the City of Trenton, OAL Dkt No. EDU160-00 Final Decision, (September 11, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>. Petitioner's claim has no import or significance beyond her personal employment relationship with the Board, making a relaxation of the rule unwarranted. Petitioner argues that the reorganization was a sham, and done in bad faith, and that the Boards alleged failure to follow the rules in conducting its reorganization justify relaxation of the 90 day rule. This is essentially the basis for the entirety of the matter at hand. The vast majority of cases brought in this forum are formed by an allegation that one party did not follow the rules. Petitioner's argument, taken to its logical conclusion, would require that no petitioner be required to adhere to the rules of procedure in those matters. I **CONCLUDE** that this argument does not provide a basis for relaxation of the 90 day rule.

Accordingly, I **CONCLUDE** that Petitioner's petition of appeal should be dismissed as out of time for failure to comply with the requirements of N.J.A.C. 6A:3-11.3(i).

DECISION AND ORDER

The Board's motion to dismiss the appeal of the petitioner 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.

7/12/2010
DATE

ELIA PELIOS, ALJ

Date Received at Agency: JUL 14 2010

Date Mailed to Parties: JUL 14 2010

APPENDIX

EXHIBITS

For Petitioner:

P-1 Verified Petition

For Respondent:

R-1 Motion to Dismiss

R-2 Certification of Counsel

R-3 Statement of Undisputed Facts

#348-10

EMILY DIAZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher of world languages, challenged respondent Board's action in placing her on an unpaid medical leave of absence. Respondent contended that its action was a proper exercise of its authority under *N.J.S.A.* 18A:16-4, as a psychiatric examination of petitioner revealed that Diaz was medically unfit to continue her teaching duties. The respondent further contended that it was not obligated to return petitioner to her teaching position, as Diaz had not furnished proof of recovery satisfactory to the Board.

The ALJ identified two issues to be determined in this case: 1) whether the Board properly placed petitioner on a psychiatric leave of absence pursuant to its authority under *N.J.S.A.* 18A:16-4, and 2) if so, whether the Board's determination that petitioner had not demonstrated satisfactory proof of recovery was arbitrary, capricious or unreasonable. The ALJ found, *inter alia*, that: petitioner's request to be transferred from the high school to a middle school teaching assignment was accompanied by a letter from her personal physician which supported Diaz's claims that she was under "extreme duress" and required a transfer as a matter of "medical necessity", therefore, the Board properly directed Diaz to undergo a psychiatric examination in accordance with the requirements of *N.J.S.A.* 18A:16-2; a mutually agreed-upon psychiatrist, Dr. Gallina, diagnosed petitioner with an adjustment disorder and concluded that Diaz was not fit to remain in the classroom – whether at the high school or middle school level – until she pursued therapy; subsequently, the Board properly placed Diaz on a psychiatric leave of absence; to demonstrate proof of recovery, Diaz later engaged other doctors – a psychiatrist and a psychologist – to evaluate her, resulting in two reports which found petitioner fit for duty. The ALJ concluded that the Board had a reasonable basis for its decision not to accept the reports of Diaz's personal psychiatrist and psychologist, as they do not speak in terms of recovery or address the concerns raised by Diaz's initial medical evaluations. Accordingly, the ALJ ordered the petition dismissed.

Upon a thorough and independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, and recommended that the parties agree upon an expert to perform a fitness-for-work evaluation to advise regarding Diaz's present emotional ability to return to the classroom.

This synopsis is not part of 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 27, 2010

OAL DKT. NO. EDU 1751-09
AGENCY DKT. NO. 353-12/08

EMILY DIAZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The petitioning tenured teacher, Emily Diaz, challenges respondent's action in requiring that she take an unpaid leave of absence for psychological reasons. She asks that she be returned to her position teaching Spanish in respondent's district and that she be made whole for lost pay and benefits. After consultation with counsel for the parties, the Administrative Law Judge (ALJ) assigned to this case identified the following issues to be adjudicated:

> 1. Did the Board properly place Diaz on a psychiatric leave of absence pursuant to its authority under *N.J.S.A.* 18A:16-4, and
> 2. Is the Board's determination that Diaz has not demonstrated satisfactory proof of recovery arbitrary, capricious or unreasonable?
> Initial Decision at 3.[1]

The leave of absence challenged by petitioner commenced in consequence of a psychological evaluation performed in September of 2008, which found petitioner medically unfit to continue her teaching duties. (Respondent's Exhibit R-2 at 12) The evaluation, in turn, had been precipitated by a letter from petitioner asking for a change in teaching assignment for "medical" reasons. (Joint Exhibit J-1)

[1] These two issues were also set forth in the Prehearing Order.

Respondent contends that it is not obligated to reinstate petitioner, because she has not provided proof of recovery. Petitioner argues that she has provided proof of recovery by means of the reports and testimony of two mental health professionals that she hired subsequent to the evaluation, both of whom opined that she was fit for work. (Petitioner's Exhibits P-9 and P-12) The Commissioner adopts the Initial Decision of the Administrative Law Judge (ALJ) dismissing the petition and recommending that petitioner demonstrate, by way of evaluation by an expert acceptable to both parties, her fitness to return to work.

It is undisputed that in 2002 petitioner began her employment in respondent's district. While her first year of teaching was at the middle school, her assignment in subsequent years was at the high school. It is further undisputed that she experienced significant medical problems during her period of employment at the high school and that her relationship with her supervisor became antagonistic.

On July 24, 2008 petitioner sent to respondent's superintendent, Charles Montesano, the above referenced note (Joint Exhibit J-1) asserting that she had a "medical need" for reassignment from the high school to the middle school. Attached was a letter from her personal physician, Paul Ostergaard, M.D., which maintained that petitioner was:

> suffering from the effect of extreme duress at her present job description. She currently has to take medication for gastritis to prevent an ulcer in addition to irritable bowel syndrome and insomnia.
> (Respondent's Exhibit 5)

Ostergaard further wrote:

> On the basis of my findings and in the interest of preserving her health, I must recommend a change of job venue. Please consider her request to work in a lower grade as a matter of medical necessity.
> *(Ibid.)*

Montesano testified – and the ALJ found – that because petitioner's request cited medical need, he directed that Diaz be examined by the school physician, Everett Schlam, M.D. (3T38-39; Joint Exhibit 2) It is undisputed that the meeting between Dr. Schlam and petitioner occurred on August 19, 2008 in the presence of petitioner's husband and young son, 3T8, and Schlam testified that it lasted at least a half hour. (3T15) Schlam had been able to review Ostergaard's medical file concerning petitioner prior to the meeting. (3T8) After examining petitioner and speaking to Dr. Ostergaard, Schlam issued a report dated August 22, 2008 recommending that – based upon his examination of Diaz – "psychiatric clearance prior to the 2008/2009 school year [was] requested." (Respondent's Exhibit 7)

In the report, Schlam explained that petitioner had presented as "tearful and upset," and that she had spoken of both the medical and psychological stressors that had prompted her transfer request. *(Ibid.)* More specifically, she believed that job stress had contributed to gastric issues and a feeling of being overwhelmed. *(Ibid.)* In petitioner's view, the job stress flowed from unfair treatment by the high school administration, leading her to the conclusion that it would be less stressful to teach at the middle school. *(Ibid.)* Schlam testified in the OAL that petitioner had appeared distraught, and that he was concerned about her. (3T34)

He concluded that petitioner:

> has a chronic stress disorder which is interfering with her ability to function at work. A psychiatric evaluation is required to help her manage acute stress so she can function effectively.
> (Respondent's Exhibit 7*)*

He further advised that he had discussed petitioner's condition with Ostergaard, and both doctors had agreed that petitioner would benefit from a psychiatric evaluation and counseling. *(Ibid.)*

The ALJ found, and it appears undisputed, that in consequence of petitioner's request for a transfer to the middle school "as a matter of medical necessity,"[2] and Dr. Schlam's recommendation that a psychological evaluation be undertaken, respondent asked petitioner to undergo a psychological examination and she agreed. (Initial Decision at 4 and 8; 3T40) Accordingly, effective September 1, 2008, respondent placed petitioner on paid administrative leave pending the results of the evaluation. (Initial Decision at 4)

Petitioner conceded that the forensic psychiatrist who performed the evaluation, *i.e.,* David Gallina, M.D., was selected not by respondent, but by petitioner on advice from her union. (2T138-39; 3T41) Further, petitioner testified that Gallina was paid by both the NJEA and respondent. (2T176)

It is undisputed that Gallina met with petitioner on September 24, 2008. His evaluation – memorialized in a written report, incorrectly dated September 27, 2008 but issued subsequent to that date[3] – included an extensive interview with petitioner, a patient questionnaire, the review of correspondence from petitioner and Dr. Schlam, and the administration of various psychological tests.[4] (Respondent's Exhibit R-2) The patient questionnaire invited petitioner to describe the nature of her main problem, and her response was "stress acute disorder." (Respondent's Exhibit R-3) Petitioner also checked off several physical and psychological issues on the questionnaire – including anxiety, tenseness, panic, insomnia and fatigue. *(Ibid.)* As the ALJ observed, "It was noteworthy that [petitioner's] job-related

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[2] This phraseology was used in the above referenced June 24, 2008 letter from petitioner's personal physician, Paul Ostergaard, to Montesano.

[3] Gallina explained that the September 27, 2009 date set forth on his written report reflected the date of the first section of the report. He finished the report after receiving the results of the tests that he had administered, but the typist failed to change the date. (1T109)

[4] In his report, Gallina advised that the only documents which he felt were relevant to the evaluation were petitioner's request for a transfer to the middle school, and Schlam's letter/report about his interview with petitioner.

stress was still apparent in September, when she had not been in the classroom since June." (Initial Decision at 11)

Gallina noted that in the course of his interview with petitioner she acknowledged the significant emotional stress that her medical problems had caused her and the burdens they had imposed upon her job performance. (Respondent's Exhibit R-2 at 5) She also, according to Gallina, identified – as a stressor – difficulties with her world language supervisor. Petitioner alleged, for example, that the supervisor issued a disciplinary write-up when physical discomfort precipitated her failure to go to a workshop required by the supervisor. *(Ibid.)* Petitioner related to Gallina that she had filed grievances and affirmative action complaints against the supervisor but had apparently not prevailed. *(Ibid.)*

Petitioner's explanation to Gallina for her request for a transfer to the middle school was that she had hoped 1) that there would be less pressure from the middle school administration, and 2) that she would be less under the world language supervisor's scrutiny in the middle school building, because the supervisor's office was located in the high school.[5] As an example of how she felt about her supervisor, petitioner told Gallina:

> I'm going white-knuckled. . . . I'm driving and I'm not even going to the school. I'm just driving by and my husband is sitting with me in the car, and he says your knuckles are turning white. (Respondent's Exhibit R-13 at 47)[6]

Gallina's own observations of petitioner found no evidence of psychoses, cognitive impairment or depression. (Respondent's Exhibit 2 at 9) He did identify "free-floating anxiety," *Ibid.,* occupational problems and "Adjustment Disorder With Mixed Emotions."

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[5] During her testimony at the hearing in the Office of Administrative Law (OAL), Diaz conceded that her supervisor would be her supervisor no matter where she was located. (2T151-52)

[6] This quotation is from the transcript of an audio tape which petitioner surreptitiously recorded when she appeared for the evaluation. She initially withheld it from discovery. (2T140)

(Respondent's Exhibit 2 at 10) Underlying these findings were the results of the mental status examination:

> Increased levels of generalized anxiety and stress, mostly related to health problems and to occupational conflicts on her job. Ms. Diaz is clearly dissatisfied with the administration of the high school where she works, has had multiple conflicts with authority figures in her school, and she tends to blame others for her difficulties.
> (Respondent's Exhibit 2 at 11)

At the hearing in the OAL, Gallina explained that the term "adjustment disorder" signifies a greater difficulty than the average person in adjusting to one or more external stressors in an individual's life. (1T112) It could flow from a heightened sensitivity to a certain stressor or the accumulation of stress from multiple sources. *(Ibid.)* It is usually "reflected by a mixed emotional response," *e.g.* anxiety, depression, anger, irritability. *(Ibid.)* In petitioner's case, Gallina felt that her extensive medical problems, her difficulties on the job and the normal stresses of parenthood were all significant contributors to her adjustment disorder. (1T113-14)

Gallina recommended cognitive therapy to assist petitioner in gaining insight into the nature of her occupational issues, noting that throughout her health related problems, petitioner had not sought or received any psychiatric or psychological treatment or medications.[7] (Respondent's Exhibit R-2 at 11-12) At the hearing he testified that the kind of illness and chronic pain that petitioner had experienced often wears a person down, necessitating new coping strategies. (1T119) Treatment, in his view, was essential. (1T120)

In Gallina's opinion, petitioner's belief that a transfer to the middle school would solve her problems was speculative:

> Based on today's evaluation, it is anticipated that Ms. Diaz may continue to have authority conflicts, to feel victimized, and to project most of the blame for these difficulties on others if she returns to her teaching job.

[7] Petitioner apparently did indicate to Gallina that she thought cognitive therapy might be helpful to her, especially in adjusting to the effects of her medical problems. (Respondent's Exhibits R-2 at 11; R-13 at 43)

> Her level of insight into her own contribution to these difficulties is limited.
> (Respondent's Exhibit R-2 at 12)

Thus, as a result of the evaluation, Gallina concluded that petitioner was not fit to return to work. *(Ibid.)* While he understood that transfer to the middle school was petitioner's preference, it was not medically necessary and he saw no basis to believe that it would resolve her problems. *(Ibid.)*

Gallina also explained that the nature of petitioner's individual circumstances must be considered. There are people with adjustment disorders who go to work. However, the evaluation was intended to assess petitioner's unique situation, including her medical stressors and the fact that her job involved being responsible for children. (1T125-26) Putting petitioner's status in the context of a school district, Gallina observed:

> Like any bureaucracy, the school system's ability to adjust to all the individuals who are working for them is certainly limited. . . . so it is pretty much up to the individual to try to cope with the environment that any of us are working in. I think Ms. Diaz' ability to do that without some treatment and without some help would be fairly limited.
> (1T131-32)

Ultimately, Gallina felt that treatment was "absolutely the right recommendation" for petitioner. (1T126) It is undisputed that petitioner's administrative leave was extended based upon the results of Gallina's evaluation.

The ALJ found that Gallina's is a "highly accomplished physician and expert in the field of psychiatry," and that his testimony was presented "in a professional and credible manner." (Initial Decision at 8) She found significant the fact that he had been selected not by respondent but by petitioner's union. *(Ibid.)* She further found that Gallina's conclusion – that petitioner's high level of stress and anxiety called for a leave of absence and counseling in coping skills – was convincing, and was corroborated both by petitioner's own questionnaire

answers and by petitioner's own statements in her taped and transcribed meeting with Gallina. (Initial Decision at 8-9)

In discussing the content of the taped meeting, the ALJ noted that "[a] transfer from the high school was [petitioner's] clear agenda," Initial Decision at 9, but that Gallina spoke to her about the feasibility of that agenda:

> Gallina: If I clear you to go back to work, in all probability, from what you're telling me, initially you're going to go back to the high school. Can you handle that?
> **Petitioner: No.**
> Gallina: So what is the alternative?
> Petitioner: I don't know.
> (Respondent's Exhibit at 45–46. [Emphasis added.])

Subsequent to Gallina's evaluation – on October 13, 2008, petitioner wrote to Montesano stating that she was prepared to return to work. (*See, e.g.* Joint Exhibit 3) [8] This was in contrast to what she had just told Gallina in their September 24, 2008 meeting, *i.e.,* that she would not be able to handle going back to her position at the high school. (Respondent's Exhibit R-13 at 45-46) Montesano advised petitioner, by letter dated October 14, 2008, that as a result of Gallina's determination that she was not medically able to perform teaching duties, she would need written clearance from Gallina if she wished to return to work. In the meanwhile, her days of absence would be charged to her bank of 25 sick days. (Respondent's Exhibit R-8)

Rather than following through on seeking cognitive therapy, petitioner asked her chiropractor to submit a note saying she was fit to return to full time teaching, which he did on November 10, 2008. (Petitioner's Exhibit P-8) She also arranged – at her own expense – for a second evaluation, *i.e.* by Diana Riccioli, M.D. Dr. Riccioli's examination of petitioner took place on November 4, 2008, and the report was dated November 20, 2008. (Petitioner's Exhibit

[8] She repeated this assertion via letters dated November 24, 2008 and January 19, 2009.

P-9) Respondent's Superintendent Montesano testified that he was given no prior notice that petitioner had arranged for a second evaluation. (3T44)

Riccioli's short recitation of the facts leading to petitioner's request for a second forensic evaluation, Petitioner's Exhibit 9 at 1-2, did not differ materially from the background presented in Gallina's report. The mental status assessment by Riccioli did not appear to differ in any significant degree from Gallina's. (Petitioner's Exhibit P-9 at 3) Nor did her diagnosis of "Adjustment disorder – unspecified occupational problems." *(Ibid.)* Riccioli's interpretation of the MMPI-2 test which she had petitioner take was that petitioner's judgment was "fair." (Petitioner's Exhibit P-9 at 4)

Nonetheless, Riccioli opined that petitioner was "able to return to work as a teacher without psychological restrictions." *(Ibid.)* Having found petitioner fit to return to work, Riccioli paradoxically wrote:

> perhaps [petitioner] should work in a less conflicted environment to decrease some stress, which can worsen her physical illness (fibromyalgia). Mrs. Diaz explained some of her stress related to feeling subject to conflicting demands and working <u>for what she perceives to be</u> an unhelpful supervisor.
> I recommend if possible a transfer to another school in order to decrease stress.
> (*Ibid.* [Emphasis added.])

At the hearing Riccioli confirmed that her conclusion that petitioner was fit for work was conditioned upon whether petitioner could work in a less conflicted environment. (3T108) She stated in her rebuttal testimony on the third hearing date, however, that she believed that petitioner would be able to go back to work in the high school if need be, because she had had time off, because they had discussed – during the evaluation interview – solutions to some of the problems that petitioner had experienced, and because petitioner wanted to go back to work. (3T114-15)

Montesano received Riccioli's report in November but did not allow petitioner to return to work because 1) Riccioli's evaluation contradicted Gallina's, 3T44, 2) he noticed "inaccuracies" in Riccioli's report, *Ibid.*, 3) his priority was avoiding the risk of an unfit teacher in the classroom, and 4) he did not wish for petitioner's stress to be exacerbated. (3T45)[9]

When asked to describe some of the inaccuracies in Riccioli's report Montesano testified that, contrary to what was set forth in Riccioli's report, petitioner was not "written up" for failing to attend a third day of teacher workshops, or for the content or greetings of her emails. She was written up for failing to sign Individual Education Plans (IEPs). He explained that teacher signatures on IEP documents are essential to verifying that special education students are receiving the required accommodations. The district needs to be able to produce such signed IEPs in the event that complaints are brought against it. (3T46-48)

Further, in contrast to the complaints that petitioner communicated to Riccioli about her supervisor, Ms. Lezansky, Montesano explained that a confidential investigation performed by the district affirmative action officer had unearthed no basis for a finding of discrimination or harassment. Statements from petitioner's departmental colleagues suggested that if there was a hostile work environment, it was more attributable to petitioner than to Lezansky. (3T53) In addition, Montesano testified that petitioner had also "had issues" with the supervisor who preceded Lezansky. (3T54)

Ultimately, Montesano testified that he had been keeping petitioner's position open and that he would accept her return to work provided that she:

> Hopefully [would] receive the therapy that was recommended but most importantly [would] receive clearance from a doctor who has the full picture of what's going on. (3T55)

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[9] At this point in time, petitioner's sick days had been exhausted and her leave was to be continued through March 4, 2009, under the federal Family and Medical Leave Act. *See,* Respondent's Exhibit R-12.

However, he could not support a transfer of petitioner to the middle school. Consultation with the middle school principal and a former supervisor revealed that petitioner had been transferred to the high school because her demeanor had been considered better suited to older children. (3T56) With regard to the interpersonal frictions, petitioner's supervisor would be the same at both schools. (3T55)

After petitioner filed her appeal to the Commissioner, she hired a third forensic professional – psychologist George Tierney. His first interview with petitioner took place on January 30, 2009, and his primary report was dated February 6, 2009. (2T39) On March 24, 2009, he met with petitioner again and penned a letter "To Whom It May Concern" that stated:

> Based on my clinical evaluation, I believe that Mrs. Diaz is capable, from a psychological point of view, to resume her employment as a teacher. Her mental health status is not impaired. Her mood and affect are normal, her thought procession in tact, and her cognitive functions for judgment, insight and abstractions is [sic] not impaired.
> (Petitioner's Exhibit P-12)

The February 6, 2009 report reiterated the history – provided by petitioner – that had already been articulated in Gallina's and Riccioli's reports. (Petitioner's Exhibit P-12 at 1-2) Similarly to Gallina and Riccioli, Tierney found in petitioner no psychoses, cognitive impairment or significant depression. (Petitioner's Exhibit P-12 at 3) He regarded petitioner's anxiety as natural – given petitioner's "occupational concerns." *(Ibid.)* His diagnosis was the same as those of Gallina and Riccioli, *i.e.* adjustment disorder and occupational problems. (Petitioner's Exhibit P-12 at 4)

Notwithstanding the foregoing, Tierney concluded that petitioner was "capable, from a psychological point of view, of resuming a position of teacher in the Mahwah Board of Education." *(Ibid.)* His impression of petitioner was that she was a "competent teacher in search

of a cooperative arrangement between the Mahwah Board of Education and herself." *(Ibid.)* He suggested that if petitioner's "conflict with her supervisor . . . cannot be mediated successfully within the high school itself, perhaps a less conflicted environment could be available in the middle school, as requested by Ms. Diaz." (Petitioner's Exhibit P-12 at 5) In his view, such an alternative "could result in less stressful anxiety and also be beneficial to her physical well-being." *(Ibid.)*

In sum, Tierney's conclusion that petitioner was fit for work appeared to be conditioned upon whether she could resolve her issues with her supervisor. His suggestion about a transfer to the middle school implies that he was uncertain about whether petitioner was capable of succeeding at the high school. In fact, he testified that putting her back into the high school with the people against whom she had litigation pending could generate conflict which would move her back to the state she was in when she had asked for a "medically necessary" transfer. (2T53) Further, he agreed that his interactions with Diaz had been after she had been away from work for seven months, which could have accounted for the level of function which he observed. *(Ibid.)*

Tierney's report appears to have engendered in Montesano the same kind of concerns that Riccioli's report had raised. Montesano testified that he thought Tierney's conclusions about petitioner's fitness to work might have been based in some part upon petitioner's assertions that she had not had issues with prior authority figures and that her relationships with her peers were positive. (3T57) Montesano did not believe that to be the case. *(Ibid.)* Tierney's report did not persuade Montesano that petitioner should be returned to work without medical clearance and without any therapy or counseling. [10]

[10] Diaz testified that as of the hearing date she had not availed herself of therapeutic interventions, even though she conceded that Gallina, Riccioli and Tierney had all testified that she could benefit from same. (2T152-54) She

At the hearing Gallina was asked for his perspective concerning Riccioli's and Tierney's evaluations. As regards Riccioli's conclusions he testified:

> First, I think [petitioner] needed some time off to regroup herself, she was really overwhelmed. And secondly, I think she needed some treatment. And if she was in treatment and then made a transition to a different school for example whether it be the middle school or it was [sic] somewhere else then perhaps that would be helpful. But I didn't think that just switching the external environment was really directing itself to the heart of this problem. So in that case, at the end Dr. Riccioli and I simply disagreed.
> (1T124)

In addressing Tierney's report he stated:

> Basically it reviews the same history, essentially gives the same diagnosis and then makes a recommendation to go back to work as if nothing has happened. And I just don't think that's appropriate and I don't think it makes much sense. The history that Ms. Diaz gives cries out for her to get some help and to get some treatment. . . . And that's on her behalf as well as the children that she's teaching. So, the end result of the report which again implies that changing the . . . teaching environment is the answer to the problem, I just don't think is appropriate and I disagree with it.
> (1T126-27)

When Riccioli's and Tierney's reports did not result in a return to work, petitioner instituted this controversy – on or about December 5, 2008 – by way of a petition and application for emergent relief. The application for emergent relief was unsuccessful and proceedings on the underlying petition continued in the Office of Administrative Law in January 2009 (before Tierney met with petitioner and issued his report). The first hearing date was May 19, 2009[11] and two more hearing days followed: August 5, 2009[12] and October 5, 2009.[13]

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remarked: "I think if we're going to talk about therapy, the entire Mahwah Board of Education needs to go into therapy with me." (2T153)

[11] Citation designation 1T.
[12] Citation designation 2T.
[13] Citation designation 3T.

The ALJ's overall assessment of petitioner's testimony was that it was lacking in credibility. She pointed out, for example, that in her hearing testimony petitioner had denied telling Gallina that she did not want to return to the high school. This position was inconsistent both with Gallina's recollections and with the content of the audiotape (referenced above) that petitioner had surreptitiously made of her interview with Gallina. (Initial Decision at 11) Similarly, the ALJ recounted that at the hearing petitioner denied telling Gallina that she suffered from acute stress, which contention was belied by petitioner's own words in the questionnaire that she had filled out for Gallina. (Initial Decision at 11-12)

The ALJ also noted the significant disparity in the presentations that petitioner made to Gallina and Riccioli, in meetings that occurred only six weeks apart. This rather abrupt change from a tearful, anxious demeanor to a calm and "stable" presentation flowed, in the ALJ's view, from a change in petitioner's agenda. (Initial Decision at 12) She concluded that petitioner, having been put on leave – instead of transferred to the middle school – as a result of her tearful presentation to Gallina, changed her deportment with Riccioli, in the hope of obtaining a back-to-work recommendation. (Initial Decision at 12-13)[14]

The Commissioner cannot help but observe that petitioner had sought no treatment between her meetings with Gallina and Riccioli, nor did she offer – at the hearing or subsequently – any other persuasive explanation for the remarkable change in her affect in the six weeks between the two psychological evaluations. It does not appear from the record that passage of time alone can be regarded as an explanation for the change since, as the ALJ pointed out, petitioner presented to Gallina as stressed at the end of September 2008, after she had been away from the high school environment for three months. (Initial Decision at 11)

[14] Similarly, in considering Tierney's description of petitioner's deportment during her sessions with him, the ALJ concluded that petitioner tailored her behavior to further her goal of obtaining a back-to-work recommendation.

At the conclusion of her discussion of the material facts of this case, the ALJ offered her analysis of why the three mental health professionals who met with petitioner all agreed on a diagnosis of adjustment disorder, and all assigned petitioner similar GAF scores (levels of functionality), but disagreed upon the appropriateness of a return to work by petitioner. She stated:

> [E]ach doctor approached Diaz in precisely the same way, with a view toward responding to Diaz's concerns as she presented them, and with the intention of giving her the assistance she herself claimed to need. She wished to convince Gallina that she was not fit to return to the high school, and convince him she did. She and Dr. Gallina only parted company on the issue of a transfer. Dr. Gallina did not agree that the extreme stress that Diaz described would diminish simply by a transfer to the middle school, and without therapy and a respite from her teaching duties. I find that for this reason, and out of concern for her best interest, Dr. Gallina determined that Diaz was not psychiatrically fit for an immediate return to work.
>
> Conversely, Diaz wished to convince Drs. Riccioli and Tierney that she was fit to teach and, again, she successfully did so. . . . I find that Riccioli and Tierney unwaveringly sought to support Diaz's goals. Not only did they find her to be fully functional and fit for duty, they further agreed that a transfer to the middle school would be in the best interest of her mental health. Indeed, Dr. Tierney wrote in his report, "my impression of Ms. Diaz is that of a competent teacher in search of a cooperative arrangement between the Mahwah Board of Education and herself." But Tierney is not an educator, and is not equipped to assess Diaz's competency as a teacher of world languages. Thus, this statement by him serves to emphasize that his report was written exclusively to promote Diaz's objectives of a return to teaching, but in a middle-school classroom. Indeed, there could not be a more literal expression of Diaz's purpose in seeking further psychological evaluation.
> (Initial Decision at 14-15)

In light of the foregoing, the ALJ found that Gallina "provided the most credible report and testimony, precisely because, in the end, he was able to deviate from Diaz's agenda and focus instead on what he truly felt was in her psychological best interest." (Initial Decision at 15) The Commissioner concurs, and adds that Gallina appears to have taken into consideration the fact that the evaluation had a dual purpose. On the one hand it was meant to assess petitioner's needs, but on the other hand it was meant to ascertain whether petitioner's

return to work would be harmonious with the needs of the students and the district's operational requirements.

After citing to the statutes and case law which address the obligation of school districts to ensure that their teachers are fit for duty, and the measures which districts are entitled to take in furtherance of this obligation, the ALJ found that respondent's decision to place petitioner on leave was proper. More specifically, the ALJ stated:

> I conclude that the Board properly directed Diaz to undergo a psychiatric examination in accordance with the requirements of *N.J.S.A.* 18A:16-2. In requesting a transfer from the high school, Diaz cited "extreme duress," requested the transfer as a matter of "medical necessity," and supported her request with a letter from her personal physician. School-district administration comported itself in a prudent and professional manner when, rather than simply acceding to her request, it demanded first that she be examined by the school physician and in turn by a psychiatrist.
> (Initial Decision at 16)

The ALJ further concluded:

> that the Board properly placed Diaz on a psychiatric leave of absence in accordance with *N.J.S.A.* 18A:16-4. Its reliance on the opinion of Dr. Gallina was reasonable. He is a highly regarded psychiatrist, chosen by Diaz herself, who supplied the Board with a comprehensive and articulate report. A highly stressed Diaz presented herself for evaluation by Gallina, and she made it very plain that she felt emotionally unable to return to her teaching position at the high school. Gallina understandably concluded that simply transferring Diaz to another workplace was tantamount to permitting her to run away from her problems, and afforded her no opportunity to resolve them. Gallina's determination that Diaz was not fit to return to teaching was grounded in his belief that Diaz's description of her stress was sincere. His report first and foremost considered Diaz and her best interests.
> (Initial Decision at 17)

Thus, the first of the two above identified issues to be adjudicated in this matter – did the Board properly place Diaz on a psychiatric leave of absence pursuant to its authority under *N.J.S.A.* 18A:16-4? – was decided in favor of respondent.

As to the second issue – Is the Board's determination that Diaz has not demonstrated satisfactory proof of recovery arbitrary, capricious or unreasonable? – the ALJ applied *N.J.S.A.* 18A:16-4 to the salient facts. *N.J.S.A.* 18A:16-4 instructs that if it has been determined that an employee manifests a mental abnormality, he or she "shall be ineligible for further service until proof of recovery, satisfactory to the board is furnished." (Initial Decision at 18, emphasis added)

The ALJ concluded that respondent had had a reasonable basis for its decision not to grant petitioner's request that it accept the Riccioli and Tierney reports as "proof of recovery." (*Ibid.*) Those reports had failed to address petitioner's acutely stressed and highly anxious presentation to her personal physician, to Dr. Schlam and to Dr. Gallina, or to explain reasons – other than the possible decompression petitioner's absence from the workplace might have allowed – why they believed that a return to work would not trigger a recurrence of petitioner's stress and anxiety. (Initial Decision at 18-19) They found petitioner fit for work without identifying the means by which she had allegedly recuperated or, in the case of Tierney, why he felt that petitioner was prepared to successfully handle the same stressors in the same work environment. (*Ibid.*) The Commissioner notes, also, that both Riccioli and Tierney recommended the transfer requested by petitioner, undermining somewhat their contentions that she was unconditionally fit for duty.

Having found in favor of respondent on both of the issues that the parties had agreed were presented by the pleadings, *see,* Initial Decision at 3, the ALJ recommended dismissal of the petition. (Initial Decision at 20) She suggested that the parties agree on a psychiatrist whose task it would be to "advise regarding [petitioner's] present emotional ability

to return to the classroom."[15] *(Ibid.)* Montesano testified that he would cooperate in choosing a mutually acceptable psychiatrist to evaluate petitioner's recovery/fitness to return to work. (3T84)

The Commissioner agrees with the ALJ's analysis and conclusions and is unpersuaded by petitioner's exceptions. First, the Commissioner rejects the contention in petitioner's first exception that the ultimate inquiry before the Commissioner is whether petitioner is now fit to teach. The issues before the Commissioner – which were agreed upon by the parties, set forth in the prehearing order, and correctly articulated and analyzed by the ALJ – are the reasonableness, *vel non,* of respondent's actions in 1) requiring petitioner to undergo a psychological evaluation and placing petitioner on leave and 2) in declining to accept the Riccioli and Tierney reports as proof of recovery.

In her second exception, petitioner asserts that the ALJ disregarded the evidence presented by petitioner's experts and accepted the analysis of Gallina, which – petitioner urges – was 'questionable.' At the outset, the Commissioner's review of the thorough Initial Decision mitigates against a conclusion that the ALJ failed to consider the substance of Riccioli's and Tierney's reports and testimony. Rather, as stated above, the ALJ found that their reports reflected the presentation offered by petitioner during her meetings with them. That presentation was noticeably different from the demeanor manifested during the meetings between petitioner and both Schlam and Gallina. The ALJ appropriately wondered why the later evaluators – despite agreeing with Gallina that petitioner had an adjustment disorder – glossed over the information set forth not only in Gallina's report but also in the letters from Drs. Schlam and

[15] The ALJ referenced the two-year limit set forth in *N.J.S.A.* 18A:16-4, and opined that sufficient time remained for an evaluation to take place.

Ostergaard concerning petitioner's intense anxiety,[16] and gave no explanation as to how they believed petitioner had achieved recovery from her self-diagnosed "acute stress disorder" in six weeks. (Initial Decision at 18-19)

In criticizing Gallina's report and analysis, petitioner appears to suggest that Gallina was biased in favor of respondent. To support this contention she points to interactions between Gallina and respondent's superintendent, Charles Montesano. For example petitioner states that Gallina's report was directed to Montesano, who "paid him and to whom he owed his allegiance" (Petitioner's Exceptions at 11); Gallina received oral and written materials from Montesano but his report did not refer to same; Gallina gave an oral report to Montesano before writing the conclusion to the written report; and, when petitioner asked Gallina how she did on her testing, he indicated that the results would be sent to Montesano.[17]

The Commissioner does not agree with petitioner's analysis on this point. First, it is undisputed that the petitioner chose Gallina at the recommendation of her union, and that petitioner's union shared with respondent the cost of Gallina's services. (2T138; 2T176; 3T41) More importantly, since the ultimate purpose of the evaluation in this matter was not therapy, but rather a determination as to petitioner's fitness to teach in respondent's schools, it was unremarkable that Gallina addressed his report to the school administrator, or that Gallina updated Montesano during the evaluation process. In any event, no action was taken regarding petitioner until all aspects of the evaluation were completed.

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[16] Gallina's conclusion that Diaz was experiencing "increased levels of general anxiety and stress," Respondent's Exhibit R-2, was corroborated by Ostergaard's letter, Respondent's Exhibit R-5, Schlam's letter, Respondent's Exhibit R-7, petitioner's own statements on Gallina's questionnaires, Respondent's Exhibit R-3, and the transcript of petitioner's surreptitiously taped session with Gallina, Respondent's Exhibit R-13.

[17] Petitioner maintains that Gallina's failure to provide her with immediate feedback not only indicated that he was not an independent evaluator but also prevented her from presenting the test results to a physician of her own choice for a second opinion. It would appear, however, that she received the test results in discovery, and hired two other forensic experts, both of whom were qualified to test her.

That Montesano may have sent Gallina documents has little significance, since Gallina clearly identified – in his report – which documents he relied upon. Documents about petitioner's work history did not appear to be among them. Rather, Gallina appeared to rely primarily upon petitioner's information and testing, and his own observations. A review of the transcript of petitioner's interview with Gallina reveals, ironically, that petitioner herself spoke extensively to Gallina about her work history, her difficulties with her supervisors, and the extreme stress that her work situation caused her. (Respondent's Exhibit R-13 at 16-35)

The Commissioner also rejects petitioner's assertion that Gallina's recommendations were discrepant with the content of Gallina's report – which petitioner characterizes simply as the description of a well-adjusted individual. At the outset the Commissioner notes with disapproval that the "excerpts" from Gallina's report which petitioner presents in her second exception leave out inconvenient facts. For example, petitioner does not include, in her discussion of the section of Gallina's report entitled "Language, Speech and Thinking," Gallina's observation that petitioner cried during the interview on several occasions "particularly when describing the various stressors in her life, including[18] the multiple medical procedures that she has had done." (Respondent's Exhibit R-2 at 8, emphasis added) Nor does petitioner include, in her comment on the report section entitled "Mood and Affect," Gallina's statement that petitioner manifested "free-floating anxiety." (Respondent's Exhibit R-2 at 9)

In point of fact, while Gallina found that petitioner manifested no psychoses or profound personality disorders, and determined that her cognitive functioning was sound, his report as a whole finds that she has an adjustment disorder with mixed emotions and an

[18] Common usage of the word "including" implies "but not limited to."

occupational problem.[19] (Respondent's Exhibit R-2 at 10) As stated above, he agreed that some persons diagnosed with adjustment disorder can function satisfactorily at work. However, he opined that it was necessary to assess petitioner's case on its individual merits. Accordingly, he expressed concern about petitioner's level of anxiety and stress, the adequacy of her repertoire of coping skills, her limited insight into her own contribution to the frictions in the workplace, and the likelihood that placing her into the same environment would result in the same problems for her.[20] Such concerns belie the petitioner's contention that Gallina's recommendations were inconsistent with his findings.

Petitioner's third and last exception alleges that the ALJ failed to make appropriate findings of fact and conclusions of law. In light of the foregoing discussion, the Commissioner rejects the third exception in its entirety. The ALJ's numerous findings, including her credibility findings were reasonable and supported by the record. Thus, the Commissioner is obliged to defer to them and, in this case, is wholly in accord with them. *N.J.S.A.* 52:14B-10(c); *D.L. and Z.L. 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).

Finally, in considering the facts and credibility issues in this case, the Commissioner notes the following. Petitioner's arguments completely ignore the content of the recording that petitioner herself made of her meeting with Gallina, which recording offers a first-hand corroboration of the state of mind and demeanor that Gallina observed and reported, and stands in stark contrast to Riccioli's and Tierney's portrayal of petitioner. Further, petitioner

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[19] A diagnosis of adjustment disorder has previously been held to constitute sufficient reason to render an employee unfit for duty and place that employee on leave pursuant to *N.J.S.A.* 18A:16-4. *Chambers v. Pleasantville Board of Education,* Commissioner Decision No. 263-98 (June 18, 1998).

[20] For example, he stated that Diaz "has had multiple conflicts with authority figures in her school, and she tends to blame others for her difficulties." (Respondent's Exhibit R-2 at 11)

initially failed to disclose the recording, suggesting that she knew that it would be unhelpful to her. These factors weaken petitioner's position.

In addition, without a professional evaluation the Commissioner, a lay person who has not had the opportunity to observe petitioner, cannot conclude that the more stable deportment which Riccioli and Tierney described and which the ALJ observed at the hearing is evidence of recovery and resolution of petitioner's problems. As noted by the ALJ, by the time petitioner had met with Riccioli, her priorities and agenda appeared to have changed. By the time petitioner met with Tierney she had been away from the workplace stressors for many months, and by the time the ALJ was able to observe petitioner, over a year had passed from the last day that petitioner had been at work.

Accordingly, the petition is dismissed for the reasons set forth in the Initial Decision, and it is recommended that the parties agree upon an expert to perform a fitness-for-work evaluation.

IT IS SO ORDERED.[21]

COMMISSIONER OF EDUCATION

Date of Decision: 8/27/10

Date of Mailing: 8/27/10

[21] 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 01751-09
AGENCY DKT. NO. 353-12/08

EMILY DIAZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,
Respondent.

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

Mark Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Zitomer, attorneys)

Record Closed: February 2, 2010 Decided: March 2, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Emily Diaz, a tenured teacher of world languages, challenges the action of the Mahwah Board of Education ("the Board") in placing her on an unpaid medical leave of absence. The Board contends that its action is a proper exercise of its authority under

N.J.S.A. 18A:16-4, as a psychiatric examination of Diaz revealed a mental abnormality, thus rendering her ineligible for further service. The Board further contends that it is not presently obligated to return Diaz to her teaching position, as she has not furnished proof of recovery satisfactory to the Board.

PROCEDURAL HISTORY

Diaz filed a Verified Petition and Notice of Motion for Emergent Relief with the Commissioner of Education on December 5, 2008, challenging the actions of the Board and seeking immediate restoration of her salary and benefits. The matter was transmitted to the Office of Administrative Law on December 9, 2008. On December 18, 2008, Administrative Law Judge Leslie Celentano issued a decision denying the request for emergent relief. On January 5, 2009, the Commissioner affirmed Judge Celentano's decision, and returned the case to the Office of Administrative Law for a hearing on the merits of the underlying claims raised in the petition.

The Board filed a Motion to Dismiss in Lieu of an Answer on January 30, 2009. Diaz opposed the Motion to Dismiss, urging that material issues of fact necessitated that her claims be adjudicated through plenary hearing. While Diaz's opposition papers additionally renewed her request for emergent relief, these claims were withdrawn, through counsel, at the oral argument on the motion which was heard on March 11, 2009. By letter dated March 10, 2009, Diaz additionally sought relief in the form of an order directing that, pending a full hearing, she be placed back on the payroll. Argument on this request for relief was likewise heard on March 11, 2009.

By Order dated March 16, 2009, the Board's Motion to Dismiss was denied, as was Diaz's request to be restored to a full pay status pending plenary hearing. Hearings were conducted on May 19, 2009, August 5, 2009, and October 5, 2009. The parties submitted post-hearing briefs on January 15, 2010, and simultaneous replies on February 2, 2010, at which time the record closed.

ISSUES PRESENTED

Prior to the hearing, I conferred with counsel via telephone and it was agreed that the pleadings raised the following issues for determination:

1. Did the Board properly place Diaz on a psychiatric leave of absence pursuant to its authority under N.J.S.A. 18A:16-4?

2. If so, is the Board's determination that Diaz has not demonstrated satisfactory proof of recovery arbitrary, capricious or unreasonable?

FACTUAL DISCUSSION AND FINDINGS OF FACT

Background Facts

The general background facts are not in dispute, and were either the subject of a joint stipulation filed by the parties, or were uncontroverted at hearing. I **FIND** as follows:

1. Diaz is a tenured Spanish teacher, who commenced her employment with the Board on or about September 1, 2005. For the 2008–2009 school year, Diaz was placed on Step 11 of the Teacher's Salary Guide.

2. On or about July 24, 2008, Diaz requested a transfer from her teaching position at Mahwah High School to the middle school. Her letter requesting the transfer cited medical need. (J-1.)

3. Insofar as the request for transfer cited medical issues, the Superintendent of Schools, Dr. Charles Montesano, requested that Diaz be examined by the school physician, Dr. Everett Schlam. (J-2.)

4. Diaz was examined by Dr. Schlam, who issued a report on August 22, 2008. In a letter dated August 22, 2008, Dr. Schlam advised that, based upon his examination of Diaz, "psychiatric clearance prior to the 2008/2009 school year is requested."

5. As a result of Dr. Schlam's recommendation, Montesano asked Diaz to submit to a psychiatric examination, and she acquiesced to this request.

6. Effective September 1, 2008, the Board placed Diaz on a paid administrative leave, pending the results of the psychiatric examination.

7. On September 24, 2008, Diaz was examined at Board expense by Dr. David Gallina, a psychiatrist. He issued a report dated September 27, 2008, finding that Diaz was not fit to return to work.

8. On October 13, 2008, Diaz wrote to Montesano and advised that she was ready to return to work. (J-3.)

9. On October 14, 2008, Montesano wrote to Diaz and advised that, effective October 13, 2008, she would be charged sick days for her absence.

10. Diaz was advised that when she was medically able to return to work, she would need to supply written clearance from Dr. Gallina attesting to her fitness.

11. Thereafter, school district administration advised Diaz that her sick days would be exhausted on November 24, 2008, and that she was entitled to a federal Family and Medical Leave Act (FMLA) leave through March 4, 2009.

12. Diaz sought a second opinion at her own expense from forensic psychiatrist Dr. Diana Riccioli, who issued a report on November 20, 2008. Dr. Riccioli concluded that Diaz was fit to return to her duties.

13. By letter dated November 24, 2008, Diaz indicated that she had "no choice" but to request an FMLA leave, but that she was ready, willing and able to return to work. (J-4.)

14. Diaz again requested to return to work on January 19, 2009.

15. On January 30, 2009, Diaz sought a psychological assessment and opinion at her own expense from Dr. George Tierney, a psychologist. Dr. Tierney issued his report on February 6, 2009. Dr. Tierney opined that Diaz was fit to return to her duties.

16. The Board was unwilling to accept Dr. Riccioli's report, or that of Dr. Tierney, as satisfactory proof of recovery, and remains unwilling to do so, to date.

The Decision to Place Diaz on a Medical Leave

The testimony of Superintendent Montesano, and that of Dr. Schlam, provides insight into the district's decision to request a psychiatric evaluation, and ultimately place Diaz on a medical leave of absence. Montesano stated that his concern about Diaz's health was triggered by a June 24, 2008, letter he received from her personal physician, Dr. Paul Ostergaard. (R-5.) Dr. Ostergaard wrote that Diaz was "suffering from the effect of extreme duress at her present job description." Dr. Ostergaard's letter requested that consideration be given to a transfer to a "lower grade as a matter of medical necessity." His letter was written at Diaz's request. Diaz forwarded Dr. Ostergaard's letter to Dr. Montesano via letter dated July 24, 2008, and she asked that Montesano consider her "medical need for a reassignment out of the High School and into the Middle School." (J-1.)

Dr. Montesano felt it appropriate to obtain additional information from the school physician, and, accordingly, he wrote to Diaz on August 4, 2008, and stated that, in order to give full consideration to her request, he would need Dr. Ostergaard to forward

records to the school physician, Dr. Schlam. Montesano additionally requested that Diaz be examined by Dr. Schlam. (J-2.)

Dr. Schlam's letter of August 22, 2008, in which he stated that "Ms. Diaz has a chronic stress disorder which is interfering with her ability to function at work," served to heighten Montesano's concern about Diaz's health. Schlam elaborated on his findings at the hearing. He is a family physician, not an expert in psychiatry, but does have enough general medical background to make referrals for further psychiatric evaluation. Schlam has experience in evaluating patients who are experiencing anxiety, and he has performed "fitness-for-duty" evaluations in the past.

Schlam testified that Diaz was accompanied by her husband when she was evaluated, and that her husband did most of the talking. The evaluation lasted for at least a half hour.[1] Diaz was quite tearful and upset, and her husband related many concerns about her overall health and her poor treatment by the school district. Schlam testified that Diaz appeared acutely stressed, and he was advised that she felt ill and had difficulty sleeping. Diaz's husband shared that she was also dealing with serious physical issues, including multiple breast-cancer surgeries and gastrointestinal concerns. After the evaluation, Schlam conferred with Ostergaard. Based upon all the information available to him, Schlam concluded that a referral for psychiatric evaluation was appropriate. Dr. Schlam confirmed on cross-examination that he agreed with Dr. Ostergaard that Diaz was under "extreme duress," and that her stress was interfering with her ability to function.

Diaz was provided a list of three Board-approved psychiatrists by Montesano. She initially made an appointment with one of the listed doctors, but cancelled the appointment because, upon further research, it appeared his practice emphasized child psychiatry. When asked on cross-examination who selected Dr. Gallina, Diaz answered somewhat coyly, stating she was unsure. Upon further questioning she conceded that

[1] Diaz testified that the evaluation was much shorter, and was interrupted by phone calls. To my mind, this is not a critical point. I believe that Schlam spent sufficient time with Diaz, and had enough information, to determine to make a referral to a specialist.

her union was instrumental in his choice, and that the Board and her union ultimately agreed that she be evaluated by Dr. Gallina. It is clear that Dr. Gallina was not on the original list of psychiatrists generated by the Board, that he was recommended by Diaz's representatives, and that nonetheless the Board agreed to accept his evaluation, and pay for it.

In a report dated September 27, 2008, Dr. Gallina found that Diaz suffered from "increased levels of generalized anxiety and stress," and concluded that it was his medical opinion, "with reasonable medical certainty that Ms. Diaz is unfit to assume her job related duties as a teacher." (R-2.) He recommended cognitive therapy, and his prognosis was guarded. Upon receiving this report, Montesano placed Diaz on a sick leave. He stated that his decision to do so was motivated by concern first and foremost for the safety and educational well-being of Diaz's students. Diaz's well-being mattered to Montesano as well, but was at all times secondary to his obligations to his students.

Montesano testified that Diaz's position is currently being filled by a long-term substitute. The position is available for Diaz at any time, and Montesano confirmed that he is not adverse to her return, provided Diaz receives appropriate medical clearance. On cross-examination, he emphasized that he feels no animosity toward Diaz and that he did not advise Gallina that he wished to obtain any predetermined result. A series of e-mails generated about Diaz by district administrators certainly pointed to their frustration in dealing with her and her health issues. (P-22.) They likewise touch on performance issues, such as excessive student cuts from her class, and an alleged untruth by Diaz about a student pass to the health office. In their electronic correspondence district administrators characterize Diaz as "bizarre," and state that she is sapping "time and energy from everyone." The e-mails were unprofessional in tone, but nonetheless did not demonstrate that the desire to send Diaz for further medical evaluation was prompted by anything other than the letter from her own treating physician, Dr. Ostergaard.

Diaz's testimony supports the conclusion that it was not her conduct on the job, but rather her request for a transfer based on "medical necessity" that prompted the

district to ask for further medical evaluations. Indeed, Diaz testified that she requested a transfer due to her medical condition and because her constant disagreements with administration were causing excessive stress. She felt that she would be less stressed at the middle school, which she perceived to be a more collegial environment.

Joseph Tondi, Diaz's New Jersey Education Association field representative, testified on Diaz's behalf, and clearly shared the impression that the transfer request was the only reason for the Board's action in requiring a psychiatric evaluation. Indeed, he noted that the present case was somewhat unusual, as typically an on-the-job incident precipitates a request for psychiatric evaluation. Tondi was unaware of any aberrant on-the-job behavior by Diaz.

Accordingly, I **FIND** that the Board required Diaz to undergo a psychiatric evaluation because she had requested a transfer to the middle school as a matter of medical necessity, and the school physician, Dr. Schlam, felt that further psychiatric evaluation was indicated. I further **FIND** that the action of the Board in placing Diaz on a medical leave of absence was based on the findings of Dr. Gallina, a psychiatrist, who concluded that she was not fit to remain in the classroom, unless and until she pursued certain therapeutic interventions.

The Expert Opinions

Dr. David Gallina testified on behalf of the Board. He is a highly accomplished physician and an expert in the field of psychiatry. His testimony was presented in a professional and credible manner, and he convincingly opined that it was in Diaz's long-term best interest to take a leave from work and address her stress and related mental-health issues.

Diaz surreptitiously taped her meeting with Gallina, and the transcription of that tape was entered into evidence as R-13. Although she agreed that her union was instrumental in selecting Gallina, Diaz did not trust him, and she testified that she "just want[ed] to make sure that [she] was covered." That transcription, together with a

questionnaire filled out by Diaz in Dr. Gallina's office, illuminate what she herself described as the presenting problems. She indicated that she suffered from headaches, bowel disturbances, fatigue, and insomnia, that she felt panicky and tense, and that she was anxious and restless and unable to relax at work.

Diaz related to Dr. Gallina that her personal physician did not wish to see her return to her position at the high school, and that Ostergaard had advised, "you shouldn't go to work feeling the way you are." (R-13 at 47.) Diaz informed Dr. Gallina that she experienced an extreme stress reaction even when simply driving by the high school, stating:

> I'm going white knuckled. Like this was so blah. I'm driving and I'm not even going to the school. I'm just driving by, and my husband is sitting with me in the car, and he says your knuckles are turning white. I wasn't going to the school. It was summer.
>
> [Ibid.]

Diaz indicated on the questionnaire she filled out for Dr. Gallina that she suffered from an "acute stress disorder."

Dr. Gallina reviewed the letters submitted by Drs. Ostergaard and Schlam in reaching his final diagnosis. He met with Diaz, and afterwards had her complete two diagnostic tests, the Hamilton Depression Inventory (HDI) and a Personality Assessment Inventory (PAI). During Gallina's interview with Diaz, she shared many frustrations with her work environment, and related stories of unfair treatment by school district administrators. A transfer from the high school was her clear agenda. She stated that the middle school had a different administration and better teamwork. But it became clear during the course of her conversation with Dr. Gallina that a transfer may no longer be a logistical possibility because the school year had already started. If cleared for an immediate return to work she would likely continue to be assigned to the high school. Dr. Gallina stated to Diaz:

> If I clear you to go back to work, in all probability, from what you're telling me, initially you're going to go back to the high school. Can you handle that? No. So what is the alternative?
>
> [Id. at 45–46.]

Diaz did not dispute Dr. Gallina's statement, or urge that she felt medically able to return to the high school if necessary. Rather, she replied, "I don't know." Diaz elaborated that her husband "hopes I can get help . . . . It's too long, too much. It has to stop." (Id. at 48.)

It was readily apparent that the "help" Diaz sought was a transfer, so much so that Dr. Gallina felt compelled to spend some time explaining that he did not believe that fitness for duty could be established for a position at the middle school, but not for a position at the high school. He explained to Diaz that either she was fit to teach or not. But Diaz was adamant that a simple transfer would alleviate her acute stress, urging that she did not "think the issue is teaching . . . the issue is dealing with [the] high school" (Id. at 50.)

Dr. Gallina diagnosed Diaz with an "adjustment disorder." He did not find that she suffered from an organic mental illness, and found that she was oriented as to time, place and person. She demonstrated no confusion. He saw no objective signs of depression. Dr. Gallina found Diaz to be logical, coherent and relevant.[2] However, Dr. Gallina indicated that his mental-status examination revealed "increased levels of generalized anxiety and stress, mostly related to health problems and to occupational conflicts on her job." He found that Diaz's understanding of her contribution to these job-related difficulties was "limited." Dr. Gallina emphasized that a transfer to the middle school would not, in his view, eliminate her stress, or address the unsuccessful manner

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[2] Dr. Gallina states in his report that Diaz's GAF score is 70-80. The GAF is the doctor's subjective assessment of the patient's global functioning. This score is generally within the range of functionality, but there could be evidence of mild symptoms of mental illness such as depressed mood, per the DSM-IV (P-12a).

in which she coped with that stress. His prognosis for Diaz was "guarded." Dr. Gallina recommended therapy to assist her in gaining insight into her problems.

Dr. Gallina elaborated on the findings in his report at the hearing. He stated that an "adjustment disorder" is a response to external stressors, and generally lasts for up to six months after the stressor is removed. He found Diaz to be suffering from considerable stress, caused by her medical issues, her job issues, and the usual stresses of being a wife and mother. It was noteworthy that her job-related stress was still apparent in September, when she had not been in the classroom since June. Dr. Gallina opined that Diaz was not fit to return to her classroom duties because he strongly felt that some time away from the classroom would assist her. A leave of absence would afford her time to engage in therapy and thus better understand her work-related difficulties and develop coping mechanisms. Gallina testified that the physical symptoms of Diaz's stress, including headaches, insomnia and pain, all negatively impacted her ability to perform, to her detriment and that of her students.

Dr. Gallina emphasized that Diaz was not a seriously psychiatrically involved person, and that clearly she was functional. Dr. Gallina conceded that many people who suffer from adjustment disorders continue to work, but he stated, somewhat passionately, that these people were not in issue. Gallina testified:

> . . . we're not talking about, you know, six hundred thousand other people with adjustment disorders, we're talking about this young woman and the difficulties that she has encountered, . . . and I think we're obliged to get her some help . . . . Treatment for her, I think, in my opinion was absolutely the right recommendation to make.

Diaz denied advising Dr. Gallina that she did not want to return to the high school, but her version of the events lacked credibility. Diaz's testimony was inconsistent with both Dr. Gallina's recollections and the statements she herself made during her interview with the doctor, as captured on her surreptitious recording. Diaz indicated that she did not recall advising Dr. Gallina that she suffered from an acute stress disorder, that these were Dr. Schlam's words, not hers. But again her testimony

lacked credibility, as the questionnaire she filled out asked her to "state in your own words the nature of your main problems," and she wrote "stress acute disorder." (R-3.) Diaz urged at hearing that her request for a transfer was based on "medical physical" needs and not "mental medical" needs, but this assertion was likewise wholly lacking in credibility. Indeed, Diaz supported her transfer request with Dr. Ostergaard's letter, which plainly stated that she was suffering from "extreme duress."

Diaz obviously was dissatisfied with Dr. Gallina and his findings. She had presented a doctor's note to school-district administration to accomplish her goal of transferring from the high school, and not to find herself placed on a medical leave. Accordingly, a Diaz with a very different agenda presented herself to Dr. Diana Riccioli for a second opinion less than two months after her visit to Dr. Gallina. There was no evidence that Diaz availed herself of any therapeutic interventions prior to seeing Dr. Riccioli. Dr. Riccioli testified at hearing on Diaz's behalf. Like Dr. Gallina, she is an experienced and well-qualified physician who is an expert in psychiatry. Her testimony was professionally presented. But Dr. Riccioli's testimony centered on an effort to discredit Dr. Gallina's findings, as opposed to focusing on an in-depth assessment of Diaz and her mental status and needs.

Dr. Riccioli's report offered little insight into the evaluation process or the substance of her discussion with Diaz, this despite the fact that Riccioli stressed at hearing that she spent three hours with Diaz, as opposed to the shorter time invested by Dr. Gallina. Since Diaz retained Dr. Riccioli and paid for her evaluation, she "trusted" Riccioli and felt no need to secretly tape-record their session together. Dr. Riccioli did not ask Diaz to fill in a form that specified her concerns, and Dr. Riccioli's report does not appear to specify all the issues that were shared by Diaz, other than recounting a few incidents of alleged mistreatment at the high school.

Dr. Riccioli testified that she found no evidence of anxiety and that Diaz advised that she was ready and eager to return to work, even at the high school. Indeed, the word "stress" is curiously absent from the mental-status examination section of Dr. Riccioli's report. It certainly would appear that Diaz no longer described herself as

"white-knuckled" at the thought of driving past the high school. Nonetheless, the diagnoses of the two psychiatrists are essentially identical. Dr. Riccioli concurred with Dr. Gallina's diagnosis of an "adjustment disorder." She agreed with Dr. Gallina that Diaz was fully oriented, and that her insight and judgment were not impaired. Dr. Riccioli emphasized that an "adjustment disorder," although a psychiatric illness, is a minor illness that generally does not impair functionality. This was consistent with Dr. Gallina's explanation of the nature of this disorder. Like Dr. Gallina, she found a GAF of 70-80.

The finding of any psychiatric disorder by Dr. Riccioli, albeit a mild one, is somewhat surprising. While Diaz's medical issues are certainly real, the report did not discuss any problems in coping with or making a satisfactory adjustment to these medical concerns. The discussion in Dr. Riccioli's report about the workplace noted friction, and the perception that supervisors wished to "get rid" of Diaz, but did not indicate at all that this friction caused any unusual stress for Diaz. Thus, the agreement on diagnosis appears designed to form the backdrop for Dr. Riccioli's contention that Dr. Gallina's finding of unfitness is inconsistent with his diagnosis. Indeed, despite their agreement on diagnosis, the ultimate conclusions of the two psychiatrists were entirely at odds. Dr. Riccioli opined that Diaz was able to return to her duties as a teacher, without restriction. Dr. Riccioli testified that she examined Diaz again on May 13, 2009, apparently in anticipation of giving testimony at the hearing, and that this more recent evaluation further buttressed her view that Diaz was fit to return to work. Surprisingly, Riccioli found that a change in assignment to the middle school would be helpful, this despite her testimony, and that of Diaz, that Diaz was ready to return to work, even at the high school.

Subsequent to her evaluation with Dr. Riccioli, Diaz was evaluated by a psychologist, Dr. George Tierney, who met with her on January 30, 2009, February 6, 2009, and March 24, 2009. Dr. Tierney is a well-qualified psychologist, whose testimony was presented in a professional manner. Again, the visits to Dr. Tierney, unlike the visit to Dr. Gallina, were designed to obtain an opinion that furthered Diaz's goal of returning to the classroom. Diaz was referred to Dr. Tierney by her attorneys.

She did not feel a need to protect herself by taping her meetings with Dr. Tierney. It is clear, however, that once again, she could not have described herself as experiencing acute stress.

Indeed, Dr. Tierney's report indicated that he found Diaz to be calm and not agitated. He noted that there was some anxiety, but none that was inappropriate to the various stressors in Diaz's life. Diaz shared her workplace conflicts with Dr. Tierney, as well as her history of medical issues. Like the psychiatrists that evaluated Diaz before him, Dr. Tierney diagnosed Diaz with an "adjustment disorder" and found her GAF to be 70-80. Dr. Tierney found her mental-health status to be unimpaired, and found her fit to return to work. Despite finding no mental-health impairment and no evidence of any stress sufficient to impair functioning, however, his report likewise suggested that the transfer sought by Diaz would be in her best interest. Dr. Tierney testified that Dr. Gallina's conclusion that Diaz was not fit to teach was a "non sequitur," and that nothing in his report or his findings regarding her mental status justified that conclusion.

At first blush, the conclusions of Drs. Gallina, Riccioli and Tierney appear impossible to reconcile. While they all agreed that Diaz was not acutely mentally ill, only Gallina found that she was not fit to return to work. Moreover, Drs. Riccioli and Tierney urged that a determination that Diaz is not fit to work is inconsistent with Dr. Gallina's conclusion that her GAF was in the 70-80 range. Indeed, they opined that the DSM-IV does not view a score in this range as indicative of impaired functionality.

But in fact, each doctor approached Diaz in precisely the same way, with a view toward responding to Diaz's concerns as she presented them, and with the intention of giving her the assistance she herself claimed to need. She wished to convince Gallina that she was not fit to return to the high school, and convince him she did. She and Dr. Gallina only parted company on the issue of a transfer. Dr. Gallina did not agree that the extreme stress that Diaz described would diminish simply by a transfer to the middle school, and without therapy and a respite from her teaching duties. I **FIND** that for this reason, and out of concern for her best interest, Dr. Gallina determined that Diaz was not psychiatrically fit for an immediate return to work.

Conversely, Diaz wished to convince Drs. Riccioli and Tierney that she was fit to teach and, again, she successfully did so. However, I **FIND** that Riccioli and Tierney unwaveringly sought to support Diaz's goals. Not only did they find her to be fully functional and fit for duty, they further agreed that a transfer to the middle school would be in the best interest of her mental health. Indeed, Dr. Tierney wrote in his report, "my impression of Ms. Diaz is that of a competent teacher in search of a cooperative arrangement between the Mahwah Board of Education and herself." But Tierney is not an educator, and is not equipped to assess Diaz's competency as a teacher of world languages. Thus, this statement by him serves to emphasize that his report was written exclusively to promote Diaz's objectives of a return to teaching, but in a middle-school classroom. Indeed, there could not be a more literal expression of Diaz's purpose in seeking further psychological evaluation. Although both Drs. Riccioli and Tierney are clearly competent practitioners, I **FIND** that Dr. Gallina provided the most credible report and testimony, precisely because, in the end, he was able to deviate from Diaz's agenda and focus instead on what he truly felt was in her psychological best interest.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public school teachers perform a unique role, one that requires that they spend long hours educating and nurturing the children in their care. It is strenuous, demanding work and requires a good deal of patience and stamina. Accordingly, the school laws recognize that teachers must be physically and mentally fit for the challenges that await them each day. N.J.S.A. 18A:16-2 provides:

> The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

The constitutionality of N.J.S.A. 18:16-2 has been upheld by our courts, which have recognized that fitness to teach entails far more than skilled pedagogy. See Gish v. Bd.

of Educ. of Paramus, 145 N.J. Super. 96 (App. Div. 1976). The State's broad interest in the fitness of its teachers has been expressed as follows:

> A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.
>
> [In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 30 (App. Div. 1974) (quoting Adler v. Bd. of Educ. of New York, 342 U.S. 485, 493, 72 S. Ct. 380, 385, 96 L. Ed. 2d 517, 524 (1952).]

In determining whether a local board has met its burden of proving a deviation from normal mental or physical health, thus permitting it to require a fitness examination, it has been recognized that the "bar set by [N.J.S.A. 18A:16-2] is low, which comports with the overriding purpose in this and related statutes that the health, safety and well-being of students is paramount." Bd. of Educ. of Lyndhurst v. Blevis, No. A-6004-07T3 (App. Div. October 8, 2009) <http://lawlibrary.rutgers.edu/search.shtml>.

I **CONCLUDE** that the Board properly directed Diaz to undergo a psychiatric examination in accordance with the requirements of N.J.S.A. 18A:16-2. In requesting a transfer from the high school, Diaz cited "extreme duress," requested the transfer as a matter of "medical necessity," and supported her request with a letter from her personal physician. School-district administration comported itself in a prudent and professional manner when, rather than simply acceding to her request, it demanded first that she be examined by the school physician and in turn by a psychiatrist. Indeed, it was Diaz herself, and her personal physician, who presented the evidence of deviation from normal mental health necessary to invoke the procedures contemplated by the statute.[3]

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[3] The implementation of N.J.S.A. 18A:16-2 requires that the employee be provided with a statement of reasons for the directive that he or she undergo a psychiatric examination. N.J.A.C. 6A:32-6.3; Kochman v. Keansburg Bd. of Educ., 124 N.J. Super. 203 (Ch. Div. 1973). A challenge to the procedural aspects of the Board's request here was not raised by the pleadings or by counsel at hearing. Nor did Diaz at any time assert that she was unwilling to be

A discrete incident that evidences deviation from normal health, either in the presence of children, or outside the school day, is not required to trigger the Board's rights under N.J.S.A. 18A:16-2. The plain language of the statute does not so require, and it is well established that statutory language should be given its ordinary meaning. Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 23-24 (2009). Indeed, the request for a psychiatric examination in Gish "included [not] a single instance of any undue conduct or actions in the classroom or out of the classroom with respect to a particular student." Gish, supra, 145 N.J. Super. at 103. The board there nonetheless was upheld in its efforts to insist that Gish submit to a psychiatric examination.

I further **CONCLUDE** that the Board properly placed Diaz on a psychiatric leave of absence in accordance with N.J.S.A. 18A:16-4. Its reliance on the opinion of Dr. Gallina was reasonable. He is a highly regarded psychiatrist, chosen by Diaz herself, who supplied the Board with a comprehensive and articulate report. A highly stressed Diaz presented herself for evaluation by Gallina, and she made it very plain that she felt emotionally unable to return to her teaching position at the high school. Gallina understandably concluded that simply transferring Diaz to another workplace was tantamount to permitting her to run away from her problems, and afforded her no opportunity to resolve them. Gallina's determination that Diaz was not fit to return to teaching was grounded in his belief that Diaz's description of her stress was sincere. His report first and foremost considered Diaz and her best interests.

N.J.S.A. 18A:16-4 sets forth the rights and obligations of the parties in the event of a finding of deviation from normal health, including the right to continued employment, stating:

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seen by a psychiatrist. More importantly, the requirement that a board supply a statement of reasons for its request appears superfluous where, as here, the medical condition at issue was brought to the Board's attention by the employee herself.

> If the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee . . . has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, . . . be reemployed with the same tenure as he possessed at the time his services were discontinued . . . .
>
> [Emphasis added.]

Diaz urges that the reports of Drs. Riccioli and Tierney provided satisfactory proof of recovery, and that the Board's refusal to accept these reports and return her to the classroom was, and remains, arbitrary, capricious and unreasonable.

The action of a local school board that lies within its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Boult v. Bd. of Educ. of Passaic City, 136 N.J.L. 521 (E. & A. 1948); Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288 (App. Div. 1960). The scope of the Commissioner's review is extremely narrow, and he may not substitute his judgment for that of those who made the decision, but rather, can only determine if the local board, and its administration, had a reasonable basis for their conclusions. Bd. of Educ. of Bernards Twp. v. C.M., 96 N.J.A.R.2d (EDU) 762.

I **CONCLUDE** that the Board, and its administration, had a reasonable basis for their decision not to accept the report of Diaz's personal psychiatrist. Indeed, Riccioli's report does not speak in terms of recovery. Rather, her report simply finds Diaz fit to work. Dr. Riccioli does not address the concerns raised by any of the physicians who examined Diaz, including Diaz's personal physician, Dr. Ostergaard. Having reasonably accepted the findings of Dr. Gallina, a physician selected by Diaz, the Board correctly sought a finding of recovery from either Gallina or another physician who, at a minimum, accepted and understood that Gallina had examined a Diaz who presented herself as overwhelmed by stress, and who had stated that anxiety rendered her unable to return to her teaching duties at the high school. Dr. Riccioli's report offers no insight into

Diaz's alleged recuperation since her examination by Gallina, making the Board's refusal to accept her report a rational exercise of the discretion granted to it by N.J.S.A. 18A:16-4.

Much like Dr. Riccioli, Dr. Tierney also does not address Diaz's recovery, but rather rejects the notion that Diaz was ever unfit for her duties. Again, the Board was understandably unable to reconcile this finding with that of Dr. Gallina, and thus, I **CONCLUDE**, reasonably determined that it was unable to accept Tierney's report as evidence of Diaz's fitness to return to her duties.

I am unable to grant Diaz relief in the form of back pay or benefits, in light of my conclusion that the Board conducted itself in a reasonable manner, and in a manner consistent with applicable law. Where a local school board properly places a staff member on leave in accordance with N.J.S.A. 18A:16-4, there is no basis in law to compel the board to pay that staff member during the period of ineligibility. Chambers v. Pleasantville Bd. of Educ., EDU 8498-97, Initial Decision (May 1, 1998), adopted, Comm'r (June 18, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>.

For the same reason, I am unable to direct that Diaz immediately resume her teaching duties. However, although the Board was reasonable in its determination not to accept the reports offered to date, the testimony of Drs. Riccioli and Tierney convinced me that Diaz may presently be fit to teach. Diaz urges in her post-hearing submission that her demeanor in court likewise supports her readiness to return to work. I concur that she presented as a stable, appropriate individual to my observation, but that is merely the observation of a layperson. The Board is clearly entitled to the opinion of a medical professional.

An opportunity remains for Diaz to provide proof to the Board of her recovery, and to thus return to her teaching duties. There presently is no factual or legal basis to permanently remove Diaz from her teaching position. N.J.S.A. 18A:16-4 makes it plain that Diaz's tenure rights remain intact, and that, indeed, any concerns about her teaching performance or professional conduct must be resolved through the evaluative

process, or the disciplinary procedures available to the Board. The mechanisms established by N.J.S.A. 18A:16-2 et seq. were not intended to address performance concerns, but rather concerns about physical and mental fitness for duty.

While clearance from Dr. Gallina would undoubtedly be the easiest and most straightforward way to confirm Diaz's recovery, Gallina is not the only physician who can provide the Board with the assurances it needs. Accordingly, the parties can and should confer and agree upon a psychiatrist who can evaluate Diaz and advise regarding her present emotional ability to return to the classroom. If the evaluation is conducted by Dr. Gallina, the Board must defray the cost of that evaluation, in accordance with N.J.S.A. 18A:16-3. If the Board approves another physician, selected by Diaz, she must defray the cost, again as required by N.J.S.A. 18A:16-3. There is a two-year period from the date a leave of absence commenced within which to demonstrate fitness. N.J.S.A. 18A:16-4. As Diaz commenced her sick leave on October 13, 2008, there is ample time for her to obtain the psychiatric clearance needed to return to her teaching duties.

ORDER

Based on the foregoing, it is **ORDERED** that the relief sought by Diaz is **DENIED** and that the 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.

March 2, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: Mar. 2, 2010

Date Mailed to Parties: MAR 8 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WITNESSES

Petitioner

Dr. Diana L. Riccioli
Dr. George P. Tierney
Joseph Tondi
Emily Diaz

Respondent

Dr. David Gallina
Dr. Charles Montesano
Dr. Everett Schlam

EXHIBITS

Joint

J-1	Letter from Diaz to Montesano, dated July 24, 2008
J-2	Letter from Montesano to Diaz, dated August 4, 2008
J-3	Letter from Diaz to Montesano, dated October 13, 2008
J-4	Letter from Diaz to Donohue, dated November 24, 2008

Petitioner

P-1	Not admitted
P-2	Not admitted
P-3	Not admitted
P-4	Not admitted
P-5	Not admitted
P-6	Not admitted
P-7	Not admitted

P-8	Not admitted
P-9	Report of Dr. Riccioli, dated November 20, 2008
P-10	Not admitted
P-11	Letter from Diaz to Dr. Montesano, dated January 12, 2009
P-12	Report of Dr. Tierney, with attachments, dated March 27, 2009
P-12(a)	Excerpt from Diagnostic and Statistical Manual of Mental Disorders
P-13	Letter from Department of Health and Human Services to Diaz, with attachments, dated November 4, 2008
P-14	Medical Authorization release forms
P-15	Timetable of visits
P-16	Letter from Heisenbuttel to Pascale, dated June 16, 2008
P-17 1	Not admitted
P-18	Not admitted
P-19	Not admitted
P-20	Not admitted
P-22	E-mails between school district personnel

Respondent

R-1	Curriculum Vitae, Dr. Gallina
R-2	Report of Dr. Gallina, dated September 27, 2008
R-3	Patient questionnaire, completed by Diaz
R-4	Test results
R-5	Letter from Dr. Ostergaard, dated June 24, 2008
R-6	Not admitted
R-7	Letter from Dr. Schlam to Dr. Montesano, dated August 22, 2008
R-8	Letter from Dr. Montesano to Diaz, dated October 14, 2008
R-9	Letter from Donohue to Diaz, dated November 17, 2008
R-10	Not admitted
R-11	Resolution of Mahwah Board of Education
R-12	Letter from Dr. Montesano to Diaz, dated December 5, 2008
R-13	Transcript of Gallina interview

OAL DKT. NO. EDU 5465-10
AGENCY DKT. NO. 43-3/10

A.M. on behalf of minor child A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE NORTH STAR ACADEMY CHARTER SCHOOL OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Settlement Agreement and General 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.

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Section 2 of the Agreement references several actions that may have already taken place, and have therefore 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 either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates 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.

COMMISSIONER OF EDUCATION

Date of Decision: 8|26|10

Date of Mailing: 8|30|10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5465-10

AGENCY DKT. NO. 43-3/10

A.M. ON BEHALF OF MINOR CHILD A.B.,

Petitioner,

v.

BOARD OF TRUSTEES, NORTH STAR ACADAMY CHARTER SCHOOL OF NEWARK, ESSEX COUNTY

Respondent.

Elizabeth Athos, Esq. for petitioner (Education Law Center, attorney)

Brenda Liss, Esq., for respondent (Riker Danzing Scherer Hyland & Perretti, attorneys)

Record Closed: June 11, 2010 Decided: July 13, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 28, 2010 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 on the attached settlement agreement. As evidence by the attached certification of Paul Bambrick-Santoyo, Managing Director and Secretary of the Board of Trustees, the North Star Academy Charter School Board of Trustees approved the settlement at a public meeting on June 14, 2010, and authorized its Chief Operating Officer to execute the settlement agreement on its behalf.

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

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

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

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

OAL DKT. NO. EDU 05465-10

July 13, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

7-15-10

Mailed to Parties:

JUL 15 2010
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/rr

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into this 14th day of June, 2010, by and between **ANGELA MASON** ("Mason"), residing at 53 Ingraham Place, Newark, New Jersey 07108, on behalf of herself and her minor son Anthony Brown ("A.B.") (collectively, "Petitioners"), and **NORTH STAR ACADEMY OF NEWARK**, whose address is 10 Washington Street, Newark, New Jersey 07102, its affiliates and related entities and their successors, present or former trustees, directors, officers, employees, agents and representatives (collectively, "North Star"). Petitioners and North Star (collectively "the parties") mutually desire to enter into this Agreement.

WHEREAS, A.B. was enrolled as a student at North Star from 2005 to 2009, and is enrolled as a student at University High School in Newark for 2009-2010;

WHEREAS, on or about March 9, 2010, Petitioners filed a Verified Petition before the Commissioner of Education of the State of New Jersey, A.M. o/b/o minor child A.B. v. North Star Academy Charter School of Newark, Agency Docket No. 43-3/10 ("the Petition"), alleging that disciplinary action taken by North Star violated A.B.'s rights under the United States Constitution, the New Jersey Constitution, the New Jersey Civil Rights Act, and provisions of New Jersey Statutes Title 18A and New Jersey Administrative Code Title 6A; and North Star filed an Answer denying such allegations and denying any liability to Petitioners; and the Petition has been transmitted to the New Jersey Office of Administrative Law;

WHEREAS, the parties wish to resolve this matter and all outstanding disputes between them in accordance with the terms set forth in this Agreement; and

WHEREAS, North Star's Board of Trustees consented to the terms set forth herein at a meeting on June 14, 2010, and authorized the execution of this Agreement;

NOW, THEREFORE, for the good and sufficient consideration set forth below, the parties hereby AGREE as follows:

1. Denial of Liability. It is understood and agreed that the execution of this Agreement by North Star does not in any way constitute an admission or concession of liability or wrongdoing on its part.

2. Consideration.

(a) In consideration for the execution of this Agreement by Mason and her compliance with the promises made herein, North Star agrees to provide the following consideration:

(1) A.B. will be permitted to re-enroll in North Star for tenth grade, 2010-11, beginning August 23, 2010, provided that if A.B. chooses to exercise this option, he will notify North Star by no later than July 2, 2010.

(2) A.B. will be provided one-on-one tutoring in Algebra II by a North Star summer school teacher from June 14, 2010 through July 16, 2010. From June 14th through July 2nd, he will be provided tutoring for a total of eight hours (four hours per week with a week off for final exams), with tutoring to be scheduled on Mondays (1½ hours), Wednesdays (1½ hours), and Thursdays (1 hour), beginning at 3:45 p.m. From July 5th through July 16th, he will be provided tutoring for a total of 18 hours (inclusive of tests and assessments), with tutoring to be scheduled Mondays through Fridays from noon to 2:00 p.m. The tutoring schedule will be as follows:

Week of June 14: 4 hours (6/14 1½ hrs, 6/16 1½ hrs, 6/17 1 hr)
each day beginning at 3:45 pm

Week of June 28: 4 hours (6/28 1½ hrs, 6/30 1½ hrs, 7/1 1 hr)
each day beginning at 3:45 pm

Week of July 5: 8 hours (2 hrs each 7/6, 7/7, 7/8, 7/9)*
each day 12 – 2 pm.

Week of July 12: 10 hours (2 hrs each 7/12, 7/13, 7/14, 7/15, 7/16)
each day 12 – 2 pm
*School is closed July 5.

Tutoring will be provided at North Star's downtown campus during the weeks of June 28, July 5 and July 12, and at the main branch of the Newark Public Library during the week of June 14. North Star will reimburse A.B. for his bus transportation for tutoring sessions in June and July, by check payable to Mason in an amount equivalent to $3.00 for each tutoring session attended by Anthony, sent by mail to Mason by mail no later than July 30, 2010.

(3) North Star shall administer an Algebra II proficiency test to A.B. on July 16, 2010 to determine whether he can be excused from taking Algebra II as a prerequisite for other math classes at North Star, and shall provide the results of such testing by mail to Mason by July 30, 2010.

(4) North Star will provide A.B. with its ninth and tenth grade reading lists by June 14, 2010 (receipt of which is hereby acknowledged).

(5) A.B.'s student records through grade 8, including disciplinary records, will remain unchanged, except as follows:

a. His second trimester report card will be revised to reflect his correct average of 82, and grade of B, in Algebra and his status on the honor roll for that trimester;

b. His disciplinary incidents of 4/12/2006, 1/16/2007, and 3/28/2007 will be corrected to specify that a "student apology," not a suspension, was the consequence for those infractions; and

c. All records related to the expulsion of A.B. for an incident occurring on June 9, 2009 will be amended to include the following addendum: "A.B. appealed North Star's expulsion and, pursuant to the settlement of that appeal, the parties agreed that the disciplinary action against A.B. for the incident that occurred on June 9, 2009, should be characterized as a suspension through the end of the 2008-09 school year, and not as an expulsion. As a result, the Board of Trustees' decision of November 16, 2009 shall have no legal force or effect."

(6) A.B.'s student records after grade 8, including high school transcript, will reflect enrollment at University High School for grade 9 and, if A.B. exercises the option set forth in paragraph 2(a)(1) above, enrollment at North Star beginning in grade 10.

(b) Mason acknowledges that North Star's agreement to the terms set forth in subparagraph (a) above is good and valuable consideration, and she understands and agrees that she would not receive the consideration set forth in this paragraph except for her execution of this Agreement and fulfillment of the promises contained herein.

(c) Mason understands that if she breaches any provision of this Agreement, North Star's agreement to provide the consideration set forth above will be void and of no effect.

3. General Release of Claims by Mason. It is understood and agreed by and between the parties that in return for the consideration set forth in Paragraph 2 and the other promises contained herein, Mason does, knowingly and voluntarily, completely and forever waive, release and discharge North Star, its affiliates and related entities and their successors, present or former trustees, directors, employees, officers, agents and representatives from any and all claims, causes of action, and judgments, and any and all claims and rights to compensatory or punitive damages, pre- or post-judgment interest, or attorneys' fees, and any claim of liability of whatever kind and character based on any conduct or incident occurring at any time up to and including the date of this Agreement and relating in any way to A.B.'s past enrollment or attendance at North Star or action taken by North Star with respect to such past enrollment or attendance. Without limiting the foregoing, this General Release includes any and all claims Petitioners, or either of them or anyone on their behalf, may have arising under the New Jersey Civil Rights Act or any other federal, state, or local law, rule and/or regulation or any claim arising under the common law, including but not limited to contract or tort law, whether cognizable in law or in equity; and it specifically includes any and all claims and causes of action that A.B. or anyone on his behalf may have. Mason further agrees that she has not filed any claims, charges or actions or made any allegations relating to North Star in any matter filed in any court, agency, or tribunal, other than the Petition.

4. General Release of Claims by North Star. It is understood and agreed by and between the parties that in return for the release set forth in Paragraph 3 and the other promises contained herein, North Star does, knowingly and voluntarily, completely and forever waive, release and discharge Petitioners from any and all claims, causes of action, and judgments, and any and all claims and rights to compensatory or punitive damages, pre- or post-judgment interest, or attorneys' fees, and any claim of liability of whatever kind and character based on any conduct or incident occurring at any time up to and including the date of this Agreement and relating in any way to A.B.'s past enrollment or attendance at North Star. Without limiting the foregoing, this General Release includes any and all claims North Star or anyone on its behalf may have arising under any federal, state, or local law, rule and/or regulation or any claim arising under the common law, including but not limited to contract or tort law, whether cognizable in law or in equity. North Star further agrees that it has not filed any claims, charges or actions or made any allegations relating to Petitioners in any matter filed in any court, agency, or tribunal, other than the Petition.

5. Withdrawal of Petition. Mason shall withdraw the Petition and take any and all action necessary to secure its dismissal with prejudice, subject only to her right to seek relief in the event that North Star fails to comply with any obligation on its part under this Agreement.

6. Severability. If any provision of this Agreement is declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, that provision will immediately become null and void, leaving the remainder of the Agreement in full force and effect.

7. Construction. The parties have had an ample opportunity to review and have in fact reviewed this Agreement. Accordingly, the normal rule of construction, to the effect that any ambiguities to be resolved against the drafting party, shall not be employed in the interpretation of this Agreement.

8. This Agreement is entered into in the State of New Jersey and shall be construed and interpreted in accordance with the laws of the State of New Jersey.

9. Integration. This Agreement represents the complete understanding between the parties. No other promises, agreements, discussions, or understandings have been made or relied upon by either party to induce the execution of this Agreement by the other party. No other promises, agreements, discussions, or understandings shall be binding or shall modify this Agreement unless made in writing and signed by the parties thereto.

BY SIGNING THIS AGREEMENT, ANGELA MASON ACKNOWLEDGES AS FOLLOWS:

1. **She has read this Agreement completely.**

2. **She has had an opportunity to consider the terms of this Agreement.**

3. **She has been advised to consult with an attorney prior to executing this Agreement.**

4. **She has had an opportunity to consult an attorney to explain this Agreement and its consequences to her before she signed it, and she has used this opportunity to whatever extent she desired.**

5. **She understands and means everything she has said in this Agreement and she agrees to all its terms.**

6. **She is not relying on North Star or any representative of North Star to explain this Agreement to her.**

Mason has signed and agreed to this Agreement voluntarily and entirely of her own free will, without any pressure from North Star or any representative of North Star.

Witness:

Elizabeth Athos

Elizabeth Athos
(print witness name)

Angela Mason
ANGELA MASON

Dated: 6/11/2010

NORTH STAR ACADEMY CHARTER SCHOOL OF NEWARK

By: Michael Ambriz
Michael Ambriz
Chief Operating Officer

Dated: Jun 14, 2010

4046890.3

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800

Attorneys for Respondent, North Star Academy Charter School of Newark

A.M., on behalf of A.B. , Petitioners, vs. North Star Academy Charter School of Newark, Respondent.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION Docket No. 43-3/10 **CERTIFICATION**

PAUL BAMBRICK-SANTOYO, of full age, hereby certifies as follows:

1. I am the Managing Director and Secretary of the Board of Trustees of North Star Academy Charter School of Newark.

2. At a public meeting on June 14, 2010, the Board of Trustees of North Star Academy adopted a motion to approve the proposed settlement of this case and authorize North Star's Chief Operating Officer, Michael Ambriz, to execute the settlement agreement on its behalf. Before adopting the motion, the Board was informed of the settlement terms and the administration's recommendation to agree to those terms. The Board determined that the settlement was in the school's best interest.

3. 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.

6/15/10
Date

PAUL BAMBRICK-SANTOYO

#350-10

LITTLE FALLS EDUCATION ASSOCIATION, ON BEHALF OF ITSELF, ITS MEMBERS, AND DEBORAH CAPUTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE FALLS, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners asserted that the Board's failure to renew the contract of Deborah Caputo – a member of the Education Association – after the superintendent of schools had recommended that her employment be renewed for the 2009-2010 school year was arbitrary and capricious. Petitioners demanded Caputo's reinstatement as a teaching staff member, together with full back pay and emoluments. The Board moved to dismiss the petition, contending that the only basis upon which petitioner's claim could move forward is an allegation of a violation of constitutional or legislatively conferred rights.

The ALJ found that: there is a clear distinction between a probationary teacher employed on a year to year contract and a teacher who has acquired the legislative status of tenure; a tenured teacher has an expectation of continued employment, while a non-tenured teacher must rely upon an offer of continued employment by the board – which must be approved by a recorded roll-call vote of the full membership of the board, pursuant to *N.J.S.A.* 18A:27-1; and petitioner failed to allege any violation by the Board of her constitutional or legislatively conferred rights. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons comprehensively presented in his recommended decision, 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.

August 26, 2010

OAL DKT. NO. EDU 11271-09
AGENCY DKT. NO. 159-7/09

LITTLE FALLS EDUCATION ASSOCIATION, ON BEHALF OF ITSELF, ITS MEMBERS, AND DEBORAH CAPUTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE FALLS, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Respondent Board's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

As their exceptions, petitioners provide two copies of their previously submitted letter brief in opposition to respondent Little Falls Township Board of Education's Motion to Dismiss. As it is determined that the Administrative Law Judge (ALJ) fully considered and addressed the arguments advanced therein in his Initial Decision, they will not be revisited here.

Upon his full consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively presented in his decision – that the Board's Motion to Dismiss is appropriately granted.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/10

Date of Mailing: 8/30/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
OAL DKT. NO. EDU 11271-09
AGENCY DKT. NO. 159-7/09

LITTLE FALLS EDUCATION ASSOCIATION,
ON BEHALF OF ITSELF, ITS MEMBERS,
AND DEBORAH CAPUTO,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF LITTLE FALLS, PASSAIC COUNTY,
Respondent.

Genevieve M. Murphy-Bradacs, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Derlys Maria Gutierrez, Esq., for respondent Little Falls Township Board of Education (Adams Stern Gutiereez and Lattiboudere, attorneys)

Record Closed: March 17, 2010 Decided: July 26, 2010

BEFORE **DANIEL B. MC KEOWN**, ALJ (t/a):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Little Falls Education Association (Association) is the majority representative of teaching staff members employed by the Little Falls Township Board of Education (Board). Deborah Caputo (petitioner) is a member of the Association. Caputo had been employed as a teaching staff member by the Board for the 2008-09 academic year. The superintendent of schools recommended that her employment be renewed for the 2009-2010 academic year. Despite that recommendation, petitioner was not reemployed by the Board. She alleges in a Petition of Appeal filed before the Commissioner of Education on or about July 15, 2009, that because the superintendent recommended her for reemployment the Board's action to withhold reappointment from her is arbitrary and capricious. Petitioner demands reinstatement as a teaching staff member, and seeks all back pay with pre- and post-decision interest, benefits, and all other emoluments of employment, including pension credit, she would have received had the Board not acted in an arbitrary and capricious manner.

The Board moved to dismiss the Petition in lieu of filing an Answer. The argument made by the Board is that the only basis for a nontenure, non-renewal of employment claim may move forward is an allegation of a violation of constitutional or legislatively conferred rights. In the absence of petitioner making such an allegation in the filed Petition, the Commissioner's office granted her ten days within which to submit a letter brief or memorandum providing reasons why the matter should not be dismissed. Petitioner filed the requested memorandum on or about August 25, 2009. On September 15, 2009, the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to-13.

A hearing was scheduled for December 16, 2009. However, upon request of counsel, the hearing was converted to a prehearing conference. At that conference the parties agreed to the facts, and also agreed that the issue presented is one of law; that is, whether a nontenure teacher whose employment is not renewed when challenging that non-reemployment must plead a violation of constitutional or some legislatively

conferred right to avoid dismissal of that challenge. The record closed upon receipt of minutes of an Executive Board meeting of June 2, 2009.

For the reasons which follow, I **CONCLUDE** a nontenure teacher, when challenging a non-reemployment action, must plead that the adverse action is in violation of a constitutional or some legislatively-conferred right to avoid a dismissal of that challenge.

FACTS

For purposes of the motion to dismiss, the parties agree that the facts are these.

1. Petitioner was employed by the Board as a third-grade teacher for the 2008-09 year.
2. The superintendent of schools evaluated petitioner's performance in the classroom on three separate occasions.
3. The superintendent provided petitioner with a summative evaluation at the end of the school year.
4. The parties agree the evaluations and the summative evaluation were generally positive.
5. The superintendent recommended petitioner be reemployed the following year.
6. Petitioner received notice that the Board would be discussing matters pertaining to her employment at its April 20, 2009, meeting.
7. At that meeting, four members voted in the affirmative to continue her employment, while five board members abstained from voting.
8. The effect of the voting under N.J.S.A. 18A:27-4.1 is petitioner's employment was not continued into the 2009-2010 year.
9. Petitioner submitted a written request on May 1, 2009, for a statement of reasons why her employment was not continued.
10. The superintendent provided the requested statement of reasons in writing on May 6, 2009.

11. The superintendent explains in the statement that one board member abstained from voting on any teachers who taught his children in the present year; that a another board member abstained from voting because she was petitioner's mother-in-law; and, that the remaining three members who abstained from voting perceived the superintendent "showed reserve when questioned about [his] recommendation for reappointment; and (b) that "[petitioner] did not receive what they perceive to be the highest 'glowing' review for a new teacher." (See Exhibit A, attached to Board's memorandum.)

12. Finally, the superintendent explained that the three Board members who perceived "reserve" also believed that petitioner's continued employment would "perpetuate an inherent conflict of interest, as you [petitioner] are a relative of a Board member." (Ibid.)

13. Petitioner was granted the opportunity to be heard by the Board on June 2, 2009.

14. Board minutes of an executive meeting (see Minutes of Executive Session held June 2, 2009) and of a regular meeting held the same evening (see Minutes of Regular Meeting held June 2, 2009, attached as Exhibit B to Board's memorandum) show that while petitioner's employment was again considered, there were insufficient affirmative votes to renew her employment.

ANALYSIS

There is a clear distinction to be drawn between a probationary teacher employed on a year-to-year contract, with one who has acquired the legislative status of tenure and not otherwise dependent upon a contract for continuing employment. The former teacher must rely upon an offer of continued employment by the board and which must be approved by a recorded roll-call vote of the full membership of the board. N.J.S.A. 18A:27-1. The latter teacher, by virtue of having acquired the legislative status of tenure, has an expectation of continued employment. Absent charges being brought against a tenured teacher and proven true by the board, or a reduction in force, or resignation by the teacher from the board's employ, or other legitimate reasons as

provided in law, the tenure teacher has an enforceable claim of continued employment. See N.J.S.A. 18A:28-5 et seq. Such expectation of continued employment is a property interest, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A nontenure teacher has no legally enforceable expectation to continued employment. N.J.S.A.18A:27-4.1(a) does provide that a board of education may not withhold its approval of a nontenure teacher recommended for renewal of employment by the chief school administrator, as is the case here, for reasons that are either arbitrary or capricious. But, as noted by the Board, past decisions of the New Jersey Supreme Court, the Appellate Division, the State Board of Education, and the Commissioner of Education demonstrate that board of education decisions are entitled to great deference and are entitled to a presumption of correctness. See, e.g., Kopera v W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960); Donaldson v. Bd. of Educ. of N. Wildwood, 65 N.J. 236, 241 (1974); Dore v Bedminster Bd. of Educ., 185 N.J. Super. 447, 453-54 (App. Div. 1982).

In Sheridan v. Bd of Educ. Of the Borough of Pitman, EDU 8068-03, modified, Commissioner of Educ. (Dec.1, 2004), aff'd, State Bd. of Educ. (June 1, 2005), http://lawlibrary.rutgers.edu/oal/search.html, nontenure teacher Sheridan claimed the reasons given by the board for non-renewal of employment were not the real reasons. The administrative law judge (ALJ) agreed with Sheridan and found the real motivation to be a conflict with the superintendent and political pressure from influential parents over voluntary extracurricular activity with the [National Honor Society]. The Commissioner of Education rejected the ALJ's conclusion that Sheridan was entitled to relief in any form. The Commissioner held a non-renewed teacher may obtain relief if he or she can demonstrate that the board of education withheld its approval for reasons that were arbitrary or capricious. But, the ruling is conditioned upon the teacher being able to demonstrate that even it true, the given reasons would constitute a violation of his or her constitutional or legislatively-conferred rights. In the absence of such a showing, the complaining teacher fails to state a claim upon which relief may be granted.

In this case, even accepting that petitioner's evaluations of her classroom performance were acceptable, and even accepting that the superintendent recommended petitioner for renewed employment, and even accepting that the vote of the Board on the motion to renew her employment was four affirmative votes and five abstentions, the reasons given for the abstentions do not constitute arbitrary or capricious reasons. In addition, the reasons for the abstentions do not implicate a constitutional or legislatively conferred right to which petitioner may be entitled. In my view, it is reasonable for a board member to abstain from voting on the renewal of employment of a teacher who had taught their children; it is reasonable for a relative, in this case the mother-in-law of petitioner, to abstain from voting to avoid even the appearance, if not the fact, of a conflict of interest; and, in this case, it is reasonable for three members to abstain from voting on petitioner's renewal of employment because of a perceived lack of enthusiasm by the superintendent on his recommendation to renew her employment.

Finally, petitioner asked for and was provided the reasons for her non-renewal of employment. Petitioner was afforded the opportunity to be heard by the Board. The Board reconsidered its earlier determination not to continue petitioner's employment and, again, the motion to continue her employment carried an insufficient number of affirmative votes for the motion to be carried.

CONCLUSION

Having reached the conclusion that petitioner failed to allege some constitutional or legislatively conferred right which the Board was to have violated, the Board's motion to dismiss must be granted. The Petition of Appeal seeking relief in various forms, including reinstatement, must be and is hereby **DISMISSED**. The Board acted within its broad grant of discretionary authority to determine who shall teach in its schools.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 26, 2010 — Daniel B. McKeown

DATE — **DANIEL B. MC KEOWN**, ALJ (t/a)

Date Received at Agency: July 26, 2010

Date Mailed to Parties: JUL 27 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DOCUMENTS SUBMITTED
BY THE PARTIES

For Petitioner

Exhibit A – attached to petitioner's opposition to Board's motion to dismiss

For the Board

Exhibit A – Statement of Reasons for Nonrenewal – attached to Board's motion to dismiss

Exhibit B – Minutes of Regular Board Meeting – June 2, 2009

Letter of Recommendation – provided petitioner by superintendent and evaluations of petitioners teaching performance - attached to Board's response of January 5, 2010

Minutes of Executive Board Meeting held June 2, 2009

#351-10E

OAL DKT. NO. EDU 7847-10
AGENCY DKT. NO. 169-7/10

LYNN RUSSO, JULIE HARARI, CARMEN ORTIZ, DANIEL JOYCE, WARREN CURTAIN, JOANNE AGRESTI, PETER RIVERA, ROBERT HARARI, JOHN EGAR, and KENDALL STEVEN,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON
V.	:	APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF HUDSON COUNTY SCHOOLS OF TECHNOLOGY, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioners have failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/10

Date of Mailing: 8/30/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER - EMERGENT RELIEF
OAL DKT. NO. EDU 7847-10
AGENCY DKT. NO. 169-7/10

LYNN RUSSO, JULIE HARARI, CARMEN ORTIZ, DANIEL JOYCE, WARREN CURTAIN, JOANNE AGRESTI, PETER RIVERA, ROBERT HARARI, JOHN EGAR AND KENDALL STEVEN,

Petitioners,

v.

BOARD OF EDUCATION OF HUDSON COUNTY SCHOOLS OF TECHNOLOGY,

Respondent.

Julie Harari, for Petitioners (*pro se*)

Joanne Agresti, for Petitioners (*pro se*)

Thomas R. Kobin, Esq. for Respondent (Chasan Leyner & Lamparello, attorneys)

BEFORE **TAHESHA L. WAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY[1]

Petitioners seek an Order for Emergent Relief directing Respondent, the Board of Education of Hudson County Schools of Technology, (Respondent) to reinstate its

[1] Procedurally, the Commissioner of Education may exercise incidental jurisdiction to determine issues under the Open Public Meetings Act, where such issues are part of a controversy under the school laws. Sukin v. Northfield Board of Education, 171 N.J. Super. 184, 187 (App. Div, 1979).

sports programs for the 2010-2011calendar year. On July 21, 2010, the Commissioner of the State Department of Education (Commissioner) received Petitioners' application for emergent relief. The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 27, 2010, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. On August 3, 2010, the application for emergent relief was heard.

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.

Petitioners must satisfy all four (4) requirements in order to be entitled to receive the relief requested.

Petitioners are parents of students at Hudson County Prep (County Prep) in Jersey City and Hudson County High Tech School (County Tech) in North Bergen.

Petitioners' claim that on March 18, 2010, Respondent proposed to eliminate sports programs at its school board meeting. On April 1, 2010, it was detailed at Respondent's Board of Estimate meeting that the sports program would be reduced by

65%. On April 22, 2010, Respondent approved the elimination of sport programs effective June 2010, at its school board meeting. The Petitioners further claim that the above actions were taken without proper public notice and participation, as required under the Open Public Meetings Law[2] and the various policies of the schools. Nonetheless, the budget was placed on the May 13, 2010, agenda of the Hudson County Board of Chosen Freeholders (Freeholders) for approval. Despite alternatives proffered by public members, the Freeholders ultimately approved the budget which included the elimination of the sports programs at County Prep and County Tech. At the next Freeholder meeting on June 21, 2010, a resolution to amend the County budget and to reinstate the sports programs was voted down.

Petitioners contend that the elimination of the sports programs at County Prep and County Tech was not motivated by monetary concerns. Petitioners represented also that this measure is harmful because students will have difficulty getting to the sports activities at the receiving districts, there will be fewer opportunities, the likelihood of college recruitment and/or scholarships will be diminished, and social concerns.

Respondent has rejected Petitioners' request to reinstate their sports programs for calendar year 2010-2011 in light of fiscal concerns. Specifically, Respondent cites to program costs, its five (5) percent decrease in state aid, and the need to eliminate its duplicative extracurricular activities offered in the other municipal schools within the County which its students can participate in.

After hearing the parties' arguments and reviewing the documents submitted, I **CONCLUDE** that Petitioners have not shouldered their burden of establishing the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Most specifically, there has been no showing of irreparable harm by Petitioners.

It is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33.

[2] N.J.S.A. 10:4-6, *et seq.*

In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). Injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

Moreover, in context with the nature of this case, it is well established that participation in an extracurricular activity is a privilege and not a fundamental right, and therefore a student's lack of participation thereof does not rise to the level of irreparable harm. Daniel K. Palmer, et als. v. Peter L. Merluzzi, et als., 689 F. Supp. 400, 1988 U.S. Dist. Lexis 9857 (1988).

It is axiomatic that participation in extracurricular activities by law is considered a privilege and not a fundamental right, notwithstanding their positive ability to build character and life skills in youth. Further, students at County Prep and County Tech will not be foreclosed from the opportunity to participate in sports at alternate schools within the County. Accordingly, I **CONCLUDE** emergent relief is not warranted.

ORDER

It is hereby **ORDERED** that Petitioners' application for emergent relief be **DENIED.**

This Order on application for emergent 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.

August 3, 2010

DATE

TAHESHA L. WAY, ALJ

352-10

OAL DKT. NO. EDU 456-10
AGENCY DKT. NO. 12-1/10

IN THE MATTER OF THE TENURE HEARING OF MICHELE TIMBERMAN, CITY OF BRIDGETON SCHOOL DISTRICT, CUMBERLAND COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the proposed "Settlement Agreement and Resignation," 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: 8|26|10

Date of Mailing: 8|30|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 456-10
AGENCY DKT. NO. 12-1/10

IN THE MATTER OF THE TENURE HEARING OF MICHELE TIMBERMAN, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.

A. Paul Kienzle, Esq., for petitioner, Bridgeton School District (Casarow, Kienzle & Raczenbek, attorneys)

Ned P. Rogovoy, Esq., for respondent, Michele Timberman

Record Closed: July 15, 2010 Decided: July 15, 2010

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 23, 2010, 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 is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):

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 days and unless 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 15, 2010
DATE

W. TODD MILLER, ALJ

JUL 20 2010

Date Received at Agency:

JUL 21 2010

Date Mailed to Parties:

/sd

Bridgeton Public Schools

Bank Street Administration Building
P.O. Box 657
Bridgeton, New Jersey 08302

Telephone: (856) 455-8030, Ext. 1882
Fax: (856) 459-2084
Email: pkienzle@bridgeton.k12.nj.us

A. Paul Kienzle, Jr.
Labor Relations Administrator
House Counsel

July 13, 2010

Honorable William Todd Miller, ALJ
Office of Administrative Law
1601 Atlantic Avenue, Sixth Floor
Atlantic City, NJ 08401

RECEIVED
2010 JUL 15 P 2:15
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RE: I/M/O Tenure Hearing of Michele Timberman
Bridgeton School District
OAL Docket No.: EDUTH 00456-2010S
Agency Ref. No.: 12-1/10

Dear Judge Miller:

Regarding the above-captioned matter, you will find enclosed herewith the following:

1. Three copies of the settlement agreement between Michele Timberman and the Board of Education of the City of Bridgeton dated July 13, 2010.

2. Three copies of the Resolution of the Board of Education of the City of Bridgeton dated July 13, 2010.

Please note that attached to the settlement agreement is the resignation of Michele Timberman. Please note that this not a matter that is subject to the Board of Examiners since Ms. Timberman is not certificated and the agreement fully incorporates her understanding of the consequences of the agreement.

It is requested that Your Honor review these documents for compliance for the necessary resolution of this matter and enter an Order directing the settlement as agreed to between the parties.

If there is anything further that is necessary, 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 cooperation.

Respectfully yours,

A. PAUL KIENZLE, JR.
Labor Relations Administrator/House Counsel

APK/dg
cc: Ned Rogovoy, Esquire
H. Victor Gilson, Ed. Ph.D, Superintendent
James A. Dunkins, Human Resource Director
Nicole M. Schoener, School Business Administrator/Board Secretary

SETTLEMENT AGREEMENT
AND RESIGNATION

This Settlement Agreement and Resignation (the "Agreement"), is entered into this 13th day of July, 2010, by and between MICHELE TIMBERMAN ("Mrs. Timberman") 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 "Mrs. Timberman" shall mean and include Michele Timberman and any and all of her 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 Mrs. Timberman's employment by the Board.

WITNESSETH:

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming a staff member, incompetence and insubordination against Mrs. Timberman pursuant to N.J.S.A. 18A:6-11 and said charges were certified and are pending under Agency Docket No. 12-1/10 and OAL Docket No. EDUTH 00456-2010S; 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 Mrs. Timberman; 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 Mrs. Timberman and the Board has agreed to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) Mrs. Timberman agrees that upon signing this Agreement and by signing her Resignation which is attached hereto as **Appendix A**, she is irrevocably resigning her employment with the Board effective at least by June 30, 2011 pursuant to the remaining terms of this Agreement.

(B) As a result of the tenure charges being certified and contested as represented in the prior introduction, Mrs. Timberman was not paid for 120 days and as a part of this Agreement, she will not seek any reimbursement for those days.

2. (A) Mrs. Timberman will remain employed in a secretary position until the date of her resignation which is June 30, 2011. Thereafter, she will have no claim to any employment with the Bridgeton Board of Education. Mrs. Timberman's employment is contingent upon her compliance with work rules, attendance and proper conduct attendant to the position.

(B) Mrs. Timberman, for the consideration given by the Board as set forth above, which she acknowledges is adequate and satisfactory to her, hereby commits as follows:

(1) Mrs. Timberman 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 Mrs. Timberman has ever had or now has against the Board in connection with her employment with the Board, the resignation of her employment, compensation and/or benefits with the Board and the charges. Mrs. Timberman further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by her and which seeks personal, equitable or monetary relief for her against the Board, including but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and 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 Mrs. Timberman's employment. Mrs. Timberman understands that she is not releasing any claims she may have to enforce the provisions of this Agreement. This release covers both claims that Mrs. Timberman knows about and those she may not know about, except for claims (i) that may arise after the date Mrs. Timberman executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Mrs. Timberman has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Mrs. Timberman further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction 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.

(2) All of these releases shall operate from June 1, 2010 retroactively to the inception of her employ with the Board. The release does not cover the period of time from June 1, 2010 through June 30, 2011, but any action shall only be allowed as it relates to any damages for the period from June 1, 2010 through June 30, 2011. If no incidents whatsoever occur, then the acceptance of her resignation which is attached hereto as **Appendix A** to be effective June 30, 2011 shall act as a release for that stated period from June 1, 2010 through June 30, 2011.

3. The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 12-1/10, OAL

Docket No. EDUTH 00456-2010S, with prejudice in light of Mrs. Timberman's resignation after one year of resumed employment as a secretary and her waiver of the 120 days of non-pay. In executing this Agreement, Mrs. Timberman 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 Mrs. Timberman, 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 Mrs. Timberman'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 Mrs. Timberman. 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 Mrs. Timberman has ever had or now has against each other arising out of or relating to her 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. Mrs. Timberman agrees that she shall be responsible for her own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

10. In executing this Agreement, Mrs. Timberman has had an opportunity to

speak to her attorney and has relied upon the legal advice of her attorney as to the terms of this Agreement, which have been completely read by her and explained by her 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 Mrs. Timberman and the Board.

12. This Agreement shall become effective immediately following the execution by Mrs. Timberman 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:

Michele Timberman Date: 7/8/10

Michele Timberman

Subscribed & sworn to before me
this 8th day of July, 2010

Notary Public

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 Edwards Dated: 7/13/10

, Board President

Witness:

, Business Administrator/
Board Secretary

APPENDIX A

Resignation of Michele Timberman

To the Bridgeton Board of Education, Cumberland County:

I, Michele Timberman, hereby resign my employment with the Bridgeton Board of Education, Cumberland County, effective June 30, 2011.

Michele Timberman

Subscribed & sworn to before me
this 9th day of July, 2010.

Attorney at Law

APPENDIX B

Joint Statement of
Michele Timberman, Cumberland County

Michele Timberman was employed by the Board on or about Sept. 1, 2001 and she resigned on June 30, 2011.

RESOLUTION
OF
THE BOARD OF EDUCATION
OF THE CITY OF BRIDGETON

WHEREAS, the Board of Education has filed tenure charges against Michele Timberman for conduct unbecoming a staff member, incapacity, insubordination, and other just cause; and

WHEREAS, on the first day scheduled for trial, all parties appeared and conferred over the appropriate resolution of the charges; and

WHEREAS, Michele Timberman is a non-certificated secretary having acquired tenure under the New Jersey Statutes in her employment with the Bridgeton Board of Education; and

WHEREAS, in order for this matter to proceed there may be a submission of an extensive number of documents, proofs and the requirement of a number of trial days to come to a conclusion; 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 interest of the public to agree to the settlement agreement attached hereto which settlement agreement includes the resignation of Michele Timberman from employment in the School District of the City of Bridgeton and which settlement agreement resolves the non-certificated secretary's 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 her rights and proof of knowledge of her rights are specifically set forth in significant detail in the settlement agreement.

2. The staff member in question is a non-certificated individual.

3. 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.

4. It is anticipated that trial in this matter would consume many days of additional trial time which all parties indicate under the circumstances and pursuant to the agreement of the parties is not in anyone's best interest.

5. The anticipated trial would result in substantial financial expense to the Bridgeton Board of Education with respect to the loss of staff time, mileage and fees that could conceivably be assessed.

6. It is anticipated that the loss of work days for the Superintendent of Schools, the Principal of Bridgeton High School, the two High School Nurses, the Board

of Education Human Services Director, one EEO employed by the Bridgeton School District, the one main office secretary at Bridgeton High School, and the supervisor in this case and other possible witnesses would amount to over thirty (30) days in lost work time for school personnel.

7. The Board of Education, for the settlement not to take place, would be responsible to resume paying salary without the benefit of work performed beyond the length of time for the anticipated hearing which would result in additional expense to the Board of Education.

8. Due to the fact that a tenure hearing may be a complicated and involved matter and the fact that the employee involved is a non-certificated individual, there are clearly significant uncertainties of litigation and the Board of Education determines that it is in its best interest to approve the agreement in order to bring some finality to this matter and avoid possible continued litigation and expense including possible appellate expense that could be anticipated were the matter to proceed.

9. It has been reported by the Principal of the Bridgeton High School that there are certain personal circumstances involved with the staff member in question and that her removal from Bridgeton High at this time is more than sufficient and appropriate to deal with this entire matter.

10. It is clearly a business decision to come to the agreement between the Board of Education and Michele Timberman as it will clearly save the Board of Education time, money and give the Board of Education the flexibility in staffing.

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 Brenda Dellaquilla; and seconded by Marie Bernstein.

ROLL CALL VOTE

NAME	AYES	NOES
Marie Bernstein	X	
Ronald Bowman	X	
Brenda Dellaquilla	X	
Mary Peterson	X	
Kenny Smith-Bey Jr.	X	
Angelia Edwards	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

July 13, 2010, 2010.

Dated: July 14, 2010

NICOLE M. SCHOENER
SCHOOL BUSINESS ADMINISTRATOR

353-10

OAL DKT. NO. EDU 163-10
AGENCY DKT. NO. 372-12/09

IN THE MATTER OF THE TENURE HEARING OF BRIAN YUKNA, CAMDEN COUNTY TECHNICAL SCHOOL DISTRICT.	:	COMMISSIONER OF EDUCATION
	:	DECISION

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

Upon review, the Commissioner approves the settlement terms with the following comments and adjustments. First, it is the Commissioner of Education's responsibility – pursuant to *N.J.A.C.* 6A:3-5.6(a), which articulates the standards set forth in *In re Cardonick*, 1990 *S.L.D.* 842, 846 (State Board, April 6, 1983) – to review and approve or disapprove a settlement of tenure charges against a teaching staff member. The Commissioner finds that the six standards articulated in *N.J.A.C.* 6A:3-5.6(a) have been met in this case.

Second, while Paragraph 8 characterizes the Agreement as "confidential," the parties are reminded that, pursuant to *N.J.A.C.* 6A:3-5.6(b), no settlement terms may restrict access to information deemed public by law – including this Commissioner final decision incorporating the Agreement. By way of contrast, the exhibits to the letter which the parties agree to attach to the Agreement, may not be annexed to the agreement. These exhibits include letters written by minors and are subject to privacy laws.

Third, Paragraph 2 of the Agreement references an action that may have already taken place, and may therefore have preceded consideration of the settlement by the

Commissioner. 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, with the foregoing amendments, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates 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.

COMMISSIONER OF EDUCATION

Date of Decision: 8|26|10

Date of Mailing: 8|30|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 163-10
AGENCY DKT. NO. 372-12/09

IN THE MATTER OF THE TENURE HEARING OF BRIAN YUKNA, CAMDEN COUNTY TECHNICAL SCHOOL DISTRICT, CAMDEN COUNTY.

David C. Patterson, Esq., for petitioner, Camden County Technical Schools (Maressa Patterson, attorneys)

Mark J. Molz, Esq., for respondent, Brian Yukna

Record Closed: June 30, 2010 Decided: June 30, 2010

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

This matter was transmitted to the Office of Administrative Law on January 27, 2010, 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 20, 2010.

2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):

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

DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: JUL 20 2010

Date Mailed to Parties: JUL 20

/sd

SETTLEMENT AGREEMENT 4/20/10

BETWEEN: CAMDEN COUNTY TECHNICAL SCHOOLS BOARD OF EDUCATION

AND

BRIAN YUKNA

THE PARTIES AGREE TO RESOLVE THEIR DIFFERENCES AS FOLLOWS:

(1.) TENURE CHARGES ARE DISMISSED AGAINST BRIAN YUKNA

(2.) BRIAN YUKNA SHALL RETURN TO WORK ON 7/1/10.

(3.) BRIAN YUKNA WILL BE TRANSFERRED TO T. I. DIVISION AT GLOUCESTER TWP. CAMPUS AT SAME SALARY AS COUNSELOR.

(4) BRIAN YUKNA SHALL RETAIN HIS TENURE, BUT CANNOT BUMP ANOTHER EMPLOYEE IN HIS OLD POSITION

(5.) BRIAN YUKNA MAY BE TENURED IN NEW POSITION BUT MAY USE HIS PRIOR CREDITABLE POSITION.

(6) BRIAN YUKNA RECOGNIZES HE WILL CHANGE UNIONS TO FESP

(7.) BRIAN YUKNA WILL RECEIVE ALL BACK PAY BUT NO VACATION OR SICK TIME FOR THE TIME HE HAS BEEN OUT ON SUSPENSION

(8.) THIS SETTLEMENT IS CONFIDENTIAL AND NEITHER PARTY SHALL DISPARAGE THE OTHER.

(9) THE ATTACHED LETTER & EXHIBITS SHALL BE THE ONLY INFORMATION RELEASED ABOUT BRIAN YUKNA IN RESPONSE ~~FOR~~ ANY REQUESTS FOR REFERENCE.

BRIAN YUKNA

Albert Monillas
SUPERINTENDENT

MARK MOLZ

LETTER OF RECOMMENDATION

MR. YUKNA WAS HIRED IN THE 2005-2006 SCHOOL YEAR AS A GUIDANCE COUNSELOR. HE HAS A MASTER'S DEGREE IN COUNSELING AND HAS CERTIFICATIONS IN:

K-12 ART
STUDENT PERSONNEL SERVICES
DIRECTOR of SCHOOL COUNSELING SERVICES
SUBSTANCE AWARENESS COUNSELING

MR YUKNA INITIATED A TUTORING PROGRAM TO PREPARE STUDENTS TAKING THE HSPA EXAM AND TO EXCEL IN MATHEMATICS AND ENGLISH IN ADDITION, MR. YUKNA WAS RESPONSIBLE FOR STANDARDIZED TESTING, ADMISSIONS, TOURS FOR STUDENTS IN 8TH GRADE AND STAFF + STUDENT SCHEDULES.

HE BECAME DIRECTOR OF STUDENT PERSONNEL SERVICES IN 2006-2007

MR. YUKNA HAS SERVED ON THE SCHOOL LEADERSHIP COMMITTEE, GRADUATION COORDINATION COMMITTEE, PROM COMMITTEE AND HAS BEEN RESPONSIBLE FOR COMPILING DATA TO SUPPORT NJ SCHOOL REPORT CARD AND ASSA FUNDING

STUDENT LETTERS ARE ATTACHED.

R.

RECEIVED
2010 JUN 30 P 12:40
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AMENDED RESOLUTION

RESOLUTION APPROVING SETTLEMENT AGREEMENT BETWEEN BRIAN YUKNA AND THE BOARD OF EDUCATION OF THE CAMDEN COUNTY TECHNICAL SCHOOLS

WHEREAS, the Camden County Technical Schools' Board of Education previously certified Tenure Charges against Mr. Brian Yukna on December 16, 2009, which Tenure Charge is attached hereto and incorporated by reference herein as Exhibit "A". Said Charge related to the change of a placement test score by Mr. Yukna on an incoming accepted student; and

WHEREAS, Mr. Yukna through his counsel has contested the charge; and

WHEREAS, the matter was referred to the Office of Administrative Law for a full hearing on the Tenure Charge under the caption I/M/L v. THE TENURE HARING OF BRIAN YUKNA, CAMDEN COUNTY TECHNICAL SCHOOL DISTRICT, CAMDEN COUNTY, OAL Docket No. EDU163-10, Agency Docket No. 372-12-09; and

WHEREAS, on the day of hearing, the parties entered into extensive settlement negotiations in an effort to see if the matter could be resolved to the satisfaction of both parties; and

WHEREAS, as a result of said negotiations, it has been determined that this matter should be settled in accordance with N.J.A.C. 6A:3-5.6 and the Settlement Agreement attached hereto and incorporated by reference as Exhibit "B"; and

WHEREAS, the Settlement Agreement is submitted for approval to the Commissioner of Education and for an Order withdrawing the tenure charge; and

WHEREAS, the reasons for entering into the Settlement Agreement are:

That a review of Mr. Yukna's personnel record indicates there is no other progressive discipline against Mr. Yukna;

That for over three years, Mr. Yukna had been performing the required duties of Director of Student Personnel Services, including admitting students to the Pennsauken Campus of the Technical Schools;

That initially the Board of Education was under the impression the placement test was administered to determine if the student should be admitted, which upon further review with staff, it has been determined that the student was already admitted;

That Mr. Yukna acknowledged that after admitting the student he decided to give the student a mathematics placement test to determine whether tutoring would be necessary; that the student completed the test quickly with a failing score which he felt was because the student failed to understand the instructions and that he changed the test score to the minimum passing which still reflected tutoring may be necessary and which was not a detriment to the student.

WHEREAS, it has been determined that Mr. Yukna should not return to his previous position as Director of Student Personnel Services because of his mistake in judgment by changing this placement test score, but that a position is available to be offered to him as a Counselor at the Technical Institute Division (Adult) at the Gloucester Township Campus beginning on July 1, 2010, which will be the return to work date for Mr. Yukna, conditioned on approval of this proposed Settlement Agreement and dismissal of the Tenure Charge; and

WHEREAS, it has further been determined that Mr. Yukna shall not be entitled to any salary increase for the school year 2010-2011 in the position as a Counselor at the Technical Institute at the Gloucester Township Campus; and

WHEREAS, Mr. Yukna's new position will require him to transfer from the Administrator II Union to the FESP Union; and

WHEREAS, the Board of Education for the Camden County Technical Schools has reviewed this matter and the findings set forth hereinabove, and taking into consideration that there is no other progressive discipline against Mr. Yukna since his employment at the Camden County Technical Schools, that Mr. Yukna had for over three (3) years performed his required duties in his position as Director of Student Personnel Services and was the decision maker on admitting students to the Technical Schools Pennsauken Campus without any issues, that the student on whom the placement test score was changed had already been admitted by him and the Board was under a misimpression that the test was for admission purposes which was incorrect, that Mr. Yukna acknowledged that he changed the score for the student on the Mathematics placement test which is a mistake in judgment by him, that Mr. Yukna indicated the test was given to determine the Mathematic capabilities of the student in order to determine necessity of tutoring which test score change still indicated tutoring may be required and was not a detriment to the student, that because of his mistake in judgment he will be removed from his position as Director of Student Personnel Services at the Pennsauken Campus to placement as a Counselor at the Technical Institute (Adult Division) at the Gloucester Township Campus with no salary increase for school year 2010-2011, that for these reasons it is determined not to be in the public interest to proceed with the Tenure Charge but to accept this Settlement and permit Mr. Yukna to retain employment with the Camden County Technical Schools and continue to be a viable staff employee; and

WHEREAS, the Settlement on this matter was placed on record before the Honorable Bruce M. Gorman on April 20, 2010; and

WHEREAS, the consent of both parties to accept this Settlement was placed on the record through the testimony and acknowledgement under oath by both Dr. Albert Monillas, Superintendent of the Camden County Technical School and Mr. Brian Yukna; and

WHEREAS, the Court further took testimony from Mr. Yukna that he fully understood his rights in regard to the matter before the Court and that he was voluntarily entering into this Settlement Agreement; and

WHEREAS, the Members of the Camden County Technical Schools Board of Education have reviewed the Settlement Agreement and have determined that same should be approved in the best interest of the Board of Education and Mr. Yukna and that the Tenure Charge should be withdrawn without further pursuing lengthy and costly litigation against Mr. Yukna in order to permit him to remain a viable member of the Technical School Staff; and

WHEREAS, Mr. Yukna has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for any action against his Certificate.

NOW, THEREFORE, BE IT RESOLVED by the Vice President and Members of the Camden County Technical Schools Board of Education that based on the statements set forth hereinabove, it hereby approves the attached Settlement Agreement dated April 20, 2010 between Camden County Technical Schools Board of Education and Mr. Brian Yukna.

BE IT FURTHER RESOLVED, that a certified copy of this Resolution shall be submitted to the Commissioner of Education's Office as required.

RICK V. TAYLOR, VICE PRESIDENT

JAMES CLARK, BOARD SECRETARY

Adopted: June 17, 2010

Certified to be a true copy of a Resolution approved by the Camden County Technical Schools Board of Education at its regular meeting held on June 17, 2010 meeting.

JAMES CLARK, BOARD SECRETARY

Adopted: June 17, 2010

363-10

OAL DKT. NO. EDU 07873-09
AGENCY DKT. NO. 136-6/09

BONNIE ZYSK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Rochelle Hendricks
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/02/10

Date of Mailing: 9/02/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CORRECTED

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07873-09

AGENCY DKT. NO. 136-6/09

BONNIE ZYSK,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

Respondent.

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

Jeffrey R. Merlino, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: July 22, 2010 Decided: July 28, 2010

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

On July 20, 2009, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement and Settlement Agreement and the Board's resolution July 22, 2010. Initial Decision Settlement was forwarded to the parties.

On July 28, 2010, the parties re-sent a copy of the Stipulation of Settlement to correct the typographical error in the docket number and the agency reference number. The change was done only on the first page.

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

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

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

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

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

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

28, 2010

DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

LINDABURY, McCORMICK, ESTABROOK & COOPER
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Ridgewood Board of Education

BONNIE ZYSK,	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DKT. NO: EDU 07873-2009N AGENCY DKT. NO: 136-6/09
vs.	:	
RIDGEWOOD BOARD OF EDUCATION	:	STIPULATION OF SETTLEMENT
Respondent.	:	

WHEREAS, Bonnie Zysk ("Petitioner"), a tenured secretary, was employed by the Respondent, Ridgewood Board of Education ("Board") in the position of 12-month .34 FTE Class VIII General Secretary to the Business Office; and

WHEREAS, on or about June 1, 2009, the Board abolished the position of 12-month .34 FTE Class VIII General Secretary to the Business Office, leaving no such position remaining in the Ridgewood School District ("District"); and

WHEREAS, Article XXV of the collective bargaining agreement between the Board and the Ridgewood Association of Educational Secretaries ("RAES") provides tenured secretaries in the same position will have seniority over non-tenured secretaries in the event of layoff or the abolishment of a position; and

WHEREAS, on or about June 22, 2009, a Verified Petition of Appeal was filed on behalf of Petitioner with the Commissioner of Education seeking to reverse the Board's action

subjecting Petitioner to layoff and for retaining non-tenured or less senior individuals within Class VIII of the secretarial positions within the District; and

WHEREAS, on or about July 8, 2009, the Board filed an Answer to Petitioner's Verified Petition of Appeal denying the allegations; and

WHEREAS, the matter was assigned to the Office of Administrative Law and a conference was conducted on June 9, 2010; and

WHEREAS, the parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. Effective July 1, 2010 for the 2010-11 school year, Petitioner will be recalled and appointed to the position of 10-month .47 FTE Class VIII Attendance Secretary at Ridgewood High School. Petitioner's tenured status will continue and she will receive appropriate credit for her years of experience on the Class VIII salary guide as set forth in the collective bargaining agreement between the Board and the RAES. Petitioner shall retain her accumulated unused sick days in the District and shall possess same upon her recall.
2. The Board shall make its regular pension contribution on Petitioner's behalf for the 2009-10 school year.
3. Petitioner does not have any lost wages for the 2009-10 school year.
4. Petitioner waives any claim for reimbursement of attorneys' fees or other remuneration except as provided herein.
5. The parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a hearing.

6. Petitioner shall release the Board from any and all claims, rights and liability through July 1, 2010.

7. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

8. This Agreement shall be governed by the laws of the State of New Jersey.

9. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations. The parties acknowledge that are represented by competent counsel and that are fully satisfied with the legal representation provided by their respective counsel.

11. This Agreement shall remain confidential to the maximum extent permitted by law.

12. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

13. This Agreement shall be incorporated into a Final Order by the Office of Administrative Law and disposes of any and all claims that were raised or could have been raised in the captioned matter. To the extent that this Agreement is not incorporated into a Final Order by the Office of Administrative Law, Petitioner agrees to withdraw the pending Verified Petition of Appeal with prejudice.

14. This Agreement is subject to ratification by the Board.

Bonnie Zysk, Petitioner Date: 7/15/10

ON BEHALF OF THE RIDGEWOOD BOARD OF EDUCATION

Angelo DeSimone, Board Secretary Date: 7/20/10

EXCERPT FROM THE MINUTES OF THE REGULAR PUBLIC MEETING OF THE BOARD OF EDUCATION OF RIDGEWOOD BERGEN COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session on Monday, July 19, 2010 at 7:33 p.m. in the Education Center, 49 Cottage Place, Ridgewood, New Jersey.

The following members of the Ridgewood Board of Education were present:

Ms. Sheila Brogan; Ms. Laurie Goodman; Mr. Charles Reilly; Mr. Robert Hutton, Vice-President; Ms. Michele Lenhard, Board President

The following members were absent: None

D. HUMAN RESOURCES

x. **Settlement Agreement**
It is recommended that the Board approve a settlement agreement between the Board and Employee No. 024317 to resolve litigation.

Mr. Reilly moved approval of Consent Item D – Human Resources.

Ms. Brogan seconded the motion, which carried by the following roll-call vote:

AYES: Ms. Brogan, Ms. Goodman, Mr. Reilly, Mr. Hutton, Ms. Lenhard

NAYS: None

I certify that this is a true and correct excerpt from the Ridgewood Board of Education minutes.

7/26/10
Date

Jennifer Daviet
Assistant Board Secretary

364-10

OAL DKT. NO. EDU 06625-10
AGENCY DKT. NO. 117-6/10

A.C. and B.L.-C. on behalf of minor children J.C. and C.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/02/10

Date of Mailing: 9/02/10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06625-2010

AGENCY DKT. NO. 117-6/10

A.C AND B.L.-C. ON BEHALF OF J.C. AND C.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY

Respondent.

Robert A. Kosicki, Esq. for petitioner (Brach Eichler, attorneys)

Fredrick J. Sirota, Esq. for respondent Ho-Ho-Kus Board of Education (Wiley, Malehorn, Sirota, and Raynes, attorneys)

Record Closed: July 23, 2010 Decided: July 26, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 25, 2010 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 on the attached settlement agreement. The Ho-Ho-Kus Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated July 20, 2010, and has authorized its president to execute the agreement on its behalf.

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

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

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

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

July 26, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 7-28-10

Mailed to Parties:

JUL 28 2010
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RESOLUTION OF THE HO-HO-KUS BOARD OF EDUCATION

WHEREAS the Board recently addressed the issue of the domicile of the parents of minor students J.C. and C.C. at a hearing on May 18, 2010 at which the parents were represented by legal counsel and given an opportunity to provide testimony and evidence; and

WHEREAS the Board considered the testimony and evidence presented by the parties;

WHEREAS the Board conducted the hearing in executive sessions pursuant to the relevant exceptions relating to students and litigation;

WHEREAS the Board conducted a vote on the issue in public session in accordance with the Open Public Meetings Act;

WHEREAS the Board concluded that the parents were not domiciled in the District;

WHEREAS the parents of minor students J.C. and C.C. filed a Petition with the Commissioner of Education regarding the Board decision after the hearing of May 18, 2010;

WHEREAS the District filed a Counter-Petition for tuition for the periods during which the parents were not domiciled in the District;

WHEREAS the parents have now moved into the District and become domiciled in Ho-Ho-Kus; and

WHEREAS the matter has now been settled amongst the parties.

NOW, THEREFORE BE IT RESOLVED that the Board of Education determines that the Settlement Agreement regarding the mutual dismissal of the Petition and Counter-Petition by the parents and the Board is hereby approved and requests and approves the execution of the same by the President and Board Secretary.

BE IT FURTHER RESOLVED that the Board of Education authorizes its attorney, Fredric J. Sirota of Wiley Malehorn Sirota & Raynes to execute on its behalf the Stipulation of Dismissal to be submitted to the Commissioner of Education.

The undersigned, Board Secretary of the Ho-Ho-Kus Board of Education hereby certifies that the above Resolution was adopted by the Board at its properly constituted meeting of July 20, 2010 at the Ho-Ho-Kus School, 70 Lloyd Road, Ho-Ho-Kus, New Jersey by a majority vote.

The undersigned Acting Board Secretary of the Ho-Ho-Kus Board of Education hereby certifies that the above Resolution was properly adopted by the Ho-Ho-Kus Board of Education at its meeting of July 20, 2010.

Deborah Ferrara 7/24/10
Acting Board Secretary

Deborah Ferrara
Board Secretary

Dated: 7/20/10

WILEY MALEHORN SIROTA & RAYNES
250 MADISON AVENUE
MORRISTOWN, NEW JERSEY 07960
(973)539-1313
Attorneys for Respondent

ANGEL CARCHI AND BONNIE LEIBOWITZ-CARCHI, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN J.C. AND C.C.,

Petitioners,

v.

HO-HO-KUS BOARD OF EDUCATION,

Respondent-Counter Petitioner

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Agency Reference No.: 117-6/10

OFFICE OF ADMINISTRATIVE LAW
Docket No.: EDU 6625-2010N

STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted and resolved by and between the parties, it is hereby stipulated and agreed that the Petitioners hereby dismiss all counts and claims in its Petition with prejudice and without costs and the Respondent hereby dismisses all counts and claims in its Counter-Petition with prejudice and without costs.

BRACH EICHLER, LLC
Attorney for Petitioners

Robert A. Kosicki

Dated: July 12, 2010

WILEY MALEHORN SIROTA & RAYNES
Attorneys for Respondent-Counter Petitioner

Fredric J. Sirota

Dated:

SETTLEMENT AGREEMENT

WHEREAS, A.C. and B.L.C., petitioners of J.C. and C.C. ("Petitioners"), filed a Petition with the New Jersey Commissioner of Education disputing the Ho-Ho-Kus Board of Education's determination regarding Petitioners' Ho-Ho-Kus residency and domicile entitled A.C. and B.L.C. on behalf of minor children J.C. and C.C. vs. Borough of Ho-Ho-Kus BOE, Bergen County, OAL Docket Number EDU 06625-2010N, Agency Reference No. 117-6/10 ("Petition"); and

WHEREAS, Ho-Ho-Kus Board of Education ("Respondent-Counter Petitioner") filed an Answer and Counter-Petition to the Petition with the New Jersey Commissioner of Education seeking back tuition for the period of September 2008 through June 2010; and

WHEREAS, a dispute existed with regard to the Petitioners' residence and domicile; and

WHEREAS, the parties in good faith have engaged in negotiations concerning the dispute with regard to the Petitioners' Ho-Ho-Kus residence and domicile and the parties enter into this settlement agreement ("Agreement") in order to reach a compromise of the Ho-Ho-Kus residence and domicile dispute; and

WHEREAS, the parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. Upon the execution of this Agreement, Petitioners, through their attorney, will execute a Stipulation of Dismissal with prejudice and without costs, withdrawing all claims that were or could have been included in the Petition filed with the Commissioner of Education, Counsel for the Respondent-Counter Petitioner shall file the Stipulation of Dismissal with prejudice and without costs with the Office of Administrative Law upon Respondent-Counter Petitioner's approval on or before July 30, 2010 or this Agreement is null and void and without any legal effect.

2. Upon the execution of this Agreement, Respondent-Counter Petitioner through its attorney, will execute a Stipulation of Dismissal with prejudice and without costs, withdrawing all claims that were or could have been included in the Petition filed with the Commissioner of Education, Counsel for the Respondent-Counter Petitioner shall file the Stipulation of Dismissal with prejudice and without costs with the Office of Administrative Law upon Respondent-Counter Petitioner's approval on or before July 30, 2010 or this Agreement is null and void and without any legal effect.

3. In consideration for the signing of the Agreement and accepting the terms set forth in it. Respondent-Counter Petitioner agrees to waive forever and dismiss with prejudice and without costs any and all claims for back tuition against the Petitioners for the period covering September 2008 through June 2010. In consideration for the signing of the Agreement and accepting the terms set forth in it, Petitioners agree to waive forever and dismiss, with prejudice and without any costs, any and all claims limited to and relating to Ho-Ho-Kus residence and domicile for September 2008 through June 2010.

4. This Agreement 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.

5. The Respondent-Counter Petitioner and Petitioners, 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.

6. The terms of this Agreement represent a compromise of all disputed claims specifically limited to and relating to the dispute with regard to the Petitioners' Ho-Ho-Kus residence and domicile between the Petitioners and Respondent-Counter Petitioner and resolve all of the issues specifically limited to and relating to the dispute with regard to the Petitioners' Ho-Ho-Kus residence and domicile raised by Petitioners and Respondent-Counter Petitioner. 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.

7. Both parties waive any and all claims, demands, liabilities, damages, costs, expenses, actions and causes of action that they now have against each other, specifically limited to and relating to the dispute with regard to the Petitioners' Ho-Ho-Kus residence and domicile, including any heirs, members, officers, agents and employees under statutory or common law, and corresponding New Jersey statutes and regulations. Each and every claim which either party made or could have made to this date in any forum, including the Office of Administrative Law, Superior Court of New Jersey or the Federal courts specifically limited to and relating to the dispute with regard to the Petitioners' Ho-Ho-Kus residence and domicile are hereby compromised, settled and released, and fully discharged forever, without any further liability on either party including heirs, or any past, present or future agents, employees, officers, directors, divisions, successors or assigns. This Agreement does not compromise, settle, release, bar or waiver any claim or right not directly related to the dispute with regard to the Petitioners' Ho-Ho-Kus residence and domicile. This Agreement does not affect any right of either party to bring any action or make any claim in any venue arising under Individual with Disabilities Education Act, 20 U.S.C. §§ 1400 et. Seq. ("IDEA") and in no way compromises any claim which either party has or may have relating to Petitioners children's right to a Free and

Appropriate Public Education by way of example and not limitation, under IDEA and or Section 504 of the Rehabiliation Act, 29 U.S.C. § 794 and/or the Americans with Disabilities Act, 42 U.S.C. § 12131, and/or New Jersey Law Against Discrimination N.J.S. 10:5-1 et. seq. and/or any other federal or state substantive or procedural law.

8. This Agreement is contingent upon approval by the Ho-Ho-Kus Board of Education. Approval of the Agreement will be placed on the agenda of the Board of Education for the July 20, 2010 meeting.

Witness:

Angel Carchi, Petitioner, individually and on behalf of his minor children, J.C. and C.C.

Date: 7-12-2010

Witness:

Bonnie Lebowitz-Carchi, Petitioner, individually and on behalf of her minor children, J.C. and C.C.

Date: 7-12-2010

Attest:

HO-HO-KUS BOARD OF EDUCATION

Board Secretary

By: Ellen Maine Walsh

Date: 7/20/2010

368-10

BETSY CAREY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner's position as a tenured teacher of consumer science was eliminated in a reduction in force (RIF), effective in June 2007. She alleged that the appointment of a non-tenured individual as a teacher of culinary arts for the 2009-2010 school year violated her tenure and seniority rights, as petitioner claimed that she had taught essentially the same material in her cooking classes that is now included in the culinary arts curriculum. After her position ended in June 2007, petitioner collected unemployment compensation until obtaining employment in another district in February 2008. She went on to retire from teaching in March 2008. The Board maintained that: petitioner's voluntary retirement in 2008 ended any recall rights she may have had; and the new culinary arts program – which was implemented during the 2009-2010 school year – is substantially different from the family and consumer science program, as it is a vocational program geared to prepare students for careers in food services production and requires instructors to hold culinary arts teacher certification. Consequently, the Board contends that petitioner was not qualified to teach culinary arts and suffered no violation of her tenure rights.

The ALJ found that: petitioner's recall rights to any position with the Board expired with her retirement from teaching in March 2008, and the culinary arts teaching position did not become available for more than a year later; petitioner lacked the certifications and practical restaurant experience necessary to teach in the new culinary arts program; and petitioner presented no evidence to support her contention that the Board hired or retained a non-tenured teacher to teach business, computer or technology education courses in violation of her tenure, seniority and recall rights. The ALJ denied petitioner's appeal and dismissed the case.

Upon a thorough and independent 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.

September 8, 2010

OAL DKT. NO. EDU 11994-09
AGENCY DKT. NO. 222-9/09

BETSY CAREY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the record and Initial Decision in this matter, the Commissioner adopts the Initial Decision as the final decision – for the reasons set forth therein.[1] Accordingly, the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|08|10

Date of Mailing: 9|08|10

[1] Neither party filed exceptions to the Initial Decision.
[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 11994-09
AGENCY DKT. NO. 222-9/09

BETSY CAREY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

Kerry A. Wright, Esq., for respondent Board (Porzio, Bromberg and Newman, attorneys)

Record Closed: July 09, 2010 Decided: July 28, 2010

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

STATEMENT OF THE CASE

Betsy Carey, a laid-off former tenured teacher with the Township of Springfield Board of Education (Board), protests the appointment of a non-tenured individual rather than her recall to a teacher of culinary arts position for the 2009-2010 school year. She contends that the appointment was to a non-tenured individual who was hired before

the Department of Education approved a new program and that, in her cooking classes, she taught substantially all the material included in the culinary arts curriculum.

PROCEDURAL HISTORY

The Bureau of Controversies and Disputes of the Department of Education (DOE) referred the matter to the Office of Administrative Law (OAL), where it was filed on November 2, 2009, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I heard the matter on April 27, 2010. The parties requested a transcript and the opportunity to submit briefs. After several extensions requested by counsel for petitioner, I closed the record on July 9, 2010, upon the receipt of briefs.

STATEMENT OF FACTS

The facts are largely undisputed. I **FIND** the following **FACTS**:

Carey is duly certified by the DOE with an Instructional Certificate with endorsements to teach business education and consumer science. She began her employment with the Board in 1999 as a consumer science teacher and earned tenure in September 2002. During her tenure she taught sewing, introduction to foods, and advanced foods and baking.

During the 2006-2007 school year, due to a budget shortfall, the Board reorganized its programs for the following year. It reduced its family and consumer science program from three family and consumer science teachers to one. It dismissed a non-tenured teacher as well as Carey who, although tenured, had less seniority than the one retained teacher. Carey retained recall rights. During the 2007-2008 and 2008-2009 school years, the Board employed only the one remaining family and consumer science teacher, Carolyn Roberti. Roberti retired effective July 1, 2009. After Carey's employment ended on June 30, 2007, due to the reduction-in-force, she collected unemployment compensation until obtaining employment with the Livingston Board of Education in February 2008 as a family and consumer science teacher for seventh and

eighth-grade students. She retired and began collecting a pension around the end of March 2008.

Ellyn Atherton is the director of human resources and professional development for the Board. She testified without contradiction that, for several years, there had been ongoing discussions between the Board and its administration regarding the establishment of a culinary arts program. The retirement of Roberti as the last remaining family and consumer science teacher gave the Board the opportunity to move forward with its desire to abolish the family and consumer science program and establish a culinary arts program.

Atherton described the culinary arts program as vastly different from the family and consumer science program in that it was geared to prepare students for food services production. It would be a vocational program based under DOE career and technical education guidelines, which are uniquely different than those for family and consumer science. To meet these goals, the superintendent created a new curriculum through the "Careers through Culinary Arts Program" (C-CAP), a national culinary arts program aimed at preparing students for careers in the restaurant and hospitality industries.

The Board started to meet with the Executive County Superintendent for Union County to confirm that this program would be vocational in nature even though the high schoolwas not a vocational school. . Although the Board desired to replace the family and consumer science program and establish a culinary arts program, it was unsure whether it could attract a qualified teacher for the new curriculum. Therefore, around April 2009, it placed an advertisement in the Star Ledger newspaper for a "culinary arts/family & consumer science teacher." The Board did not recall Carey for the culinary arts teacher position. Instead, in the end of June 2009, the Board hired William Doring for the culinary arts teacher position commencing on September 1, 2009. He holds a certificate in culinary arts and a Servsafe certification required under the culinary arts program. The culinary arts teacher certification is a vocational license that requires a professional experience of having worked in a position such as a chef or in the hotel/restaurant industry. Additionally, in order to meet the demands of the new

curriculum, during the summer of 2009, the Board completely renovated the old family and consumer science room to create two new rooms that would support the culinary arts program. It installed "professional quality appliances," and a service area for students to learn how to prepare, serve, and clean up.

Oddly, the Board hired Doring and made the room alterations before it formally submitted its application to the DOE for the new program and before it had received DOE approval. The Board approved the curriculum for culinary arts and food service management through an August 17, 2009, resolution. The Board needed to convince the DOE that its proposed program would meet certain requirements. On September 3, 2009, the Board submitted to the DOE its approval application for the career and technical education program of "Cooking and Related Culinary Arts" to prepare students for an entry-level job in the occupation; to include academic, career, and technical content; to be aligned with business and/or labor; and to be able to lead to an industry-recognized credential or certificate at the secondary level. (R-10.) The Board received verbal approval for its program in early September 2009, after the school year had already begun. It obtained formal approval by September 29, 2010, after working with DOE Representative Roger McCloughan who required follow-up information as to academic and technical resources and verification that the teacher of this program would hold a Servsafe certificate. McCloughan also recommended that the Board partner with the American Culinary Federation. (R-15.) In anticipation of approval, students who had registered for family and consumer science courses for 2009-2010 were given the option to switch to the new culinary arts program.

Unlike Doring, Carey never worked in a restaurant; was not required to visit any restaurants as part of her course study in college; does not hold a culinary arts certification; does not hold a Servsafe certificate, and has never taken a Servsafe course.

In order to implement the new culinary arts program, the Board created a three-year curriculum guide for a "Career and Technical Education Program in Culinary Arts & Food Service Management." (R-1.) It consists of six courses of pre-restaurant 1 and 2, food fundamentals 1 and 2, and restaurant 1 and 2. The goals of these courses are: to

introduce students to the foodservice job market with its versatility and limitless career opportunities, R-1, p. 396, and to reinforce math skills by giving specific training in the areas of costing foods and figuring out profit margins and tax on menu items offered in commercial restaurants, R-1, p. 414. The units in these courses include career awareness; personal hygiene, safety and sanitation; terminology, nutrition, tools, knives and utensils; weights and measures; mise en place; ingredients; eggs; dairy; vegetables; fruits; potatoes; pasta, rice, and other starches; garnishes; salads and dressings; appetizers; industry math; use and care of equipment; dish and ware washing; soups and stocks; sauces and gravies; meat; poultry; seafood; quick breads; yeast products; cookies; pies and pastries; cakes and icing; pudding and desserts; costing and portion control; ordering, receiving and storing; computer usage; garde manger; sandwiches; hot station, dessert plating and preparation; regional cooking; international cooking; management training; catering; job readiness; kitchen and dining room maintenance, menu planning; front of the house service; table setting; and beverages.

The family and consumer science curriculum had consisted of courses in introduction to food and nutrition; advanced foods and nutrition; baking I; international cuisine; strategies for living; and family lifestyles. (R-3 to R-7.) Much of the course content for the food-related courses is similar to that in the culinary arts curriculum although geared to home economics rather than commercial culinary arts. The philosophy of the family and consumer science curriculum was described as: teaching practical life skills that students can take with them for survival so they will be able to take care of themselves and recognize the importance of family and consumer science in everyday life, R-3, p. 306; helping students to become well-rounded individuals and working contributors to a democratic society, R-4, p.298; and teaching students to develop consumer, family, and life skills necessary to be a functioning member of society. (R-5, p. 258.)

Again, many of the food preparation units in the family and consumer science curriculum and the culinary arts curriculum are similar. Indeed, Carey credibly testified that she taught advanced foods and nutrition and baking which included shopping, increasing or decreasing recipes, planning a menu, making dinner for an entire class,

serving the food, food safety, and how to maintain appliances and clean work areas. It is clear, however, from the comparison of the two curricula that the focus of the culinary arts curriculum is exposure to career opportunities as opposed to learning how to take care of oneself. For example, although required by the culinary arts curriculum, Carey did not teach the requirements of the Occupational Safety and Health Act, food service terminology, or use of a baker's scale. Although she taught the preparation of many of the same foods, instructional strategies were different and more basic. She did not explore the entrepreneurial aspect of a career in the food-services industry and the labor market or discuss the versatile hour requirements that accompany food-services careers. She conceded that she did not use in her courses the instructional strategies set forth in the culinary arts curriculum. She did not have her students inspect a food-service facility to determine if it met state and local health codes or discuss common kitchen pests. She did not use "restaurant preparations" in her class although they used measures. Carey's students did not participate in a banquet or catered event or practice having several entrees ready at the same time. Her students did not learn how to do restaurant pricing, calculate the tax on a guest check at a restaurant or how to operate commercial-kitchen equipment such as slicers, cash registers, band saws or dough dividers. She did not teach management training or how to apply for restaurant positions. She did not teach how to do trade math, or how to complete a purchase requisition form, read a daily food-production report or gauge the number of portions in commercial cans and packages. Carey summed up her testimony by acknowledging that her teaching focused on cooking and baking and cleaning for the home and family, for personal use, and not for commercial use.

LEGAL DISCUSSION

The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teachers achieve tenure protection. Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982). More specifically, N.J.S.A. 18A:28-5 provides:

> The services of all teaching staff members . . . which require them to hold appropriate certificates issued by the board of examiners, serving in any school district . . . , excepting those who are not the holders of proper certificates in full

> force and effect . . . shall be under tenure during good behavior and efficiency . . . after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

"In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute." 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). No 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. N.J.S.A. 18A:28-4.

A tenured teacher dismissed as part of a reduction in force must be placed on 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 such vacancy." N.J.S.A. 18A:28-12.

For several reasons, I **CONCLUDE** that Carey lacks recall rights to the culinary arts teacher position.

Carey's recall rights to any position with the Board expired with her retirement from teaching in March 2008. The culinary arts teaching position did not become available until more than a year later. In Murray v. Board of Education of the Northern Highlands Regional High School District, 96 N.J.A.R.2d (EDU) 351, a tenured German foreign-language teacher retired because of the pending abolishment of his position. He later challenged the Board's employment of a non-tenured teacher to act in the

place of an English teacher taking an approved maternity leave. He was certified as an English teacher. The Commissioner and the State Board of Education held that, since Murray had not rescinded his retirement, Murray was not entitled to be placed on a preferredeligibility list for reemployment when a vacancy occurred for which he was qualified. When his retirement duly took effect, his employment relationship with the district was severed. Carey was still retired at the time the culinary arts teacher position became available.

Carey claims, in essence, that the culinary arts program is only a thinly disguised effort to repackage the family and consumer science program. I disagree. The Court in Dennery v. Board of Education of the Passaic County Regional School District #1, 131 N.J. 626, 639 (1993) held:

> When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements.

However, a mere overlap of duties does not render the two positions equivalent for tenure purposes. "If a newly-created position is similar to a tenure holder's abolished position but also required additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position." Id. at 640. The creation of the culinary arts program by the Board consisted of much more than simply renaming the family and consumer science teacher position or tacking on additional meaningless requirements.

(A) The Board had to satisfy the rigorous requirements of the DOE. Although Carey argues that the Board "jumped the gun" by hiring Doring and making the physical renovations before obtaining DOE approval for its proposed culinary arts program, such early action does not negate the fact that the Board had to ultimately satisfy the DOE requirements in order to move forward with its program. The Board had to file a formal and specially designed application to create a "career and technical education program." Unlike the family and consumer science program, the Board had to verify

that the primary aim of the culinary arts program is to prepare students for an entry-level job in a specific occupation; to include career and technical content; to be aligned with business; and to possibly lead to an industry-recognized credential or certificate. DOE Representative McCloughan required the Board to form a partnership with Servsafe, a company that provides food-safety training, and to hire a Servsafe-certified instructor, which it did in Doring. The Board also complied with his request that it partner with the American Culinary Federation.

(B) As discussed above, the entire curriculum guide for culinary arts was adopted from a national program. Although the program in part taught students to cook the same types of food taught in the family and consumer science courses, the focus of the multi-year culinary arts program is on vocation rather than consumer life skills.

(C) The Board converted an ill-equipped home-economics facility into a professionally equipped facility; hardly indicative of an effort to merely repackage an old product under a different name. As sewing disappeared with the demise of the family and consumer science curriculum, the room formerly used for that purpose became a food service area.

(D) Unlike a teacher of family and consumer science, the culinary arts teacher is required to hold a valid New Jersey technical and career education teacher of culinary arts certificate, as well a sanitation and food safety and protection certificates. The vocational certificate requires a professional-experience phase.

(E) Despite similarity between the programs on how to prepare certain types of food, Carey acknowledged that the culinary arts program uniquely focused on the relationship between the labor market and the food industry, and the teaching strategies for culinary arts were so geared.

There is no merit that the actions of the Board in creating the culinary arts program was merely a subterfuge "rammed through after school began" in order to avoid Carey's recall rights as she suggests. Even though the formal application filing with the DOE occurred after the Board hired Doring, the April 2009 advertisement for a

culinary arts or a family and consumer science teacher, the extensive summer renovations, and the Board's adoption of a comprehensive and new curriculum in August 2009, in addition to the filing, collectively demonstrate an extraordinary effort to create a new program rather than a mere charade to prevent a particular teacher from exercising her recall rights. Simply, Carey lacked the certifications and the practical restaurant experience to teach the program contemplated by the Board in the spring of 2009. Also, there is no merit in Carey's argument that she should have been recalled to teach at least the introductory pre-restaurant culinary arts classes given in the first year of the new program. She presented insufficient evidence to conclude that she could teach all aspects of the introductory courses no less the advanced courses. The teaching vacancy was for an individual who was qualified to teach all six courses of the multi-year vocational program. Doring met those qualifications. Carey did not.

I **CONCLUDE** that the Board has not hired or retained a non-tenured teacher to teach business, computer or technology education courses in violation of Carey's tenure, seniority and recall rights. Although Carey made such an allegation in her petition, she presented no evidence in support of it and made no argument to support it in her brief.

ORDER

It is hereby **ORDERED** that Betsy Carey's petition appealing the determination of the Board of Education of the Township of Springfield, 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, 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, 2010
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 7/28/10

Date Mailed to Parties: JUL 29 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Betsy Carey

For Respondent:

Ellyn Atherton

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Advertisement, Star Ledger, April 26, 2009

For Respondent:

R-1 Springfield Culinary Arts Curriculum Guide

R-2 Board Minutes, August 17, 2009, Curriculum for Culinary Arts and Food Service Management

R-3 Course Guide, Introduction to Food and Nutrition

R-4 Course Guide, Advanced Foods and Nutrition

R-5 Course Guide, Baking I

R-6 Course Guide, International Cuisine

R-7 Course Guide, Strategies for Living

R-8 Course Guide, Family Lifestyles

R-9 Board Minutes, August 17, 2009, job description, vocational teacher of culinary arts

R-10 Application for Career and Technical Education Programs

R-11 Letter, Barry to Davino, September 23, 2009

R-12 Jonathon Dayton High School, Program of Studies, 2009-2010

R-13 Advertisement Confirmation, April 23, 2009

R-14 E-mail, McCloughan to Davino to Atherton, September 9, 2009

R-15 E-mail, McCloughan to Atherton to McCloughan

OAL DKT. NO. EDU 2899-09
AGENCY DKT. NO. 79-4/09

BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Acting Commissioner approves those settlement terms that apply to the above referenced petition No. 79-4/09, and adopts the Initial Decision only as it pertains to same. The above captioned petition is hereby dismissed, subject to compliance with the applicable terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|08|10

Date of Mailing: 9|08|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2899-09
AGENCY DKT. NO. 79-4/09

BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY,
Petitioner,
V.
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,
Respondent.

William S. Cappuccio, Esq., for petitioner

Howard E. Drucks, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: July 26, 2010 Decided: July 26, 2010

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 20, 2009, 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.

7-26-10
DATE

W. TODD MILLER, ALJ
JUL 27 2010

Date Received at Agency:

JUL 27 2010

Date Mailed to Parties:

/sd

William S. Donio, Esquire
Howard E. Drucks, Esquire
COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
File No.: 50696-268/647
Attorneys for Board of Education of the Town of Hammonton

RECEIVED
2010 JUL 26 A 11: 39
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Respondent, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1705-09T3 ON APPEAL FROM: NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION, LUCILLE E. DAVY AGENCY DOCKET NOS. 204-7/07, 235-8/07 COMMISSIONER DECISION NOS. 132-08 AND ON REMAND 356-09R OAL DOCKET NOS. 6798-07, 8091-07 (Consolidated) SAT BELOW: The Honorable Lillard E. Law, ALJ, T/A, J.S.C.
BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY, Respondent, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Appellant.	Civil Action

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 6254-08 AGENCY DOCKET NO. 109-4/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 4432-09 AGENCY DOCKET NO. 68-4/09

BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 2899-09 AGENCY DOCKET NO. 79-4/09

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE relates to and arises from the above captioned matters (the "litigation"). At all times herein, the Appellant/Respondent Hammonton Board of Education ("Hammonton") has been represented by Cooper Levenson April Niedelman Wagenheim & Levenson, P.A., William S. Donio, Esquire appearing; Respondent/Petitioner Waterford Township Board of Education ("Waterford") has been represented by Wade, Long, Wood & Kennedy, L.L.C., John D. Wade, Esquire appearing; and Respondent/Petitioner Borough of Folsom Board of Education ("Folsom") has been represented by William Cappuccio, Esquire, and it appearing Hammonton, Waterford and

Folsom (from time to time, referred to collectively as the "parties") have resolved all claims and issues arising from and limited to the litigation; and

WHEREAS, Hammonton, Waterford and Folsom, following good faith negotiations, counseled at all time by their respective attorneys, and without admitting fault or conceding liability of whatever kind arising from the claims and/or defenses advanced in the litigation, have amicably resolved their disputes as asserted by this Settlement Agreement and General Release (the "Agreement"); and

WHEREAS, Hammonton, Waterford and Folsom wish to memorialize the Agreement and move to withdraw and/or file appropriate pleadings to otherwise terminate, withdraw and/or discontinue the litigation; and

WHEREAS, Hammonton, Waterford and Folsom enter into this document voluntarily, in good faith, and represented by their respective counsel at all relevant times, hereto memorialize the Agreement and now express the full, complete and exclusive terms of the Agreement; and

WHEREAS, Hammonton, Waterford and Folsom acknowledge that the Agreement is intended only to resolve the claims and issues arising from and pertinent to the litigation as captioned above and stipulated below, and does not encompass or imply any agreement with respect to any issue not referenced below; and

WHEREAS, Hammonton, Waterford and Folsom agree to duly vote upon, ratify and adopt the Agreement at appropriately scheduled and noticed meetings, and to take whatever other actions are necessary to be in full compliance with Federal and New Jersey statutory and regulatory law; and

WHEREAS, in furtherance of the implementation of the Agreement, Hammonton, Waterford and Folsom agree that their duly authorized representatives shall execute the Agreement.

NOW THEREFORE, In consideration of the above and the promises set forth below, Hammonton, Waterford and Folsom hereby agree to the following:

1. To resolve the issues arising from the retroactive billing of Waterford and Folsom by Hammonton for the use of Hammonton's resource room by Waterford's students and Folsom's students in schools years 2004-2005; 2005-2006 and 2006-2007, Waterford hereby agrees to forward payment of Two Hundred and Fifty ($250,000.00) Thousand Dollars to Hammonton, and Folsom hereby agrees to forward payment of Twenty-Five Thousand Nine Hundred and Fifty-Six Dollars and Ninety Cents ($25,956.90) to Hammonton. It is understood that the payment by Waterford of the sum of Two Hundred and Fifty ($250,000.00) Thousand Dollars is to be issued from the resource room reserve that Waterford set aside in its budget during the course of the litigation. The dates upon which such payments shall be made by Waterford and Folsom shall be subject to respective agreements with Hammonton.

(a) In consideration of the payments by Waterford and Folsom as stated herein above, Hammonton agrees to waive any and all other past fees or charges alleged or understood to be due and owing from Waterford and Folsom for the use of Hammonton's resource room for the years 2004-2005; 2005-2006; 2006-2007, by Waterford's and Folsom's students as have been retroactively billed by Hammonton. Hammonton further agrees to withdraw or dismiss the Appeal encaptioned "*Board of Education of the Township of Waterford, Respondent v. Board of Education of the Town of Hammonton, Appellant and Board of Education of the Borough of Folsom v. Board of Education of the Town of Hammonton, Appellant under Docket No: A-1705-09T3.*"

(b) In further consideration of the payments by Waterford and Folsom as stated herein above, Hammonton hereby agrees to waive and withdraw any and all claims for charges that have been calculated by Hammonton as assessments to be imposed upon Waterford and

Folsom arising from the formation and/or rescission of the Interlocal Services Agreement between Hammonton and the Town of Hammonton.

(c) In exchange for Hammonton's agreement as set forth in (a) and (b) above, Waterford and Folsom agree to concurrently withdraw and dismiss any and all Petitions addressing, in whole or in part, the tuition assessments retroactively billed by Hammonton for the use of Hammonton's resource room by Waterford's and Folsom's students for the years 2004-2005; 2005-2006; and 2006-2007. These Petitions include the following:

(1) Waterford's Petitions encaptioned "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU-6798-07, Agency Reference No. 204-7/07*"; "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 6254-08, Agency Reference 109-4/08,*" and "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09, Agency Reference 68-4/09,*" in their entirety; and

(2) Folsom's Petitions encaptioned "*Board of Education of the Borough of Folsom v. Board of Education Town of Hammonton, Docket EDU 8091-07, Agency Reference 235-8/07*" and "*Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,*" in their entirety.

(d) Waterford and Folsom also agree to concurrently withdraw and dismiss any and all Petitions addressing, in whole or in part, the formation and/or the rescission of the Interlocal Agreement between Hammonton and the Town of Hammonton. These Petitions include the following:

(1) Waterford's Petition encaptioned *"Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09, Agency Reference 68-4/09,"* in its entirety; and

(2) Folsom's Petition encaptioned *"Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,"* in its entirety.

2. Hammonton, Waterford and Folsom agree that in exchange for the payment of the sum of $250,000.00 by Waterford and the sum of $25,956.90 by Folsom, all such retroactive billings for the use of Hammonton's resource room by Waterford's and Folsom's students for the school years 2004-2005; 2005-2006; and 2006-2007, as having been raised as issues in the litigation, will be waived and/or deemed discharged. Such waiver and/or discharge shall be operative only as to the resource room charges retroactively billed for the school years 2004-2005; 2005-2006; and 2006-2007. Hammonton, Waterford and Folsom agree that for all subsequent years, Hammonton shall have the right to charge Waterford and Folsom for the use of Hammonton's resource room by Waterford's and Folsom's students as permitted and authorized under Federal and New Jersey statutory and regulatory law governing the relationships between sending districts and receiving districts pursuant to appropriate tuition contracts; and

3. Hammonton, Waterford and Folsom agree that Hammonton shall nullify that portion of the Maintenance Reserve account that was included in the tuition calculations for school year 2009-2010. Hammonton, Waterford and Folsom further agree that all such tuition calculations henceforth shall not include any funds held in the Maintenance Reserve account, except as may be specifically authorized by law or agreed to by the parties. Hammonton, Waterford and Folsom further agree that Waterford shall withdraw and/or dismiss Count III of Waterford's Petition encaptioned *"Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09,*

Agency Reference 68-4/09," and Folsom shall withdraw and/or dismiss Count II of Folsom's Petition encaptioned "*Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,*" in its entirety; and

4. Hammonton, Waterford and Folsom acknowledge that they have had the opportunity to review the terms of this Agreement with their respective counsel and are fully satisfied with the representation provided and the terms of the Agreement. Hammonton, Waterford and Folsom enter into this Agreement and Release knowingly, without coercion or other improper influence. Hammonton, Waterford and Folsom shall be responsible only for their respective legal fees.

5. In exchange for the payment and other consideration referenced in paragraph 1 of this Agreement the parties agree as follows:

(a) Hammonton agrees to release, remise, acquit and forever discharge Waterford and Folsom, their members, employees, representatives, agents, predecessors, successors, and assigns, for liabilities retroactively charged by Hammonton for the use by Waterford's and Folsom's students of the Hammonton resource room for the years 2004-2005; 2005-2006; and 2006-2007. Waterford and Folsom hereby release, remise, acquit and forever discharge Hammonton its members, employees, representatives, agents, predecessors, successors, and assigns, from any claims of impropriety or wrongdoing with respect to Hammonton's retroactive billing of Waterford and Folsom for the use of the Hammonton resource room by Waterford's and Folsom's students for the years 2004-2005; 2005-2006; and 2006-2007; and

(b) Hammonton hereby agrees to release, remise, acquit and forever discharge Waterford and Folsom, their members, employees, representatives, agents, predecessors, successors, and assigns, for any liability associated with the formation and/or rescission of the Interlocal Contract with the Town of Hammonton. Waterford and Folsom hereby release,

remise, acquit and forever discharge Hammonton, its members, employees, representatives, agents, predecessors, successors, and assigns, of any impropriety or wrongdoing with respect to the formation and/or rescission of the Interlocal Agreement with the Town of Hammonton.

6. This Agreement is not meant to be construed as an admission of liability by Hammonton, Waterford and Folsom regarding any claim by any party to the litigation.

7. The Agreement sets forth and represents the entire agreement reached by Hammonton, Waterford and Folsom. No other agreements, promises, commitments have been reached by Hammonton, Waterford and Folsom to which Hammonton, Waterford and Folsom are bound other than those explicitly referenced herein.

8. Any modification of the terms and commitments set forth in this Agreement must be in writing and executed by authorized signatories respectively representing Hammonton, Waterford and Folsom, all acting in compliance with Federal and New Jersey statutory and regulatory law as a condition to such modification.

9. The Agreement shall be construed and interpreted in accordance with the law of the State of New Jersey. If any provision of this Agreement and Release or any portion of this Agreement and Release is declared null or void or unenforceable by any court having jurisdiction, such provision or such portion of a provision shall be considered separate and apart from the remainder of this Agreement and Release, which shall remain in full force and effect.

10. Hammonton, Waterford and Folsom agree that the Agreement has been negotiated and drafted by all parties and there shall be no construction of this Agreement that favors or disfavors any party based upon the drafting of this Agreement.

11. Hammonton, Waterford and Folsom agree to cooperate fully and to execute any and all supplementary documents and to take all actions which may be necessary or appropriate under Federal and New Jersey statutory and regulatory law to give full force and effect to the basic terms and intent of this Agreement.

12. Hammonton, Waterford and Folsom understand and agree to the terms of this Agreement. The signatories to this Agreement have full authority and have executed this release after consultation with counsel of their choosing, all pursuant to Federal and New Jersey statutory and regulatory law.

THE PARTIES HEREBY AGREE WITH THE TERMS OF THIS AGREEMENT:

FOR APPELLANT/RESPONDENT HAMMONTON
BOARD OF EDUCATION:

Joseph Girald, President Hammonton
Board of Education — DATED: 7/21/10

COOPER LEVENSON APRIL NIEDELMAN WAGENHEIM, P.A.

BY: _____ DATED: 7/22/10
William S. Donio, Esquire, Solicitor
Hammonton Board of Education

FOR RESPONDENT/PETITIONER TOWNSHIP
OF WATERFORD:

Francis J. DiRocco, President
Township of Waterford Board of Education — DATED: 7/14/10

Wade, Long, Wood & Kennedy, L.L.C.

BY: _____ DATED: 7/13/10
John D. Wade, Esquire , Solicitor
Township of Waterford Board of Education

FOR RESPONDENT/PETITIONER BOROUGH OF
FOLSOM:

BY: _____ DATED: 7/16/10
Margaret Veneziani, President Board of Education
Borough of Folsom

BY: _____ DATED: 7/16/10

William Cappuccio, Esquire, Solicitor
Borough of Folsom Board of Education

CLAC; 457984.1

JOHN DACRES, PETITIONER, V. NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioner – a school bus driver – appealed the Department's determination to suspend his school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 after an alleged incident in which a kindergarten student was left on his bus in December 2008 as the result of petitioner's failure to conduct the mandated visual inspection at the end of his route. Respondent filed a motion for summary decision, supported by certifications from several people with knowledge of the incident.

The ALJ found, *inter alia*, that: on December 5, 2008, a five-year-old student, K.B., was placed on a school bus driven by petitioner; petitioner parked the bus at the end of his route and failed to perform the mandated visual inspection of the vehicle's interior before exiting, as is required by *N.J.S.A.* 18A:39-28; K.B. remained on the bus after it was parked; the child – crying but otherwise unharmed – managed to exit the closed bus and sought help from a high school teacher who was in the parking lot; and petitioner presented no evidence of any sort in opposition to the facts offered in evidence through the certifications presented by respondent. Accordingly, the ALJ granted summary decision in favor of respondent, ordered a six-month suspension of the petitioner's school bus endorsement – which is the mandatory penalty for a first offense pursuant to *N.J.S.A.* 18A:39-28 – and dismissed the petition.

Upon full review and consideration of the record, the Acting Commissioner concurred with the ALJ that the Office of Criminal History Review is entitled to summary decision in this matter. Accordingly, the petition was dismissed and the respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 et seq., and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

This synopsis is not part of 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 8, 2010

OAL DKT. NO. EDU 02278-09
AGENCY DKT. NO. 16-1/09

JOHN DACRES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Office of Criminal History Review Unit is entitled to summary decision. Accordingly, the petition of appeal is dismissed. Respondent is directed to notify the Motor Vehicle Commission of its obligation pursuant to *N.J.S.A.* 18A:39-28 *et seq.* to suspend petitioner's school bus endorsement, and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|08|10
Date of Mailing: 9|08|10

* 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 02278-09S

AGENCY DKT. NO. 16-1/09

JOHN DACRES,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW UNIT,

Respondent.

Edward A. Cridge, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: July 2, 2010 Decided: July 26, 2010

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

The New Jersey Department of Education, Office of Criminal History Review Unit, intends to suspend John Dacres' bus driver's license "S" endorsement due to an incident in which it is alleged that Dacres, while serving as a school bus driver for the South Plainfield Board of Education, left a child on the school bus which he drove. The child was discovered walking alone in the parking area of the South Plainfield High

School on December 5, 2008. He had been a passenger on the bus, which transported him from the morning enrichment program at Roosevelt School to the afternoon kindergarten at the Riley School. It is claimed that the child feel asleep on the bus and that Dacres and the aide assigned to the bus failed to notice him and exited the bus. The child was then left on the bus, from which he managed to exit while it was parked in the lot between the High and Middle Schools. The child was unharmed. Dacres was indicted for fourth degree child abuse, abandonment and neglect in violation of N.J.S.A. 9:6-1 and 6-3 and was granted Pre-Trial Intervention, thereby postponing final disposition of the criminal charges for a period of eighteen months.

On January 7, 2009, the respondent advised Dacres by letter that it intended to suspend his "S" endorsement to operate a school bus, pursuant to N.J.S.A. 18A:39-28, which provides for such a suspension in a first instance of a driver's failure to conduct the required visual inspection of the bus at the end of a transportation route to assure that no pupil is left on the bus.[1] Dacres requested a hearing to challenge the suspension and, once the matter was transferred to the Office of Administrative Law, moved for a stay of the proceedings pending the disposition of the criminal matters, which resolution would not be final until he either successfully completed the PTI program or failed to do so and such other disposition as might then occur was finalized. I denied that application by Interlocutory Order dated October 15, 2009.

The respondent has now moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. In support of the motion, it has presented a series of certifications. One is from the child's mother, who states that the child was left on the bus and managed to open the doors and was discovered by high school personnel. Another is from the Roosevelt School aide, Bori, who escorted the child to the bus that picks up students for transport to the Riley School and who states that the bus was driven by Dacres. A third is from the principal of Riley Elementary School, Czech, who advises that the child was marked

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N.J.S.A. 18A:39-28,
"A school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus. . . . ."
N.J.S.A. 18A:39-29. Violation, suspension, revocation of school bus endorsement
"In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be:
a. suspended for six months, for a first offense; or
b. permanently revoked, for a second offense."

present at Roosevelt that morning, was marked absent from the afternoon kindergarten at Riley, and that he was informed at 1:15 pm that the child was in the school nurses' office after being picked up by teachers during a South Plainfield High School evacuation that resulted from a suspected gas leak. He also states that the child told him that he had fallen asleep on the bus, awoke to find no one else on the bus and then managed to open the bus door and exit the vehicle.

Additionally, Egan, a teacher at South Plainfield High School, states that she was assisting in the evacuation when the boy walked up to her, in tears, and asked for help. He told her that he was coming from a bus. She turned the child over to the High School's vice-principal.

Marlene Steele, the supervisor of Transportation for the South Plainfield School District, states that on December 5, 2008, there was one bus assigned to transport children from Roosevelt's kindergarten enrichment program to the afternoon kindergarten program at Riley. At the end of the morning bus route the bus driver parks the bus in the South Plainfield bus lot between the high and middle schools. She further certifies that on December 5, 2008, John Dacres was assigned as a substitute bus driver for that bus and Angelina Manno was the assigned aide on the bus. When the incident was reported to Steele she went to her office to speak to Dacres and Manno in person, but they refused to make any written statement. They were accompanied to this meeting by their respective union representatives. They were each told not to report to work until further notice. The respondent did not present any certification from the child, K.B., who, according to a Middlesex County Prosecutor's Detective Bureau report supplied as an exhibit with the motion for summary decision, was five years old at the time of the incident.

In arguing on behalf of its motion, the respondent contends that the sole factual issues material to the matter are that K.B. was left on the school bus on December 5, 2008, and that Dacres was the driver of the bus that day. It argues that the materials offered in support of the motion amply establish these facts and that Dacres has failed to demonstrate the existence of any genuine dispute of material fact that might defeat summary decision and require a full evidentiary hearing. In fact, Dacres' response to

the motion asserts that, in the face of continuing potential for criminal jeopardy due to the ongoing PTI period, he has validly invoked his Fifth Amendment privilege and that as he has not admitted any facts about the case, there is no competent evidence upon which an adjudication can be based and the motion must therefore be denied. Moreover, he asserts that "fundamental fairness" requires that he have the opportunity to cross-examine the witnesses against him and testify in his defense, should he elect to do so. He contends that if his silence at this time is utilized against him in connection with the determination of the motion for summary decision, such would be an unlawful "penalty" that cannot be imposed on one who validly relies on the Fifth Amendment privilege. Any adverse inference that may be drawn from his silence would also constitute an unlawful penalty arising from the rightful use of the privilege.

SUMMARY DECISION

Summary decision, or as it is known in judicial matters as summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial as well as executive-branch administrative cases. N.J.A.C. 1:1-12.5. The standards for determining motions for summary judgment were defined by Justice William Brennan, then a New Jersey Supreme Court Justice, in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact.

The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," Judson, supra., at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.' " Id. at 536, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

While Dacres claims that summary decision should not be granted because he has not had an opportunity to cross-examine the witnesses against him or present his own testimony, the very essence of the summary decision procedure is that in the appropriate case, the issues necessary to decide the case, that is, the material facts to which the applicable law must be applied to decide the matter, are not themselves the subject of any genuine dispute and therefore, there is no need for a testimonial proceeding. If, instead, the examination of the affidavits, certifications, and documentary evidence offered for and against the motion shows that there is a genuine dispute about any of these material facts, the motion must fail. As such, the appropriate question to be considered is, what are those material facts and are they in genuine

dispute? To determine the first question, it is necessary to look at the words of the statute upon which the respondent bases its attempt to suspend Dacres' endorsement.

The statutes that underlie the proposed suspension are very simple in form and there are few facts that must exist to form the basis for action thereunder. N.J.S.A. 18A:39-28 only requires that a driver perform a visual inspection at the end of a route. The reason for this is stated as the need to assure that no pupil is left on the bus. Thus, evidentially it is necessary to establish that Dacres was the driver of the bus in question, and the certifications of Bori and Steele support this fact. If a child is left on the bus at the end of the route, the driver is to be suspended. Evidentially, that a child is left on a bus at the end of a route is itself at the very least prima facie evidence of a failure on the part of the driver to properly inspect the bus at the end of the route. The evidence offered by the DOE demonstrates that K.B. was placed on the bus, (Bori), was transported on the bus, was found, in tears, in the parking lot after the bus had been parked, (Egan), and reported being left on the bus, (C.B. and Egan). There is clearly a prima facie showing that he was not properly removed from the bus when it arrived at his intended destination, at which he was initially marked absent (Czech). Taken together, this evidence leads to a seemingly inevitable conclusion that is, that K.B. was left on the bus after it was parked, obviously without having been discovered there by the driver whose duty it was to inspect the bus and assure that no child was left behind.

It is the responsibility of a party opposing a motion for summary decision to present certifications or other evidence to establish the existence of genuine disputes of material fact. Mr. Dacres has chosen to offer nothing in response to the DOE's evidence. In a civil matter, a party who has a genuine concern that his answers to interrogatories or other discovery demands may incriminate him has the right to plead the Fifth Amendment and refuse to answer, but unlike in the criminal context, the person invoking the right is not altogether shielded from consequences as a result of that action. It is lawful for a finder of fact to draw a negative inference from the invocation of the privilege, Baxter v. Palmigiano, 425 U.S. 308, 319-20 (1976); State, Department of Law and Public Safety, Division of Gaming Enforcement v. Merlino, 216 N.J. Super. 579 (1987), aff'd, 109 N.J. 134 (1988), and, perhaps more importantly in the context of a

motion for summary decision, even without resorting to such inference the failure of the opposing party to offer any evidence whatsoever to support a dispute of material fact in opposition to the motion can itself support the grant of the motion. A party who may properly invoke the privilege is not necessarily precluded from producing other evidence to oppose a motion for summary decision that in itself is not incriminating or likely to lead to incriminating evidence. And contrary to Dacres' statement that in the face of a denial of "all of Respondent's allegations, rather than invoking his Fifth Amendment Privilege, Respondent's Motion . . . would not be entertained and a plenary hearing would be held," it is only where a properly plead motion is opposed by evidence of genuine dispute of the material issues that the motion is doomed. A mere denial is insufficient to defeat a properly supported motion.

Mr. Dacres has not offered anything to suggest that there is any genuine issue as to the material facts of this case. His pleas for "fundamental fairness" to allow him to test the trustworthiness of evidence and to explain and rebut it at a plenary hearing, suggest that he either misunderstands or ignores the very purpose of a motion for summary decision.

Based upon the evidence offered by the respondent, giving all reasonable inferences to the opposing party, Dacres, I **FIND** that on December 5, 2008, K.B., a five-year-old student, was marked present in his morning class at the Roosevelt School. John Dacres then drove a school bus between the Roosevelt and the Riley Schools on which K.B. had been placed. I **FIND** that Dacres parked the bus between the High and Middle Schools and failed to properly inspect the bus, as required by N.J.S.A. 18A:39-28. As a result, he failed to discover that K.B. remained on the bus after it was parked and otherwise emptied. K.B., who was initially marked absent from his afternoon kindergarten class at Riley School, managed to exit the bus after Dacres and the aide had departed from the bus. He approached Ms. Egan, a high school teacher who was on the parking lot due to an evacuation of the high school then in progress. The child was in tears, but was otherwise not harmed. I **FIND** that Mr. Dacres has presented no evidence of any sort in opposition to the facts offered in evidence on the motion by the respondent through certifications of the persons who placed the child on the bus, observed that Dacres was the driver, was approached by

the child in the parking lot, determined the K.B. was present in school at Roosevelt, but initially marked as absent at Riley, and who arranged for the child to be reunited with his mother. Given the limited facts that must be established to support a violation of the duty imposed by the Legislature on a school bus driver to properly inspect the bus at the end of a route to assure that no child is left on the bus, the unopposed certifications offered by the DOE amply support summary decision in its favor. And given the mandatory nature of the penalty for a first time violator of the mandate, the six-month suspension is the only outcome where the violation is proven. N.J.S.A. 18A:39-29a. The motion for summary decision is hereby **GRANTED** and it is hereby **ORDERED** that the petitioner's "S" endorsement shall be suspended for six months.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 26, 2010
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: July 26, 2010

Date Mailed to Parties: July 26, 2010

mjm

WITNESS LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

R-1 to 2	Certification of C.B., Mother of K.B., dated June 11, 2010
R-3	Certification of Gail Bori, Special Aide of Roosevelt School, dated May 28, 2010
R-4 to 11	Certification of Carl H. Carabelli, CHRU Manager, dated May 18, 2010
R-12 to 22	Certification of Allen R. Dzech, Principal of Riley School, dated May 28, 2010
R-23 to 25	Certification of Donna Egan, High School Teacher, dated May 28, 2010
R-26 to 137	Certification of Counsel, Bryant Lawrence Horsley, Jr., dated January 23, 2009
R-138 to 142	Certification of Marlene Steele, Supervisor of Transportation, dated May 28, 2010

OAL DKT. NO. EDU 1865-09
AGENCY DKT. NO. 18-1/09

WILLIAM BIRD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

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

Article II of the Agreement appears to contemplate certain actions that may have preceded consideration of the settlement by the Commissioner. The parties are reminded that a proposed settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Acting Commissioner adopts the Initial Decision as the final decision in this case providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|08|10

Date of Mailing: 9|08|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01865-2009
AGENCY DKT. NO. 18-1/09

WILLIAM BIRD,
Petitioner,
v.
MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY
Respondent.

Edward Cridge, Esq. for petitioner (Wills, O'Neill & Mellk, attorneys)

Derly M. Guttierrez, Esq. for respondent (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Record Closed: July 23, 2010 Decided: July 26, 2010

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 23, 2009 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 on the attached settlement agreement. The Middlesex Regional Educational Services Commission has approved the settlement, as evidenced by the attached certified Board resolution dated June 4, 2010, and has authorized its Superintendent of Schools to execute the agreement on its behalf.

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

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

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

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

July 26, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 7-28-10

Mailed to Parties: Joanna Barnes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 28 2010
DATE

OFFICE OF ADMINISTRATIVE LAW

/rr

APPROVAL FROM THE REPRESENTATIVE ASSEMBLY OF THE MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY, NEW JERSEY

RESOLUTION:

That the Representative Assembly approve the settlement of the William Bird case in the amount of $65,000.00 with New Jersey School Boards Association Insurance Group paying $50,000.00 and the Commission paying $15,000.00.

I, Patrick M. Moran, Business Administrator/Board Secretary of the Middlesex Regional Educational Services Commission, in the County of Middlesex, State of New Jersey, hereby certify that the foregoing approval from the Representative Assembly of said Commission duly called and held on June 4, 2010, is a true, complete copy thereof.

Dated: June 4, 2010

Seal

Signature: _____

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
The Legal Center
1037 Raymond Boulevard, Suite 710
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent
Middlesex Regional Educational Services Commission

WILLIAM BIRD, Petitioner, v. MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION, Respondent.	BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION OAL Docket No.: EDUOR 01865-2009N **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Settlement Agreement") is made this 9 day of July, 2010, by and between William Bird ("Bird"), and the Middlesex Regional Educational Services Commission ("Commission").

RECITALS

WHEREAS, Mr. Bird was an employee of the Commission, serving as a Substance Awareness Coordinator; and

WHEREAS, the Commission separated Mr. Bird from his employment effective February 20, 2009 and, as a result, this litigation ensued; and

WHEREAS, Mr. Bird filed a Petition of Appeal before the Commissioner of Education titled, William Bird v. Middlesex Regional Educational Services Commission, Agency Ref. No. 18-1/09, OAL Docket No. EDU 1865-09 ("the Litigation"); and

WHEREAS, the Commission and Mr. Bird 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, Mr. Bird and the Commission agree as follows:

ARTICLE I
Settlement and Release

1. Settlement - Mr. Bird and the Commission hereby agree that for the consideration more specifically set forth below, the Litigation will be withdrawn, with prejudice.

2. Release - In return for the Commission's obligations pursuant to this Settlement Agreement, Mr. Bird hereby releases and discharges any and all of the Commission'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, Mr. Bird shall withdraw the Litigation, with prejudice.

2.2 Consideration - As consideration for Mr. Bird's Settlement and Release as set forth herein, the Commission agrees to the following:

a. Within 30 days of the withdrawal of The Litigation, Mr. Bird will be paid a sum total of Sixty-Five Thousand Dollars and No Cents ($65,000.00), representing the value of the loss of future employment with the Commission.

Mr. Bird agrees to withdraw, with prejudice, any and all challenges his separation from his employment. Mr. Bird expressly acknowledges and represents that he will neither seek nor be entitled to any further consideration from the Commission in connection with this Settlement Agreement other than the consideration as detailed in this subsection.

Furthermore, Mr. Bird, for the sole consideration of said Sixty-Five Thousand Dollars ($65,000.00 from the Commission and from New Jersey School Boards Association Insurance Group (hereafter the Releasees) and does forever release, acquit and forever discharge the aforementioned Releasees and his, her, their, or its agents, servants, successors, heirs, executors, administrators, and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the accident, casualty or event which occurred in or about December 2008 as a result of Mr. Bird's separation from his employment.

b. The Commission will provide Mr. Bird, through the Superintendent of Schools, with a letter of reference for Mr. Bird's use in seeking employment. Any prospective employer who makes inquiry to the Commission about Mr. Bird will be provided only with Mr. Bird's dates of employment, position / title, and salary history. Mr. Bird's personnel file, and the contents thereof, will not be disclosed or made available to any person,

unless required by law, without prior written permission of Mr. Bird.

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 Commission hereby represents and warrants that the undersigned officer of the Commission is fully authorized to execute this Settlement Agreement on the Commission'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.

3.9 Releases - It is further understood that as a condition of this settlement, all claims and/or liens, past, current and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Mr. Bird, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Mr. Bird therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and attorneys

fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Mr. Bird agrees to pay all costs, interest and attorneys fees relative to any such lien.

This Release expressly reserves all rights of the person or persons on whose behalf the payment is made and the rights of all persons in privity or connected with them and reserves to them their right to pursue their legal remedies, if any, including but not limited to, claims for contribution, property damage and personal injury against the undersigned or those in privity or connected with the undersigned.

3.10 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.

WILLIAM BIRD Dated: May 9 2010

MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION

BY: MARK FINKELSTEIN,
SUPERINTENDENT OF SCHOOLS Dated: 7/15/10

Patricia Rolon
Notary Public of New Jersey
ID No. 2349571
Commission expires September 13, 2011

OAL DKT. NO. EDU 8132-10
AGENCY DKT. NO. 285-8/10

SURETY MECHANICAL SERVICES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT, AIR CONTROL TECHNOLOGIES, INC., EAGLE MECHANICAL, INC. AND FALASCA MECHANICAL, INC.,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

Upon review of the record, including the sound recording of the proceedings at the Office of Administrative Law (OAL) and the recommended order of the Administrative Law Judge (ALJ) denying injunctive relief,[1] the Commissioner adopts the OAL order as the final order on motion – for the reasons set forth therein. Accordingly, petitioner's motion is denied.

This matter shall be returned to the OAL for such proceedings as are necessary to adjudicate the issues set forth in the pleadings.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|08|10
Date of Mailing: 9|08|10

[1] The exceptions and replies thereto submitted by the parties were not considered, as the regulations concerning emergent relief applications make no provision for same.

[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

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 08132-10
AGENCY DKT. NO. 285-8/10

SURETY MECHANICAL SERVICES,

Petitioner,

v.

BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT, AIR CONTROL TECHNOLOGIES, INC., EAGLE MECHANICAL, INC., AND FALASCA MECHANICAL, INC.

Respondents.

Colin G. Bell, Esq, for petitioner (Hankin, Sandman and Palladino, attorneys)

David C. Patterson, Esq., for respondent, Board of Education of the Camden County Vocational School District (Maressa Patterson, attorneys)

No one appearing for respondents Air Control Technologies, Inc., Eagle Mechanical, Inc., and/or Falasca Mechanical, Inc.

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner Surety Mechanical Services (hereinafter "petitioner" or "Surety") seeks emergent relief to invalidate the July 15, 2010, resolution of respondent, the Board of Education of the Camden County Vocational School District (hereinafter "Camden" or the "district") which had rejected all bids for certain mechanical work as part of a capital improvement project at its Gloucester Township campus, which mechanical work is commonly known as HVAC. This rejection included the three above-captioned respondent contractors along with petitioner. Petitioner further asserts and demands by way of emergent relief that the three respondent contractors' bids should be declared as unresponsive, that Camden should be compelled to award the project contract to petitioner and, that petitioner should be awarded attorney's fees and costs of suit. Camden contends that the bid by petitioner was substantially cost excessive and well beyond the authorized cost estimate for the project, thereby making its rejection appropriate under the circumstances. The other three bids were rejected as being non-compliant relative to the status of certain subcontractors. As a result, Camden rejected all of the four bids submitted for the project, along with two additional ones whose interests are not in issue in this matter. Camden asserts that it should then have the right to consider the bids received as a result of the issuance of a second bid invitation by it on July 27, 2010 for the mechanical work for the project and that it be permitted to award the HVAC bid to a qualified contractor who meets the bid specifications and is within the $200,500.00 cost estimate for that part of the project. The matter was transmitted to the Office of Administrative Law (OAL) for emergent hearing as a contested case on August 5, 2010, and received at the OAL on August 6, 2010, on petitioner's application for emergency relief. It was assigned to and received by this administrative law judge on August 9, 2010. The matter was scheduled for oral argument on August 11, 2010. After having considered the status of the three responding contractors and after concluding that no one intended to appear on their behalf, the matter proceeded to hearing, with the understanding that should any of those respondent parties arrive late they would be given the opportunity to be heard under the circumstances, with an appropriate opportunity to respond by the other

parties in attendance. No one did appear on their behalf, however. As a result, on that date, oral argument was held and concluded. At the conclusion of that hearing, the record closed with respect to the application for emergent relief.

FACTUAL DISCUSSION

For purposes of deciding the application for emergent relief, the following facts are determined to be undisputed, this having occurred after this tribunal received oral arguments with reference to the requested relief as well as the extensive submissions of petitioner which were a part of the transmittal packet (and which I have sua sponte accepted into evidence as petitioner's exhibits P-A through P-N) as well as the extensive response received on behalf of Camden, which had been hand delivered to the OAL on August 10, 2010, although it was not personally retrieved from the OAL mail room and received by this administrative law judge until the commencement of the hearing on August 11, 2010 (which I have similarly sua sponte accepted into evidence as respondent's exhibits R-A through R-F). All of those submissions were considered as part of the decision on the Order here in.

This matter involves a challenge to the District's bidding procedure, which, in essence, and as stated hereinabove, rejected the bids of the three top mechanical contractors due to their respective and individual failures to be compliant with the bidding specifications and which further rejected the bid of petitioner, the fourth in line bidder, when it determined that petitioner's bid was significantly over the predetermined cost estimates, which had been set at $200,500.00 for the mechanical work. Petitioner's bid was $243,000.00, which meant that it exceeded the cost estimate for mechanical work by $42,500.00.

As noted in the chronology of events in the affidavit of James Clark, business administrator (P-I), (and as corroborated in the affidavit of Dirk Muits III, architect for the project) (P-M), Camden has sought to undertake a capital improvement project at its Gloucester Township campus for its "newly developed and well received performing arts program" (see paragraph two of the Clark affidavit) which includes, among other aspects of the project, construction work, electrical work, and certain mechanical work,

the last of which is under the heading of HVAC. The mechanical work portion requires public bidding, which resulted from an estimated cost of mechanical work identified in the HVAC category, as indicated hereinabove, in the amount of $200,500.00. Based upon the uncontroverted facts in the Clark affidavit, the projected budget was properly listed, identified and targeted as early as June, 2010 when bids were placed on the project estimated cost sheet (form DOE-130) as well as by July 1, 2010, when the superintendent of schools completed his part of the cost estimate project.

Six bids were received on July 8, 2010, opened and read. The only bidder within the approved cost estimate was Air Control Technologies at $183,500.00. The others all exceeded the estimates figured either slightly or, in the case of petitioner, substantially. Upon compliance review, it was then determined that Air Control Technologies did not meet all of the bid requirements relative to the identification and qualification of subcontractors. The second lowest bid was by Eagle Mechanical and came in at $208,000.00. It also failed to meet the requirement regarding identification and qualifications of subcontractors. The third bid, which was by Falasca Mechanical, came in at $215,560.00, which also failed to meet the requirements regarding subcontractors for the project. As noted, the fourth bidder in line was Surety which came in at $243,000.00. All the parties were advised in writing by notice from Clark of the rejection of their respective bids on July 12, 2010, pursuant to N.J.S.A. 18A: 18 A-22. In a follow up e-mail exchange between Thomas Paul, president of Surety, and Clark, on July 14, 2010, Clark reiterated the basis for the rejection as being pursuant to N.J.S.A. 18A: 18A-22 and then further supplied and identified the subsections a and b on the same statutory section, which allows a school district to reject bids based upon either (1) the lowest bid substantially exceeds the cost estimate for the goods or services or (2) the board wants to substantially revise the specifications for the goods and services. This email exchange between those parties occurred one day before the district formally passed a resolution in which it indicated: "that the bids for the new Mechanical Systems, Gloucester Township Campus, Building number 2, Room 1, accepted on July 8, 2010, be rejected and that the specifications pertaining thereto be revised and rebid." (P-I) (Emphasis added).

Petitioner argues that the district resolution is automatically and patently defective, and the actions relative to same by the district are arbitrary and capricious inasmuch as it fails to give an explanation regarding the rejection of any of the bids. Further, even though the notice indicated that revisions were to be made to the specifications and then rebid, it resulted in only minor, incidental changes, at best, as a result of which it created the perception, at a minimum, of some type of tampering in order to control the bid process, which would also make such action arbitrary and capricious. The district concedes that the resolution was not artfully drawn and counsel for the district admitted that had he been on vacation at the time it is more likely than not that he could have clarified any misunderstanding or misconception or could have been more artful when it was otherwise issued. In any event, he nonetheless noted that the language quoted and emphasized hereinabove regarding the rejection of the bids stands by itself and that, as only as it pertained to the original top three bidders, the specifications were to be revised. In essence, he contends that everyone knew that their bids were rejected and that the e-mail exchange between Clark and Paul further clarified any questions about the reason for the rejection of his bid prior to the formal action by the district board. He also conceded that the issue over whether or not the changes which were effectuated were substantial or not is one that could be the subject of later fact finding, should it become necessary to do so. However, he nonetheless asserted that one does not have to get to that level since the district had the affirmative right, duty and obligation to reject all of the bids on the basis of their respective deficiencies as noted hereinabove. And, as it specifically pertains to Surety, the district maintains that it could not responsibly award a bid to Surety in light of the significantly higher bid which it had tendered, which greatly exceeded that of the others. Thus, although, as counsel suggested, a potential adjustment to the bid level could have been considered a possibility five years ago, the current budgetary crisis in New Jersey, the scrutiny and demands being placed upon school districts, and the obligations on the part of the New Jersey Department of Education to demand fiscal responsibility from those districts dictates a rejection of any bids which are at significant variance from the authorized level mandated for any project. Thus, although the district has absolutely no problem with the integrity of the work which could have been generated by Surety, its

inappropriate bid made it fall outside the realm of being a responsible bidder under the circumstances.

Surety also contends that the determinations, rejections and notice by Clark on July 12, 2010, which occurred before the July 15, 2010, meeting by the district, demonstrate that the actions by the district were arbitrary and capricious. While conceding that the procedure which the business administrator used in advance of the formal board meeting appears somewhat odd or, as he described it, "unusual", counsel for the district nonetheless maintains that it was merely the result of bad timing (since he was on vacation at the time and unable to marshal it through properly) and does not reflect any negative effort to manipulate the bid process against Surety. Rather, the district was acutely concerned about completing this necessary part of the larger construction project prior to the start of school in September in order to avoid any adverse impact upon the students there at that time. As a result, it attempted to advance the procedural bidding agenda by having the construction completed before the arrival of the students and also in light of the requirement that the State Department of Education be given the opportunity to approve it in a timely fashion as part of that process. I **FIND** complete merit with that explanation by the district and applaud the candor with which it was expressed by its attorney. I strongly suspect that as a result of the confusions or potential misconceptions which may have attended the manner in which the bidding process in this matter occurred, he will become engaged more directly by the district in the future earlier on in the process. Thus I **FIND** the explanation of the district to be plausible under the circumstances.

Finally, Surety argues that the submission of the budgetary analysis by the district to the Department of Education only after the issuance of the bid rejection resolution demonstrates that it acted in bad faith and attempted to bootstrap a late hour argument onto its prior rejection of the Surety bid. The district responds by denying any nefarious effort to thwart responsible bidding. Its submission of the supportive documentation to the New Jersey Department of Education could only have been made and done after an official resolution by the district board was made on July 15, 2010. As to this last argument and after having considered the positions of both sides in that

regard, I **FIND** that Surety's argument is specious at best. The district followed a routine, realistic, plausible procedure which is devoid of any tampering with the bid process. Its actions in that regard do not appear to reflect any ulterior motive to deny Surety appropriate entitlement since the State Department of Education also must approve the project in any event and, as result, the district was only following standard procedure in order to provide that information to the State accordingly.

LEGAL DISCUSSION AND ANALYSIS

Petitioner claims that the respondent district's actions in this matter are arbitrary, unreasonable and capricious, and that it violate its due process rights because the district has denied them an entitlement as being the lowest responsible bidder under the circumstances.

The district maintains that it properly rejected all four of the bids and that, in the particular case of Surety, it could not have permitted the significantly higher bid of Surety to have been accepted or acceptable in light of its obligation to maintain fiscal responsibility as well as pursuant to N.J.S.A. 18A: 18A-22. Thus it contends that Surety was not a responsible bidder in light of its significantly high bid.

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible. The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See N.J.A.C. 1:1-12.6; Stroh Assoc., Inc. v. Bd. of Educ. of the Twp. of Hillsborough, Somerset County, 95 N.J.A.R.2d (EDU) 235.

The foregoing regulation embodies the principles of law announced by the Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

Petitioner must meet all four criteria to prevail on this application. See Crowe v. DeGioia, 90 N.J. 126 (1982); DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester

County Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester County Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995) adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm). The moving party bears the burden of proving each of the elements for emergent relief "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

In order for Surety to demonstrate a likelihood of success on the merits, it must first show that the district's procedural acts relative to its rejection of the Surety bid mandate that its actions be overturned and, moreover, that Surety should be entitled to the contract award as the "lowest responsible bidder." In accordance with well established law, this tribunal may not overturn the District's action unless it finds that the decision was an abuse of discretion. Serenity Contracting Group, Inc. v. Borough of Ft. Lee, 306 N.J. Super. 151, 154 (App. Div. 1997), certif. denied, 153 N.J. 214 (1998) (determination by a governing body not to award a contract to a bidder will be reviewed on an abuse of discretion standard); Tec Elec., Inc. v. Franklin Lakes Bd. of Educ., 284 N.J. Super. 480, 488 (Law Div. 1995) (standard of review to determine whether the denial of the waiver by the Board of Education was the ordinary abuse of discretion standard); Palamar Constr., Inc. v. Twp. of Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983) ("A reviewing court cannot overturn the decision of a municipal body unless it finds that the decision is arbitrary, capricious, and unreasonable. Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.").

It is noted that the purpose of competitive bidding for local public contracts is not protection of individual interests of bidders, but rather advancement of the public interest in securing the most economical result by inviting competition in which all

bidders are placed on equal footing. See Twp. of River Vale v. R.J. Longo Construction Co., 127 N.J. Super. 207 (Law Div. 1974). Courts have consistently held that the purpose of the competitive bidding process is to secure the most economical result in the expenditure of public moneys by promoting uninhibited competition and guarding against "favoritism, improvidence, extravagance and corruption." Twp. of Hillside v. Sternin, 25 N.J. 317 (1957); see L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349 (1977). Accordingly, statutes authorizing competitive bidding demand that publicly advertised contracts be awarded to the "lowest responsible bidder."

Although case law suggests that strict compliance with public-bidding guidelines is required, see, e.g., Pucillo, supra, 73 N.J. at 349 ("[w]e are not, however, willing to transform the mandatory requirement in these specifications into a polite request."), competitive bidding provisions should not be construed in such a way as to thwart the primary purpose of achieving economy. Tec Elec., Inc. v. Franklin Lakes Bd. of Educ., 284 N.J. Super. 480, 484 (Law Div. 1995). As such, material conditions contained in bidding specifications may not be waived, while immaterial deficiencies may be waived. See Meadowbrook Carting Co. v. Island Heights Borough, 138 N.J. 307, 314 (1994) (holding that the inclusion of a consent of a surety is a material condition precedent to a responsive bid). These goals are also intended to be achieved through the Public School Contracts Law (PSCL). Tec Elec., 284 N.J. Super. at 483 (citing F.S.D. Industries, Inc. v. Bd. of Educ. of the City of Paterson, 166 N.J. Super. 330, 334 (App. Div. 1979)).

Under the PSCL, contracts for the performance of work to be paid out of school funds generally are required to be made only after public advertisement for bids and after the bidding have taken place. N.J.S.A. 18A:18A-4. The contract must be awarded to the lowest responsible bidder. N.J.S.A. 18A:18A-37. The "lowest responsible bidder" is the one whose response to a request for bids offers the lowest price and is responsive and who is responsible. N.J.S.A. 18A:18A-2(t). "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipments, and facilities available. N.J.S.A. 18A:18A-

2(x). "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request. N.J.S.A.18A:18A-(y). Thus, "all bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid." Meadowbrook, supra, 138 N.J. at 314. Minor or inconsequential discrepancies and technical omissions can be waived. And, as noted hereinabove, the bid cannot substantially exceed the cost estimate for the goods or services. If it does, then its entitlement falls short of constituting responsible bid conduct.

It is parenthetically noted that the distinction between conditions which may or may not be waived "stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding." Terminal Construction Corp. v. Atlantic City Sewerage Auth., 67 N.J. 403 (1975). The Supreme Court of New Jersey held that advertised conditions:

> whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived.
>
> [Id. at 412.]

In determining whether waiver of the Board's advertised conditions is capable of precipitating the effects cited in Terminal, the Court turns to the two prong test of materiality set forth in River Vale, supra, 127 N.J. Super. at 215:

> There must, therefore, be applied two criteria in determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity – first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[Ibid.]

If both of these questions are answered in the negative, then the deficiency may be waived.

The above language from Terminal underscores the notion that public entities must anticipate that their actions are to be viewed from the concept of transparency and that close scrutiny will attend a review of their actions in order to determine whether or not there has been some effort to manipulate the bidding process in favor of one party over another. Thus, although it is not the province of this reviewing tribunal to second guess and replace its own opinion over the best actions of the district, it is nonetheless incumbent to determine whether or not the actions by the district reflect such an effort at manipulation. If so, then those actions can be considered arbitrary and/or capricious.

Irreparable harm

Under the emergent relief criteria of Crowe, and as to the first requirement for a showing of irreparable harm, the petitioner asserts that dire, non-monetarily recoverable consequences could attach if the bidding process proceeds at this time. Surety maintains that it did not receive the economic benefits of being awarded the contract and that satisfying the "irreparable harm" requirement is a given in a public-bidding matter due to the fact that damages are not an available remedy to a party asserting a violation of public-bidding statutes. The district has not automatically denied this assertion. But, while money damages are not available to petitioner in this matter, there has been no showing of substantial injury to petitioner to a material degree. In that regard, Surety cannot be said to have suffered irreparable harm where it simply lost out in an attempt to secure a contract, which is a risk that it presumably would take as part of the routine function of its business.

However, by contrast, the harm that would attach to the school district should it be forced into re-adressing an award to Surety could also adversely affect its obligations relative to its financial responsibility. The greater harm would inure to the public which the district serves. Thus, I **FIND** the argument by petitioner to be specious

at best. If anything, if the stay were to be granted, it could also have a great adverse impact upon the ability of the district to timely advance a project for the benefit of its students and its citizen constituency. Thus, I **FIND** the greater harm would be to the district if the stay were to be granted at this time. Thus, petitioner's request fails as to this element. On balance, there is no showing of irreparable harm to petitioner under the circumstances. And I so **FIND.**

Right to underlying claim must be settled

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), Art. VIII, 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1c. and d. to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district. This includes providing appropriate and necessary physical plant accommodations to meet the educational needs of its students. And it also must be done in a safe and efficient manner so as to minimize any adverse physical and/or environmental exposure to the students during the construction phase of those facilities.

In the present matter, counsel for respondent has represented that the respondent district attempted to advance the agenda for the construction of the performing arts project for the benefit of children in order to assure completion before the arrival of the students in September. This effort appears to be salutatory and appropriate in accordance with the mandate noted above. Thus, I **FIND** that the unusual timing of the notice from Clark to the contractors on July 12, 2010, and the in artfully drawn resolution by the district on July 15, 2010, do not translate into such substantial deviations from acceptable bid procedure conduct to warrant relief being granted to petitioner. Nor does it reflect manipulation with the bidding process, absent any other viable proofs to the contrary. Such action is entitled to a presumption of

correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In assessing this, the local school board's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). Thus, although counsel for respondent has acknowledged that there might exist some possible dispute relative to the extent of the changes made from the original bid, it is not necessary to get to that point in this instant matter because the challenge by petitioner and the rejection of its bid by the district is based upon its substantial deviation from an acceptable bid amount, which is a entirely separate segment of the statute for which the district may reject all bids. Thus, the right underlying the claim of petitioner is not settled.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R. 2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.

[Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL Dkt. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of the Boro. of Bergenfield, 1965 S.L.D. 84, 85. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "the well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." See also G.M. v. Roselle Park Boro. Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to board action, the ALJ stated, "it is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action shall be upheld. In the G.M. case, supra, the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority.

Based upon the foregoing and after having considered all the arguments advanced as well as the proofs offered by both sides, I **FIND** that the right underlying petitioner's claim is settled against the petitioner's position. Therefore, I **FIND** that petitioner has failed to establish the right to relief and has failed to show that the action of respondent is arbitrary, capricious and unreasonable, this having occurred after having given petitioner all due deference and a full and a complete opportunity to present such arguments at the emergent relief hearing.

Requirement to show reasonable probability of prevailing on the merits

The most difficult requirement for the moving party to establish or in order to show entitlement to emergency relief is the third factor. In order to prevail on one's application for emergency relief, the party requesting the relief (the fourth unsuccessful bidder in this matter) must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving party that it will probably win on the merits. It is with respect to this that petitioner has great difficulty. Petitioner must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. Petitioner must show that respondent's actions violated petitioner's due process rights because of its rejection of all of the bids, including that of petitioner, and the offering of a second bid opportunity to all interested parties. Since, as noted hereinabove, the district is allowed by statute to reject any bid which substantially exceeds the cost estimate for the goods or services, the plain facts of this matter dictate that the actions by the district were appropriate and allowable. In fact, as properly noted by counsel for the district, the need for fiscal responsibility and responsiveness in the current climate is of such significant concern that to do otherwise would thwart the public good as well as violate the obligation of the district to adhere to such standards. Therefore, I **FIND** that petitioner has failed to show the likelihood of prevailing on the merits in light of its significantly higher bid.

Relative hardship to the parties.

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. As found hereinabove, the bid submission by petitioner is part of the act of doing business, and by contrast, I am concerned that the granting of a stay at this time would unreasonably deny the district the opportunity to proceed with the project on behalf of its students in a timely fashion and would deny it the reasonable and timely opportunity to present it to the State Department of

Education for its approval as part of the process. The relative hardships of the parties weigh in favor of denying the relief of petitioner under the circumstances. And I so **FIND.**

CONCLUSION

Based upon the foregoing, I **FIND and CONCLUDE** that for purposes of deciding this application for emergency relief, petitioner has failed to establish (1) the existence of irreparable harm, (2) that petitioner's claim is based upon a settled right, (3) that petitioner is likely to prevail on the merits, or that (4) Surety would suffer a relative hardship pending a full hearing on the merits. In view of the fact that petitioner has failed to establish any or all of the requirements for emergency relief, I **CONCLUDE** that petitioner's request should be **DENIED**.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief seeking to stay the continued award of the bid process, as well as its other requests for relief in this application, is **DENIED.**

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

August 12, 2010
DATE

JOHN R. FUTEY, ALJ

/mamf

EXHIBITS ADMITTED
AT THE EMERGENT RELIEF HEARING

For petitioner:

P-A through P-N

For respondent:

RA through R-F

#376-10EL

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

ROCHELLE R. HENDRICKS
Acting Commissioner

September 9, 2010

Stephen R. Fogarty, Esq.
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16-00 Route 208 South
Fair Lawn, New Jersey 07410

Shannon Ryan, DAG
Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
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Trenton, New Jersey 08625

Dear Counsel:

I have reviewed the materials filed in connection with the Montgomery Township Board of Education's ("Board") Motion for a Stay pending appeal of the Commissioner's June 24, 2010 decision to certify a general fund tax levy in the amount of $63,359,787 to the Superior Court, Appellate Division in the matter of *Montgomery Township Board of Education v. State of New Jersey, Commissioner of Education, Agency Dkt. No. 471-8/10.* In addition to a stay of the June 24, 2010 decision, the Board is also seeking the issuance of a temporary general tax fund levy – pending the outcome of the appeal – in the amount of $65,439,585, which represents the Board's original base budget amount.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, the Commissioner finds that the Board has failed to meet the standard required for emergent relief. Most notably, the Board has failed to demonstrate the requisite irreparable harm. The majority of the Board's arguments concernin

irreparable harm go to the contention that the budget reductions made by the Commissioner in the June 24, 2010 decision will significantly increase the budget gap for the 2011-2012 school year. As was pointed out in the Department's opposition papers, the Board's speculative projection of a 2011-2012 budget gap does not rise to the level of irreparable harm, and any claimed harm for the 2011-2012 school year is not imminent. The Board also argued that the reduction in funds allotted to student transportation services and employee tuition reimbursement would ultimately require the Board to make cuts in other areas during the 2010-2011 school year that will implicate instructional programs. The Board alleges that it would be required to pull funds from other sources in order to avoid breaching its transportation contract as well as the collective bargaining agreement. That alleged risk of harm is, again, too speculative in nature, and does not rise to the level of irreparable harm.

Additionally, the Board has failed to demonstrate a likelihood of success on the merits of the underlying appeal. The Board maintains that because the Commissioner's cuts will adversely affect the Board's ability to operate the school system, and will affect its ability to provide the students with a thorough and efficient education, it will succeed on the merits. The Department, however, points out that the Board has presented no evidence that it will not be able to provide a thorough and efficient education, and also contends that the Board actually over budgeted on certain line items that were reduced by the Commissioner. It is clear from the parties' submissions that there are material facts that remain in dispute.

There is also evidence in the record to suggest that the Commissioner's budget reductions were reasonable, and will not prevent the Board from providing a thorough and efficient education. The budget reductions that were contained in the Commissioner's June 24, 2010 decision were recommended by the Executive County Superintendent. Additionally, before the budget was submitted to the Commissioner for review and a determination of the general fund tax levy amount, the Rocky Hill Borough Council voted to approve certain budget reductions. As a result, the Commissioner finds that the Board has also failed to demonstrate a likelihood of success on the merits.

Accordingly, the Board's request for a stay of the June 24, 2010 decision is hereby DENIED. *

Sincerely,

Rochelle R. Hendricks
Acting Commissioner

VIA FAX AND REGULAR MAIL
c: County Superintendent
State Law Library

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

381-10L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

ROCHELLE R. HENDRICKS
Acting Commissioner

September 13, 2010

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Dear Counsel:

I have reviewed the papers filed in connection with petitioners' request for interlocutory review of Administrative Law Judge (ALJ) Richard McGill's August 26, 2010 Order denying petitioners' motion for summary decision in the matter entitled *Arthur Matthews and The Horace Mann Insurance Company v. Board of Education of the Union County Vocational Technical School*, OAL Dkt. No. EDU 1666-10, Agency Dkt. No. 9-1/10. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, petitioners' request is denied.

Sincerely,

Rochelle R. Hendricks
Acting Commissioner

RRH/MKD/MH
c: Honorable Richard McGill, ALJ
Clerk, OAL
VIA FACSIMILE AND REGULAR MAIL

#383-10

G.D.M. and T.A.M. on behalf of, minor child, B.M.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL, HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's adoption and implementation of Regulation 6145, entitled "Extracurricular Activities", which sets forth requirements related to students' conduct both on and off school grounds and specifies consequences for failure to comply therewith. Regulation 6145 was adopted in an effort to minimize the use of drugs and alcohol among students, but is not limited to drug or alcohol-related conduct. Consequences of violating the requirements of the regulation include the temporary revocation of participation in extracurricular activities. Petitioners contend that Regulation 6145 violates various provisions of the New Jersey and United States Constitutions and several New Jersey statutes and regulations. Both parties moved for summary decision.

The ALJ found, *inter alia,* that: the authority of a board of education over its students is subject to limitations, and is no greater than the authority conferred by statute; the authority of the board applies to student conduct on school grounds and at school-sponsored functions, with limited exceptions where the exercise of that authority is reasonably necessary for the student's physical or emotional safety, security and well-being, or for reasons relating to the safety, security and well-being of other students, staff or school grounds; Regulation 6145 not only restrains students from the use, possession or distribution of drugs or alcoholic beverages, but also applies to violations of the New Jersey Code of Criminal Justice and/or applicable municipal code or ordinance provisions; respondent has disregarded the limitations on its authority over conduct of students away from school grounds, and has no authority in regard to the New Jersey criminal code or municipal code or ordinance provisions. Accordingly, the adoption of Regulation 6145 was *ultra vires*, and its enforcement is therefore unlawful. Additionally, the ALJ found that the Board disregarded parental rights protected by the Fourteenth Amendment to the United States Constitution. The ALJ granted petitioners' motion for summary decision and ordered that Regulation 6145 is null and void.

Upon consideration and review, the Commissioner determined that Regulation 6145 gives the Board authority beyond the scope of the governing regulatory provisions, and is therefore unlawful. In so deciding, the Commissioner found that it was not necessary to reach to the constitutional arguments discussed by the ALJ. The Commissioner directed the Board to revise its policy to bring it into compliance with the requirements of *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6.

This synopsis is not part of 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 13, 2010

OAL DKT. NO. EDU 11597-09
AGENCY DKT. NO. 225-9/09

G.D.M. and T.A.M. on behalf of, minor child, B.M.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL, HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by petitioners and the Board of Education. This case involves the interpretation of Regulation 6145, which contains a provision that enables the Board to deny participation in extracurricular activities based on student conduct away from school grounds. Although the Board adopted Regulation 6145 in an effort to minimize the use of drugs and alcohol among students, a violation of the policy and regulation is not limited to drug or alcohol related conduct.

In their exceptions, the petitioners did not dispute any of the findings made by the Administrative Law Judge (ALJ) but rather ask the Commissioner to reference the applicable regulatory provisions in the Final Decision, and to make a finding that extracurricular activities are an integral part of a thorough and efficient education, and that the exclusion therefrom based on charges unrelated to the school would violate B.M.M.'s rights guaranteed by the New Jersey Constitution.

In its exceptions, the Board initially argues that the petitioners did not have standing to bring this action because Regulation 6145 was never applied to B.M.M., and similarly that the Commissioner does not have jurisdiction to decide the constitutionality of Regulation 6145 because it amounts to a facial challenge. The Board also takes exception to the ALJ's reliance on three newspaper articles that were attached to the petitioner's certification.

Additionally, the Board takes exception to the ALJ's finding that Regulation 6145 is unconstitutional. The Board maintains that because the constitutionally protected interest of a parent's right in the care, custody, and control of their children does not extend to the circumstances at issue in this case, Regulation 6145 is not unconstitutional. Finally, the Board takes exception to the ALJ's determination that Regulation 6145 is *ultra vires* and violates the applicable regulatory provisions. Specifically, the Board argues that Regulation 6145 complies with *N.J.A.C.* 6A:16-7.1 because it is designed to maintain the order and integrity of the school environment. The Board further argues that the revocation of a student's ability to participate in extracurricular activities is not discipline because such participation is a privilege not a right, and thus *N.J.A.C.* 6A:16-7.6. does not apply in this case.

After consideration and review, the Commissioner finds that Regulation 6145 gives the Board authority that is beyond the scope of the governing regulatory provisions, and is therefore unlawful.[1] Although there were constitutional arguments presented by the parties and discussed by the ALJ, this case can be decided by evaluating whether Regulation 6145 is consistent with the regulations governing the Board's authority to deny participation in

[1] The Commissioner also finds that the petitioners did have standing to bring this action. Although the Board had never determined that B.M.M. violated Regulation 6145, the petitioners were asked to sign a consent form at the beginning of the school year stating that they had received a copy of the policy. It is well recognized that the courts apply a liberal approach to standing in New Jersey, and the fact that they were asked to sign the policy and that the policy would be applied to all students is a sufficient stake and adverseness to establish standing. *See, Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.*, 58 *N.J.* 98, 107 (1971).

extracurricular activities for conduct that occurs off school grounds that is unrelated to a school event. *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6.

The relevant portions of Regulation 6145 state the following:

1. General Behavioral Expectations:

   a. Students are expected to comply with all of the Board's policies and regulations at all times ... and the District's Code of Student Conduct.

   b. Students are required to conform to reasonable standards of acceptable behavior, to respect the rights, person and property of others, to preserve the degree of order necessary for the conduct of the educational program, and to obey those in authority.

   c. Students shall not engage in activities that constitute criminal offenses or juvenile delinquency as defined by law.

2. Use of Alcoholic Beverages and/or Drugs:

   a. Expectations: All student participants in Board-sponsored extracurricular activities must refrain from the use, possession or distribution of any alcoholic beverage or other drugs (unless prescribed by a physician) both on and off school grounds, during the season or activity in which the student wishes to participate in the extracurricular activity.

Consequences for Violations of Conduct Requirements:

1. Alleged violations of the above behavioral expectations occurring on school grounds and/or at school sponsored events will be reported by supervising staff member to the building administrator. **With respect to conduct occurring away from school grounds/events, an alleged violation of the above conduct requirements shall occur if a student is formally charged and/or arrested by law enforcement for an alleged violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance provisions.**

2. Following notification of a student's alleged violation, the building administrator shall conduct a conference with the student and his/her parents, which shall include the student assistance counselor (SAC) and other district personnel, as appropriate, at which time

the student shall be provided the opportunity to address the alleged violation.

3. At the conclusion of the conference, the administrative personnel shall determine whether or not a violation of this Policy and Regulation has occurred.

4. If a violation has occurred, appropriate consequences under this Policy and Regulation shall be determined following consideration of all the facts and circumstances of a particular situation, but shall include as a minimum the following:

    a. First Violation: The student may not participate in any extracurricular activities for seven (7) school days, and/or, at the discretion of the administrator, through and including the next scheduled competitive game and/or event.

    b. Second Violation: The student may not participate in any extracurricular activities for ninety (90) school days.

    c. Third Violation: The student may not participate in any extracurricular activities for one-hundred eighty (180) school days.

It is undisputed that the Board has an obligation to establish a code of conduct for students, and that the Board's desire to limit drug and alcohol abuse is a reasonable objective. The New Jersey Administrative Code contains provisions that establish the parameters by which all boards of education ("board") are bound in the establishment of student conduct codes. *N.J.A.C.* 6A:16-7.1 provides in pertinent part,

> Each district board of education shall develop, adopt and implement a code of conduct which establishes standards, policies and procedures for positive student development and student behavioral expectations on school grounds, including on school buses or at school sponsored functions, and as appropriate, for conduct away from school grounds, in accordance with *N.J.A.C.* 6A:16-7.2 through 7.5, 7.8 and 7.9. [*N.J.A.C.* 6A:16-7.1(a)].

Further, "[a] district board of education may deny participation in extracurricular activities, school functions, sports or graduation exercises as disciplinary sanctions, where such measures

are designed to maintain the order and integrity of the school environment." *N.J.A.C.* 6A:16-7.1(e). As such, there is no doubt that under certain circumstances a board may deny participation in extracurricular activities.

The regulations, however, place limits on a board's authority to deny participation in extracurricular activities for conduct that occurs off school grounds that is unrelated to a school event. Under *N.J.A.C.* 6A:16-7.6, a board has the authority to "impose a consequence on a student for conduct away from school grounds ... that is consistent with the district board of education's code of student conduct". The board, however, can only exercise that authority when:

1. "it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds pursuant to *N.J.S.A.* 18A:25-2 and 18A:37-2" [*N.J.A.C.* 6A:16-7.6(a)1] and

2. "the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." [*N.J.A.C.* 6A:16-7.6(a)2]

It is against this backdrop that Regulation 6145 must be evaluated. As a threshold matter, the Board has attempted to suggest that the revocation of a student's ability to participate in extracurricular activities is not discipline but merely a "non-disciplinary consequence" because such participation is a privilege, not a right. The Board's argument is unfounded, and appears to be an attempt to circumvent the limitations on the authority of the Board imposed by *N.J.A.C.* 6A:16-7.6. The Commissioner agrees that participation in extracurricular activities is a privilege, and not a right, but that does not negate the fact that a board's decision to revoke a student's ability to participate amounts to a form of discipline. Therefore, the Commissioner

finds that Regulation 6145 must comply with the requirements relating to discipline for conduct away from school grounds that is outlined in *N.J.A.C.* 6A:16-7.6.

The Commissioner further finds that Regulation 6145 does not meet the elements contained in *N.J.A.C.* 6A:16-7.6(a), which must be established in order for the Board to revoke a student's ability to participate in extracurricular activities as a result of conduct that occurs off school grounds. The plain language of Regulation 6145 encompasses too many potential conduct violations that would not meet the elements of *N.J.A.C.* 6A:16-7.6(a). Although the purpose behind Regulation 6145 is the deterrent of drug and alcohol abuse, the Regulation can also be violated if a student is merely charged with any "violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinances". It is too much of a stretch to find that all off-school-grounds conduct that may result in one of those violations would automatically make it necessary for the Board to suspend or revoke a student's ability to participate in extracurricular activities in order to protect the well-being of the student, other students or the school staff. Further, the requirement in *N.J.A.C.* 6A:16-7.6(a)2 that authorizes a board to revoke a student's ability to participate in extracurricular activities when the student's off-school-grounds conduct "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school" emphasizes the notion that there must be some link between the conduct and the school environment. See also, *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J. Super.* 337, 343-344 (Ch. Div. 1970).

Finally, the Commissioner is mindful that Regulation 6145 contains a due process provision that gives the student an opportunity to be heard once a charge is reported to the Board. However, Regulation 6145 does not require the Board to take into consideration the mandates contained in *N.J.A.C.* 6A:16-7.6(a) before the Board suspends or revokes participation in

extracurricular activities. Regulation 6145 equates to a blanket authorization permitting the Board to suspend participation in extracurricular activities based on off-school-grounds conduct without the requirements imposed by *N.J.A.C.* 6A:16-7.6(a).

It is important to recognize that the regulations clearly distinguish between a board's authority to impose discipline for conduct that occurs on-site or at a school event as opposed to conduct that is completely unrelated to the school system. Certainly the Board has broad authority to impose discipline for student conduct that occurs on school grounds or at school events, which includes a ban on participation in extracurricular activities. Further, the Commissioner recognizes that there will be occasions where a student's conduct away from school grounds would necessitate the revocation of a student's ability to participate in extracurricular activities. As it is written, however, Regulation 6145 gives the Board more authority than is authorized by the New Jersey Administrative Code.

In light of the fact that Regulation 6145 does not comply with the governing regulatory provisions, there is no need to explore the constitutional arguments made by the petitioner and discussed by the ALJ. Accordingly, the recommended decision of the ALJ is adopted with respect to his finding that Regulation 6145 is unlawful. The Board is directed to revise its policy to bring it into compliance with the requirements of *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/13/2010

Date of Mailing: 9/14/2010

* 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 11597-09
AGENCY DKT. NO. 225-9/09

G.D.M. AND T.A.M., ON BEHALF OF MINOR CHILD, B.M.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

G.D.M., Esq., for petitioners
(Price, Meese, Shulman & D'Arminio, attorneys)

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

Record Closed: June 11, 2010 Decided: June 11, 2010

BEFORE **RICHARD McGILL**, ALJ:

This matter involves a challenge by G.D.M. and T.A.M. on behalf of their daughter, B.M.M. (hereinafter collectively "petitioners") to Regulation 6145, entitled "Extracuricular Activities," which was adopted by the Board of Education of the Ramapo

Indian Hills Regional High School District (hereinafter "respondent") on June 22, 2009, and implemented within the school district at the commencement of the 2009-2010 school year. Regulation 6145 sets forth requirements related to students' conduct both on and off school grounds and specifies consequences for failure to comply therewith. More specifically, in addition to general behavioral expectations, the conduct requirements relate to use of alcoholic beverages and/or drugs and compliance with the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance violations. The consequences of a violation of the requirements set forth in Regulation 6145 include the temporary revocation of participation by the student in extracurricular activities. Petitioners maintain that Regulation 6145 violates various provisions of the New Jersey and United States Constitutions and several New Jersey statutes and regulations. Both parties new move for summary decision.

PROCEDURAL HISTORY

Petitioners filed their petition with the Commissioner of Education on September 2, 2009, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. On September 21, 2009, respondent filed a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-1.5(g). The matter was transmitted to the Office of Administrative Law on September 21, 2009, for determination as a contested case.

On October 6, 2009, petitioners filed a motion for summary decision. In addition to supporting the motion, petitioner's brief opposed respondent's motion to dismiss. On November 13, 2009, respondent filed a cross-motion for summary decision. After the submission of various responsive papers, respondent's motion to dismiss was denied by Order dated June 11, 2010.

MOTIONS FOR SUMMARY DECISION

A. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R. 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. Id. at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid.

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

B. Issues

The issues in this proceeding are as follows: (1) whether Regulation 6145 violates N.J.A.C. 6A:16-7.1 or -7.6 or any other State regulation; (2) whether Regulation 6145 is unconstitutional; (3) whether Regulation 6145 is ultra vires; (4) whether Regulation 6145 violates the student's rights to a thorough and efficient education; and (5) whether Regulation 6145 infringes on the parental rights of petitioners.

C. Facts

In support of their motion for summary decision, petitioners submitted a statement of facts and a certification of T.A.M. with twenty-three exhibits attached thereto. Respondent submitted a statement of facts and a certification of C. Lauren Schoen, its Superintendent of Schools. The parties characterize Regulation 6145 somewhat differently, but the document speaks for itself. There is no question as to the wording of Regulation 6145. Petitioners presented a number of newspaper articles concerning an extended consideration of Regulation 6145 presumably to show its intent. Newspaper articles are not inherently reliable as a source of facts, but they seem to provide an indication as to some of the concerns that led to the adoption of Regulation 6145. After a review of the submissions of the parties, I am satisfied that there is no genuine issue concerning the following facts.

Based upon the submissions of the parties, I **FIND** as follows:

1. Petitioners are taxpayers and property owners in the Borough of Franklin Lakes and are the parents and natural guardians of their daughter, B.M.M., who is a senior at respondent's Indian Hills High School.

2. Franklin Lakes is one of three towns that share two public high schools operated by respondent.

3. During her first three years at Indian Hills High School, B.M.M. participated in numerous extracurricular activities and plans to engage in those same activities during her final year.

4. In 2007, respondent proposed a regulation granting the school district the authority to temporarily deny students the opportunity to participate in extracurricular activities.

5. Thereafter, respondent held numerous public hearings between 2007 and 2009 to discuss the proposed regulation.

6. T.A.M. attended all but one of the public hearings in regard to Regulation 6145.

7. G.D.M. and T.A.M. spoke against the proposed regulation at the public hearings.

8. A primary motivation for the proposed regulation was concern about illegal use of drugs and alcohol by students.

9. An article in the Franklin Lakes and Oakland Suburban News on August 20, 2008, in regard to the proposed regulation stated in part as follows:

> The impetus of the policy, officials say, was a survey of student drug and alcohol use conducted by the Rocky Mountain Behavior Science Institute in 2005.
>
> "The statistics that jumped off the page were the high percentage of students drinking at home with parental knowledge, [Schools Superintendent Paul] Saxton said. "That was alarming. We have data that reflects a significant problem."
>
> Saxton said the policy is meant to be a deterrent to illegal activities.

10. An article in The Villadom Times on July 16, 2008, concerning the proposed regulation stated in part as follows:

> Saxton explained that the policy was created after a survey of the district's students indicated by grade level the degree to which students were experimenting with alcohol and drugs. "The results scared us to death," he said, adding that the survey also indicated that an alarming number of kids were drinking alcohol at parties when the parents were home.
>
> "How do you wrap your arms around a problem like that?" he said. "We felt compelled, as educators, to do something constructive.

11. An article in The Record on August 17, 2007, concerning the proposed regulation stated in part as follows:

> School officials first thought of banning Ramapo and Indian Hills High School students from sports and clubs for off-camps misbehavior when they saw the district's survey on drug and alcohol use two years ago.
>
> The survey found that students who drank alcohol did it at home approximately 85 percent to 90 percent of the time, district Superintendent Paul Saxton said.
>
> To curb the bad behavior, officials last week introduced a draft of a pledge that students would be required to sign before they participate in clubs and sports. The pledge states that they will face suspension from extracurricular activities if they break school rules or the law.
>
> "If I thought the parents were dealing with them, we wouldn't be doing this," Saxton said, referring to the pledge. "I'm not making a blanket statement that all parents aren't taking action ... but are they aware of where [their children] are and what they're doing?"

12. On June 22, 2009, respondent voted to adopt Regulation 6145, which provides in pertinent part as follows:

Introduction:

Participation in Board-sponsored extracurricular activities is a privilege enjoyed only by students in good academic and disciplinary standing. This privilege is earned through compliance with all applicable rules and regulations. This policy is intended to be a positive statement in support of our students as they strive to remain free of all drugs and alcohol as required by state law. This policy also encourages a student to maintain good attendance and grades, abide by all school rules, and to be a good citizen. The Board has the authority to restrict or revoke a student's privilege to participate in extracurricular activities.

The consequences set forth in this Policy and Regulation relate solely to limiting the opportunity of any student found to be in violation of this Policy or Regulation to participate in Board-sponsored extracurricular activities. Nothing set forth in this Policy or Regulation shall limit the District's ability to discipline/impose additional consequences upon a student whose conduct amounts to a violation of any Board Policy or Regulation and/or the Code of Student Conduct.

. . . .

Conduct Requirements:

1. General Behavioral Expectations:

   a. Students are expected to comply with all of the Board's policies and regulations at all times, including but not limited to Board Policy and Regulation No. 5131 ("Student Conduct/Discipline"), Board Policy No. 5131.6 ("Substance Abuse"), Board Policy No. 6145.1 and 2 ("Intramural Competition/Interscholastic Competition") and the District's Code of Student Conduct.

   b. Students are required to conform to reasonable standards of acceptable behavior, to respect the rights, person and property of others, to preserve the degree of order necessary for the conduct of the educational program, and to obey those in authority.

   c. Students shall not engage in activities that constitute criminal offenses or juvenile delinquency as defined by law.

2. Use of Alcoholic Beverages and/or Drugs:

a. Expectations: All student participants in Board-sponsored extracurricular activities must refrain from the use, possession or distribution of any alcoholic beverage or other drugs (unless prescribed by a physician) **both on and off school grounds,** during the season or activity in which the student wishes to participate the extracurricular activity.

Consequences for Violations of Conduct Requirements:

1. Alleged violations of the above behavioral expectations occurring on school grounds and/or at school sponsored events will be reported by supervising staff member to the building administrator. With respect to conduct occurring away from school grounds/events, an alleged violation of the above conduct requirements shall occur if a student is formally charged and/or arrested by law enforcement for an alleged violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance provisions.

2. Following notification of a student's alleged violation, the building administrator shall conduct a conference with the student and his/her parents, which shall include the student assistance counselor ("SAC") and other district personnel, as appropriate, at which time the student shall be provided the opportunity to address the alleged violation.

3. At the conclusion of the conference, the administrative personnel shall determine whether or not a violation of this Policy and Regulation has occurred.

4. If a violation has occurred, appropriate consequences under this Policy and Regulation shall be determined following consideration of all the facts and circumstances of a particular situation, but shall include as a minimum the following:

    a. First Violation: The student may not participate in any extracurricular activities for seven (7) school days, and/or, at the discretion of the administrator, through and including the next scheduled competitive game and/or event.

    b. Second Violation: The student may not participate in any extracurricular activities for ninety (90) school days.

c. Third Violation: The student may not participate in any extracurricular activities for one-hundred eighty (180) school days.

. . . .

13. Regulation 6145 was implemented within the school district at the commencement of the 2009-2010 school year. The students were notified of this policy through start-of-year assemblies, the Student Handbook and the school website.

14. Additionally, some athletic teams were specifically notified of this policy by coaching staff at the commencement of the practice season.

15. At the beginning of the 2009-2010 school year, each student including B.M.M. was given a Student Handbook, together with a Consent Form, to be signed by students and parents acknowledging receipt of the Handbook and that students will be held accountable for their behavior and will be subject to the disciplinary consequences outlined in the Handbook.

16. G.D.M., T.A.M. and B.M.M. refused to sign the Consent Form based upon the belief that they were waiving constitutional rights and would be bound by Regulation 6145.

17. On September 22, 2009, B.M.M. was called to the Indian Hills High School Administration Office and asked to explain why she did not sign the Consent Form. B.M.M. was told that the matter would be referred to the high school's principal.

18. G.D.M. and T.A.M. received a notice entitled "Mandatory Consent Form" stating that "(i)f you fail to return the signed Consent Form, the matter will be turned over to the Administration, and it is likely that your parent's access to Genesis will be blocked."

19. Genesis is the high school's online parental tool that allows parents real-time access to vital information regarding the student's conduct in the school, including missing homework assignments and grades.

20. In response, G.D.M. and T.A.M. sent a letter to the high school principal on September 23, 2009, stating that they and their two children, including B.M.M., would not sign the Consent Form, because they believed that it was unlawful.

D. Law and Analysis

The United States Supreme Court delineated parents' liberty interest in the care, custody and control of their children in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed. 2d 49 (2000) as follows:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." Washington v. Glucksberg, 521 U.S. 702, 719, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." 521 U.S. at 720; see also Reno v. Flores, 507 U.S. 292, 301-302, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993).
>
> The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to

> recognize and prepare him for additional obligations." 268 U.S. at 535. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166.
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J.R., 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, supra, at 720 ("In a long line of cases, we have held that in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right ... to direct the education and upbringing of one's child" (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decision concerning the care, custody, and control of their children. [Id., at 56-57.]

After citing Troxel v. Granville, supra, the Third Circuit Court of Appeals stated in Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000) that the United States Supreme Court recognized that:

for some portions of the day, the children are in the compulsory custody of state-operated school systems. In that setting, the state's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655, 132 L. Ed. 2d. 564, 115 S. Ct. 2386 (1995). For some purposes, then, "school authorities act[ ] in loco parentis." Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986). But see New Jersey v. T.L.O., 469 U.S. 325, 336-37, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985) (school authorities are not merely parental surrogates but also exercise public authority for Fourth Amendment purposes.).

Thus, there may be circumstances in which school authorities, in order to maintain order and a proper educational atmosphere in the exercise of police power, may impose standards of conduct on students that differ from those approved by some parents. See, e.g., Vernonia, 515 U.S. at 664-65 (allowing participation in school athletics to be conditioned upon testing for illegal drugs); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273, 98 L. Ed. 592, 108 S. Ct. 562 (1988) (permitting censorship of school-sponsored publication); T.L.O., 469 U.S. at 347-48 (upholding warrantless search of student's effects).

Although a student may not enjoy a right of privacy to the same extent as a free adult, there are nevertheless limitation on intrusions by school authorities. Thus, in Vernonia, although the Court approved drug tests, it was also careful to indicate that the tests were inappropriate to determine "whether the student is, for example, epileptic, pregnant, or diabetic." 515 U.S. at 658. In describing the justification for the random, coerced drug testing in Vernonia, the Court pointed out that the State must demonstrate "an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." Id. at 661.

It is not unforeseeable, therefore, that a school's policies might come into conflict with the fundamental right of parents to raise and nurture their child. But when such collisions occur, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest.

As the Court said in Roberts v. United States Jaycees, 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), "the Court has long recognized that because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." Id. at 618.

> Familial relationships are the quintessential "personal bonds" that "act as critical buffers between the individual and the power of the State." Id. at 619-20. [Id., at 304-305.]
>
> The Court of Appeals further stated:
>
> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. See Merriken v. Cressman, 364 F. Supp. 913, 922 (E.D. PA. 1973) (questionnaire probing family relationships by school authorities held unconstitutional). Public schools must not forget that "in loco parentis" does not mean "displace parents."
>
> It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the Court's admonitions that "the child is not the mere creature of the State," Pierce, 268 U.S. at 535, and that it is the parents' responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship." Yoder, 406 U.S. at 233. [Id., at 307.]

The authority of a school district over students derives from statute. One applicable statute, N.J.S.A. 18A:25-2, provides in pertinent part as follows: "A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school." Another statute, N.J.S.A. 18A:37-1, states as follows: "Pupils in the public schools shall comply with rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them."

Causes for suspension or expulsion of pupils are set forth in N.J.S.A. 18A:37-2, which lists ten specific reasons. Nine of the ten reasons are clearly related to school. The other reason refers to conduct of such character as to constitute a continuing danger to the physical well-being of other pupils. This type of situation could be based on conduct off school property and totally unrelated to school activities, e.g., R.R. v. Bd.

of Educ. of the Shore Reg'l High School District, 109 N.J. Super. 337, 343-44 (Ch. Div. 1970) (where R.R. allegedly visited a neighbor's home after school and hit her on the back of the head with a piece of wood and cut her four times with a knife, the Court upheld a suspension from school out of concern for the safety and emotional well-being of other students, teachers and school property.).

Two regulations related to student conduct are applicable to this situation. One regulation, N.J.A.C. 6A:16-7.1(a), provides in part as follows:

> Each district board of education shall develop, adopt and implement a code of student conduct which establishes standards, policies and procedures for positive student development and student behavioral expectations on school grounds, including on school buses or at school-sponsored functions, and, as appropriate, for conduct away from school grounds, in accordance with N.J.A.C. 6A:16-7.2 through 7.5, 7.8 and 7.9

The reference to "conduct away from school grounds" is clarified by N.J.A.C. 6A:16-7.6, which provides as follows:

> (a) School authorities have the right to impose a consequence on a student for conduct away from school grounds, including on a school bus or at a school-sponsored function that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.
>
> 1. This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.
>
> 2. This authority shall be exercised only when the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.
>
> 3. The consequence pursuant to (a) above shall be handled in accordance with the district board of education approved code of

student conduct, pursuant to N.J.A.C. 6A:16-7.1, and as appropriate, in accordance with N.J.A.C. 6A:16-7.2, 7.3 or 7.5.

All of the above-mentioned provisions of the United States Constitution and New Jersey statutes and regulations indicate that the authority of a district board of education over students is subject to limitations. The powers of a district board of education are no greater than the authority conferred by statute. With limited exceptions, the authority of the board of education applies to student conduct on school grounds and at various school-sponsored functions. The right to impose a consequence for conduct away from school grounds is specifically limited to situations where the exercise of that authority is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds.

In Regulation 6145, respondent purports to require students to refrain from use, possession or distribution of any alcoholic beverage or other drugs both on or off school grounds. In addition, Regulation 6145 applies to violations of the New Jersey Code of Criminal Justice and/or applicable municipal code or ordinance provisions. In so doing, respondent has disregarded the limitations on its authority over conduct of students away from school grounds. Moreover, respondent has no authority whatsoever to enforce, determine guilt or otherwise impose a consequence for alleged violations (or violations) of the New Jersey Code of Criminal Justice and/or applicable municipal codes or ordinance provisions. It follows that the adoption of Regulation 6145 was ultra vires. Enforcement of Regulation 6145 is therefore unlawful.

In addition, respondent disregarded parental rights protected by the Fourteenth Amendment to the United States Constitution. It seems evident that dealing with charges against a teenager unrelated to school is the proper function of the parents without interference from school authorities. This is particularly true where the student's alleged misconduct occurred in the parent's home. In short, Regulation 6145 is grossly overbroad.

Based upon the above, I **CONCLUDE** that Regulation 6145 is ultra vires, unlawful and unconstitutional in that it violates petitioners' parental rights. In view of this determination, which addresses the essence of the situation, it is unnecessary to reach petitioners' other arguments.

Accordingly, it is **ORDERED** that:

1. Petitioners' motion for summary decision is granted.

2. Respondent's motion for summary decision is denied.

3. Respondent's Regulation 6145 is null and void.

4. Respondent shall refrain from enforcing or applying its Regulation 6145.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 11, 2010
DATE

RICHARD McGILL, ALJ

Date Received at Agency: JUN 14 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

#384-10

E.M. on behalf of minor child J.B., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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. : DECISION

SYNOPSIS

Petitioner sought a determination that the Board of Education of the City of East Orange (Board) is responsible for both the transportation costs and placement of her son, J.B. – a student eligible for special education and related services – during the time in which petitioner resided in the East Orange School District and J.B. attended an out-of-district placement at the North Hudson Academy (NHA). Respondents contended that the controversy is moot since petitioner and her son have moved to North Carolina, and dismissal of the petition is therefore appropriate.

The ALJ found, *inter alia,* that: although petitioner argues that this case "involves important public issues concerning special education for disabled children enrolled in charter schools," the actual education of J.B. is not at issue in the case since J.B. maintained his educational placement at NHA until April 2009, when the petitioner moved to North Carolina; if the petitioner's claim is that the Board failed to provide a Free and Appropriate Public Education by not providing transportation for J.B. to NHA, a due process hearing within the framework of the Individuals with Disabilities Education Act would be the primary vehicle for resolving the dispute, but no due process petition was filed by petitioner in this regard; petitioner's allegation that the "parties have an interest in determining which district is responsible for payment of private school placements where a charter school places a student in a private school for the handicapped, since there is a likelihood that this issue will arise again" is unsupported by any evidence that would substantiate any payment from petitioner to NHA for J.B.'s educational placement; NHA is not a party to this matter; petitioner has moved to North Carolina, and there is no claim for unpaid tuition. The ALJ concluded that the disputed issues have become moot and accordingly dismissed the petition.

Upon full review of the record in this matter, the Acting Commissioner adopted the conclusion of the ALJ that the case is moot. 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 13, 2010

OAL DKT. NO. EDU 11588-08
AGENCY DKT. NO. 291-10/08

E.M. on behalf of minor child J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
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.	:	DECISION

The Acting Commissioner has reviewed the record, Initial Decision of the Office of Administrative Law (OAL) and parties' exceptions and reply exceptions, and agrees with the Administrative Law Judge (ALJ) that the matter is moot as to the sole petitioner. While the issue of who was responsible for payment of J.B.'s tuition at North Hudson Academy (NHA) was never finally adjudicated, the jurisdictional requirements for such adjudication are no longer satisfied.

There is no showing in the record that petitioner paid or was charged for J.B.'s tuition at NHA, and NHA itself was neither a petitioner nor an intervenor in the case. Thus, the Acting Commissioner may not award damages for tuition. Similarly, since the record contains no proofs itemizing the transportation costs which petitioner alleges that she incurred, no award for same may be granted.

As the ALJ advised, the law instructs that courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have

concrete adversity of interest, *Anderson v. Sills,* 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). (Initial Decision at 6.) Accordingly, the Acting Commissioner adopts the conclusion of the ALJ that the case is moot, and dismisses the petition.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/13/10

Date of Mailing: 9/14/10

[1] 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 11588-08

AGENCY DKT. NO. 291-10/08

E.M., ON BEHALF OF MINOR CHILD, J.B.,

Petitioner,

v.

BOARD OF EDUCATION CITY OF EAST ORANGE, STATE OPERATED SCHOOL DISTRICT CITY OF NEWARK, AND BOARD OF TRUSTEES OF THE GREATER NEWARK CHARTER SCHOOL,

Respondents.

Esther Canty-Barnes, Esq., for petitioner (Director, Special Education Clinic, Rutgers School of Law/Newark)

Andrew W. Li, Esq., for respondent, East Orange Board of Education (Schwartz Simon Edelstein Celso and Zitomer, attorneys)

Arsen Zartarian, Esq., for respondent, State-Operated School District of the City of Newark

Derlys Maria Gutierrez, Esq., for respondent, Greater Newark Charter School (Adams Stern Gutierrez and Lattiboudere, attorneys)

Record Closed: June 14, 2010 Decided: July, 29, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner E.M. on behalf of her minor child, J.B., seeks a determination that the East Orange School District is the responsible school district for both the transportation costs and placement of J.B., a student eligible for special education and related services, during the time in which petitioner resided in the East Orange School District and J.B. attended an out-of-district placement at the North Hudson Academy (NHA).

On September 26, 2008, petitioner filed a petition for declaratory and emergency relief with the Commissioner. On October 6, 2008, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. On October 9, 2008, I heard oral argument on the emergent-relief application and denied petitioner's application on the same date. On October 24, 2008, the Commissioner of Education reversed and ordered that the East Orange Board of Education "pay the costs of 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." On November 7, 2008, East Orange Board of Education appealed the Commissioner's October 24, 2008, decision on application for emergent relief to the Superior Court of New Jersey, Appellate Division.

On August 4, 2009, the Appellate Division dismissed the emergent appeal as moot, noting that E.M. and J.B. relocated to North Carolina during the pendency of the appellate action. The Court also noted that the "only unresolved issue is who should be held responsible for the costs associated with J.B.'s placement at NHA after he moved to East Orange and before he left for North Carolina." I directed the parties to submit briefs as to the issues of why, in light of E.M. and J.B.'s move to North Carolina, the underlying petition before the OAL should not be dismissed because the issue is moot and petitioner lacks standing.

FACTUAL DISCUSSION

The following material **FACTS** are undisputed.

E.M. is the mother of J.B. J.B. has been identified as having learning and behavioral disabilities and has been classified as eligible for special education. E.M. and J.B. resided in the City of Newark, where J.B. was enrolled at the Greater Newark Charter School (GNCS) during the 2006-2007 school year. In May 2007, GNCS prepared a justification for out-of-district placement at NHA, an approved private school for the disabled located in North Bergen, New Jersey. J.B. subsequently began to attend NHA. In or about August 2007, E.M. and J.B. moved to the City of East Orange, where E.M. completed an East Orange School District registration form for J.B. While the East Orange District offered in-district programs for J.B., which it believed were consistent with the supports set forth in J.B.'s Individualized Education Plan (IEP) dated October 4, 2006; E.M. instead requested that the East Orange Board of Education recognize the special education placement at NHA as well as pay for tuition and transportation.

On or about October 18, 2007, E.M. filed a petition for due process under the Individuals with Disabilities Education Act (IDEA), seeking to have her son, J.B., remain at NHA with transportation. On June 26, 2008, the Honorable Leslie Z. Celentano, ALJ, held that J.B. was properly enrolled in GNCS and, as such, J.B.'s placement at NHA was appropriate.

J.B. remained at NHA until April 7, 2009, at which time E.M. and J.B. moved to North Carolina. NHA was not a party in this case.

LEGAL DISCUSSION

The Uniform Administrative Procedure Rules provide the Administrative Law Judge (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).]

Here, petitioner has requested declaratory relief and respondents move for dismissal of the petition. Respondents contend that dismissal is appropriate because the controversy is moot and the petitioner lacks standing. I converted the motion to dismiss to a motion for summary decision, sua sponte, 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 is the administrative counterpart to summary judgment in the judicial arena. Summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). In order to defeat a summary-decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Use of the summary-decision 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 and Trust Co. of Westfield, 17 N.J. 67, 74 (1954) (citation omitted).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a

judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citation omitted).

In this case, petitioner argues that her claims are not moot because they involve issues of "significant public importance" and this case "involves important public issues concerning special education for disabled children enrolled in charter schools." However, the actual education of J.B. is not at issue in this case because J.B. maintained his educational placement at NHA, without interruption, until April 7, 2009, when E.M. and J.B. moved to North Carolina.

If petitioner's claim is, that by not providing transportation for J.B. to NHA, the East Orange Board of Education "failed in its duty" to provide a Free and Appropriate Public Education (FAPE), a due process hearing within the framework of the Individuals with Disabilities Education Act (IDEA) would be the principal vehicle for resolving disputes between parents of children with disabilities and school districts concerning identification, evaluation, placement or provision of FAPE. 34 C.F.R. § 300.511. Here, no due process petition was filed by petitioner in this regard. Furthermore, whether transportation is a "related service" for purposes of implementing J.B.'s IEP is a determination that cannot be reached in the context of a school-law dispute heard pursuant to N.J.S.A. 18A:6-9. See Golden Door Charter Sch. v. State-Operated Sch. Dist. of the City of Jersey City, Hudson County, Comm'r of Educ. (March 15, 2007), http://www.nj.gov/education/legal/comm.html.

Petitioner also alleges that the "parties have an interest in determining which district is responsible for payment of private school placements where a charter school places a student in a private school for the handicapped, since there is a likelihood that this issue will arise again." Respondents indicate that in this case, no evidence was presented substantiating any payment from petitioner to NHA for J.B.'s educational placement. NHA, the party that would benefit from resolution of this tuition issue, was not a party in this matter. Petitioner moved to North Carolina and there has been no claim for unpaid tuition. Respondents note the explanation provided in Anderson v.

Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976), regarding the dismissal of moot cases. "[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest." Id. at 437.

Accordingly, I **CONCLUDE** that a controversy no longer exists and the disputed issues have become moot.

ORDER

It is hereby **ORDERED** that summary decision is **GRANTED** in favor of respondents and the petition is **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, 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 29, 2010
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 7/29/10

Date Mailed to Parties: JUL 30 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

387-10

OAL DKT. NO. EDU 4432-09
AGENCY DKT. NO. 68-4/09

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/10

Date of Mailing: 9/14/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4432-09
AGENCY DKT. NO. 68-4/09

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,
Petitioner,
V.
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,
Respondent.

John D. Wade, Esq., for petitioner (Wade, Long, Wood & Kennedy, attorneys)

Howard E. Drucks, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: July 26, 2010 Decided: July 26, 2010

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 7, 2009, 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.

7-26-10
DATE

W. TODD MILLER, ALJ

AUG – 3 2010

Date Received at Agency:

AUG – 4 2010

Date Mailed to Parties:

/sd

William S. Donio, Esquire
Howard E. Drucks, Esquire
COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
File No.: 50696-268/647
Attorneys for Board of Education of the Town of Hammonton

RECEIVED

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Respondent, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1705-09T3 ON APPEAL FROM: NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION, LUCILLE E. DAVY AGENCY DOCKET NOS. 204-7/07, 235-8/07 COMMISSIONER DECISION NOS. 132-08 AND ON REMAND 356-09R OAL DOCKET NOS. 6798-07, 8091-07 (Consolidated) SAT BELOW: The Honorable Lillard E. Law, ALJ, T/A, J.S.C.
BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY, Respondent, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Appellant.	

Civil Action

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 6254-08 AGENCY DOCKET NO. 109-4/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 4432-09 AGENCY DOCKET NO. 68-4/09

BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, Respondent.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 2899-09 AGENCY DOCKET NO. 79-4/09

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE relates to and arises from the above captioned matters (the "litigation"). At all times herein, the Appellant/Respondent Hammonton Board of Education ("Hammonton") has been represented by Cooper Levenson April Niedelman Wagenheim & Levenson, P.A., William S. Donio, Esquire appearing; Respondent/Petitioner Waterford Township Board of Education ("Waterford") has been represented by Wade, Long, Wood & Kennedy, L.L.C., John D. Wade, Esquire appearing; and Respondent/Petitioner Borough of Folsom Board of Education ("Folsom") has been represented by William Cappuccio, Esquire, and it appearing Hammonton, Waterford and

Folsom (from time to time, referred to collectively as the "parties") have resolved all claims and issues arising from and limited to the litigation; and

WHEREAS, Hammonton, Waterford and Folsom, following good faith negotiations, counseled at all time by their respective attorneys, and without admitting fault or conceding liability of whatever kind arising from the claims and/or defenses advanced in the litigation, have amicably resolved their disputes as asserted by this Settlement Agreement and General Release (the "Agreement"); and

WHEREAS, Hammonton, Waterford and Folsom wish to memorialize the Agreement and move to withdraw and/or file appropriate pleadings to otherwise terminate, withdraw and/or discontinue the litigation; and

WHEREAS, Hammonton, Waterford and Folsom enter into this document voluntarily, in good faith, and represented by their respective counsel at all relevant times, hereto memorialize the Agreement and now express the full, complete and exclusive terms of the Agreement; and

WHEREAS, Hammonton, Waterford and Folsom acknowledge that the Agreement is intended only to resolve the claims and issues arising from and pertinent to the litigation as captioned above and stipulated below, and does not encompass or imply any agreement with respect to any issue not referenced below; and

WHEREAS, Hammonton, Waterford and Folsom agree to duly vote upon, ratify and adopt the Agreement at appropriately scheduled and noticed meetings, and to take whatever other actions are necessary to be in full compliance with Federal and New Jersey statutory and regulatory law; and

WHEREAS, in furtherance of the implementation of the Agreement, Hammonton, Waterford and Folsom agree that their duly authorized representatives shall execute the Agreement.

NOW THEREFORE, In consideration of the above and the promises set forth below, Hammonton, Waterford and Folsom hereby agree to the following:

1. To resolve the issues arising from the retroactive billing of Waterford and Folsom by Hammonton for the use of Hammonton's resource room by Waterford's students and Folsom's students in schools years 2004-2005; 2005-2006 and 2006-2007, Waterford hereby agrees to forward payment of Two Hundred and Fifty ($250,000.00) Thousand Dollars to Hammonton, and Folsom hereby agrees to forward payment of Twenty-Five Thousand Nine Hundred and Fifty-Six Dollars and Ninety Cents ($25,956.90) to Hammonton. It is understood that the payment by Waterford of the sum of Two Hundred and Fifty ($250,000.00) Thousand Dollars is to be issued from the resource room reserve that Waterford set aside in its budget during the course of the litigation. The dates upon which such payments shall be made by Waterford and Folsom shall be subject to respective agreements with Hammonton.

(a) In consideration of the payments by Waterford and Folsom as stated herein above, Hammonton agrees to waive any and all other past fees or charges alleged or understood to be due and owing from Waterford and Folsom for the use of Hammonton's resource room for the years 2004-2005; 2005-2006; 2006-2007, by Waterford's and Folsom's students as have been retroactively billed by Hammonton. Hammonton further agrees to withdraw or dismiss the Appeal encaptioned "*Board of Education of the Township of Waterford, Respondent v. Board of Education of the Town of Hammonton, Appellant and Board of Education of the Borough of Folsom v. Board of Education of the Town of Hammonton, Appellant under Docket No: A-1705-09T3.*"

(b) In further consideration of the payments by Waterford and Folsom as stated herein above, Hammonton hereby agrees to waive and withdraw any and all claims for charges that have been calculated by Hammonton as assessments to be imposed upon Waterford and

Folsom arising from the formation and/or rescission of the Interlocal Services Agreement between Hammonton and the Town of Hammonton.

(c) In exchange for Hammonton's agreement as set forth in (a) and (b) above, Waterford and Folsom agree to concurrently withdraw and dismiss any and all Petitions addressing, in whole or in part, the tuition assessments retroactively billed by Hammonton for the use of Hammonton's resource room by Waterford's and Folsom's students for the years 2004-2005; 2005-2006; and 2006-2007. These Petitions include the following:

(1) Waterford's Petitions encaptioned "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU-6798-07, Agency Reference No. 204-7/07*"; "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 6254-08, Agency Reference 109-4/08,*" and "*Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09, Agency Reference 68-4/09,*" in their entirety; and

(2) Folsom's Petitions encaptioned "*Board of Education of the Borough of Folsom v. Board of Education Town of Hammonton, Docket EDU 8091-07, Agency Reference 235-8/07*" and "*Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,*" in their entirety.

(d) Waterford and Folsom also agree to concurrently withdraw and dismiss any and all Petitions addressing, in whole or in part, the formation and/or the rescission of the Interlocal Agreement between Hammonton and the Town of Hammonton. These Petitions include the following:

(1) Waterford's Petition encaptioned *"Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09, Agency Reference 68-4/09,"* in its entirety; and

(2) Folsom's Petition encaptioned *"Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,"* in its entirety.

2. Hammonton, Waterford and Folsom agree that in exchange for the payment of the sum of $250,000.00 by Waterford and the sum of $25,956.90 by Folsom, all such retroactive billings for the use of Hammonton's resource room by Waterford's and Folsom's students for the school years 2004-2005; 2005-2006; and 2006-2007, as having been raised as issues in the litigation, will be waived and/or deemed discharged. Such waiver and/or discharge shall be operative only as to the resource room charges retroactively billed for the school years 2004-2005; 2005-2006; and 2006-2007. Hammonton, Waterford and Folsom agree that for all subsequent years, Hammonton shall have the right to charge Waterford and Folsom for the use of Hammonton's resource room by Waterford's and Folsom's students as permitted and authorized under Federal and New Jersey statutory and regulatory law governing the relationships between sending districts and receiving districts pursuant to appropriate tuition contracts; and

3. Hammonton, Waterford and Folsom agree that Hammonton shall nullify that portion of the Maintenance Reserve account that was included in the tuition calculations for school year 2009-2010. Hammonton, Waterford and Folsom further agree that all such tuition calculations henceforth shall not include any funds held in the Maintenance Reserve account, except as may be specifically authorized by law or agreed to by the parties. Hammonton, Waterford and Folsom further agree that Waterford shall withdraw and/or dismiss Count III of Waterford's Petition encaptioned *"Board of Education of the Township of Waterford, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 4432-09,*

Agency Reference 68-4/09," and Folsom shall withdraw and/or dismiss Count II of Folsom's Petition encaptioned "*Board of Education of the Borough of Folsom, Petitioner v. Board of Education of the Town of Hammonton, Respondent, under Docket No. EDU 2899-09, Agency Reference 79-4/09,*" in its entirety; and

4. Hammonton, Waterford and Folsom acknowledge that they have had the opportunity to review the terms of this Agreement with their respective counsel and are fully satisfied with the representation provided and the terms of the Agreement. Hammonton, Waterford and Folsom enter into this Agreement and Release knowingly, without coercion or other improper influence. Hammonton, Waterford and Folsom shall be responsible only for their respective legal fees.

5. In exchange for the payment and other consideration referenced in paragraph 1 of this Agreement the parties agree as follows:

(a) Hammonton agrees to release, remise, acquit and forever discharge Waterford and Folsom, their members, employees, representatives, agents, predecessors, successors, and assigns, for liabilities retroactively charged by Hammonton for the use by Waterford's and Folsom's students of the Hammonton resource room for the years 2004-2005; 2005-2006; and 2006-2007. Waterford and Folsom hereby release, remise, acquit and forever discharge Hammonton its members, employees, representatives, agents, predecessors, successors, and assigns, from any claims of impropriety or wrongdoing with respect to Hammonton's retroactive billing of Waterford and Folsom for the use of the Hammonton resource room by Waterford's and Folsom's students for the years 2004-2005; 2005-2006; and 2006-2007; and

(b) Hammonton hereby agrees to release, remise, acquit and forever discharge Waterford and Folsom, their members, employees, representatives, agents, predecessors, successors, and assigns, for any liability associated with the formation and/or rescission of the Interlocal Contract with the Town of Hammonton. Waterford and Folsom hereby release,

remise, acquit and forever discharge Hammonton, its members, employees, representatives, agents, predecessors, successors, and assigns, of any impropriety or wrongdoing with respect to the formation and/or rescission of the Interlocal Agreement with the Town of Hammonton.

6. This Agreement is not meant to be construed as an admission of liability by Hammonton, Waterford and Folsom regarding any claim by any party to the litigation.

7. The Agreement sets forth and represents the entire agreement reached by Hammonton, Waterford and Folsom. No other agreements, promises, commitments have been reached by Hammonton, Waterford and Folsom to which Hammonton, Waterford and Folsom are bound other than those explicitly referenced herein.

8. Any modification of the terms and commitments set forth in this Agreement must be in writing and executed by authorized signatories respectively representing Hammonton, Waterford and Folsom, all acting in compliance with Federal and New Jersey statutory and regulatory law as a condition to such modification.

9. The Agreement shall be construed and interpreted in accordance with the law of the State of New Jersey. If any provision of this Agreement and Release or any portion of this Agreement and Release is declared null or void or unenforceable by any court having jurisdiction, such provision or such portion of a provision shall be considered separate and apart from the remainder of this Agreement and Release, which shall remain in full force and effect.

10. Hammonton, Waterford and Folsom agree that the Agreement has been negotiated and drafted by all parties and there shall be no construction of this Agreement that favors or disfavors any party based upon the drafting of this Agreement.

11. Hammonton, Waterford and Folsom agree to cooperate fully and to execute any and all supplementary documents and to take all actions which may be necessary or appropriate under Federal and New Jersey statutory and regulatory law to give full force and effect to the basic terms and intent of this Agreement.

12. Hammonton, Waterford and Folsom understand and agree to the terms of this Agreement. The signatories to this Agreement have full authority and have executed this release after consultation with counsel of their choosing, all pursuant to Federal and New Jersey statutory and regulatory law.

THE PARTIES HEREBY AGREE WITH THE TERMS OF THIS AGREEMENT:

FOR APPELLANT/RESPONDENT HAMMONTON
BOARD OF EDUCATION:

Joseph Girald, President Hammonton
Board of Education — DATED: 7/21/10

COOPER LEVENSON APRIL NIEDELMAN WAGENHEIM, P.A.

BY: _____ DATED: 7/22/10
William S. Donio, Esquire, Solicitor
Hammonton Board of Education

FOR RESPONDENT/PETITIONER TOWNSHIP
OF WATERFORD:

Francis J. DiRocco, President
Township of Waterford Board of Education — DATED: 7/14/10

Wade, Long, Wood & Kennedy, L.L.C.

BY: _____ DATED: 7/13/10
John D. Wade, Esquire , Solicitor
Township of Waterford Board of Education

FOR RESPONDENT/PETITIONER BOROUGH OF
FOLSOM:

BY: _____ DATED: 7/16/10
Margaret Veneziani, President Board of Education
Borough of Folsom

BY: _____ DATED: 7/16/10

William Cappuccio, Esquire, Solicitor
Borough of Folsom Board of Education

CLAC; 457984.1

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OAL DKT. NO. EDU 5346-10
AGENCY DKT. NO. 68-4/10

J.A.B., on behalf of minor child, J.A.B.,	:	
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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/10

Date of Mailing: 9/14/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05346-10

AGENCY DKT. NO. 68-4/10

J.A.B. ON BEHALF OF MINOR CHILD

J.A.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

VILLAGE OF THE TOWN OF PHILLIPSBURG,

WARREN COUNTY,

Respondent.

J.A.B., pro se petitioner

Donald E. Souders, Jr., Esq., for respondent (Florio Perrucci Steinhardt & Fader, attorneys)

Record Closed: August 9, 2010 Decided: August 11, 2010

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

On May 21, 2010, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement and Settlement Agreement and the Board's resolution.

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

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

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

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

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

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

Aug. 11, 2010
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8-13-10

Date Mailed to Parties: AUG 13 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

Donald E. Souders, Jr., Esquire
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Phillipsburg, New Jersey 08865
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Attorneys for Phillipsburg Board of Education

J.A.B. ON BEHALF OF MINOR CHILD J.A.B.,	}	**OAL Docket No. EDU-05346-2010N**
versus,	}	**Agency Reference No. 68-4/10**
TOWN OF PHILLIPSBURG B.O.E.	}	

STIPULATION OF SETTLEMENT

A Due Process Hearing was requested by the Petitioner on behalf of J.A.B. against the Phillipsburg Board of Education ("Board") to determine the appropriateness of certain discipline imposed against J.A.B., specifically a three (3) day out-of-school suspension and without there having been a formal Hearing conducted. After negotiations between the parties and the Board's counsel, Donald E. Souders, Jr., Esquire appearing for the Phillipsburg Board of Education ["PBOE"], and the parties have reached an agreement. The terms of the settlement are as follows:

a. The within matter shall and is hereby dismissed, subject to the terms set forth herein.

b. The Board shall and hereby rescinds and withdraws the three (3) day suspension imposed against J.A.B. during the 2009-2010 school year. J.A.B. student file shall be denoted accordingly.

c. Petitioner shall also take immediate steps to dismiss/withdraw any and all other pending complaints, grievances and petitions filed against the Board and any of its employees. This shall include but is not limited to the following: (a) a Petition filed with the Commissioner of Education of New Jersey pursuant to N.J.S.A. 18A:6-9 on or about April 9, 2010; (b) a letter complaint to the Department of Education dated March 29, 2010; (c) Tort Claims Notice/Notice of Claim dated March 29, 2010; (d) Revised Notice of Claim dated April 20, 2010; and (e) an "Affidavit of 3/18/10 Incident @ Phillipsburg High School" and related "Notice" dated March 21, 2010.

d. The parties shall and hereby release, dismiss and forever remise any and all claims, complaints, counterclaims and defenses which have accrued by, against and/or in favor of them at any time through the date hereof.

e. Each party shall bear their own counsel fees and costs.

f. This Agreement is effective as of the date hereof.

We hereby agree to the form and entry
of the within Stipulation of Settlement.

John Anthony Balazinski, Jr.
Petitioner/Parent
Dated: August 5, 2010

Phillipsburg Board of Education

BY: Donald E. Souders, Jr., Esquire
Attorney for PBOE
Dated: August 5, 2010

330-10

OAL DKT. NO. EDU 13094-09
AGENCY DKT. NO. 236-9/09

F.E. on behalf of minor child G.B.U., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, :

RESPONDENT. :

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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|16|10

Date of Mailing: 9|16|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13094-09
AGENCY DKT. NO. 236-9/09

F.E. ON BEHALF OF MINOR CHILD, G.B.U.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY
Respondent.

Damaris M. Solomon, Esq. for petitioner

Derlys M. Gutierrez, Esq. for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: July 15, 2010 Decided: July 29, 2010

BEFORE **KELLY J. KIRK**, ALJ:

Petitioner F.E. filed a Petition of Appeal on behalf of minor child, G.B.U., with the Commissioner of Education, challenging the residency determination made by respondent, Board of Education of the City of Clifton. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) on October 15, 2009,

where it was filed on November 9, 2009, for determination as a contested case. A hearing was held by the undersigned on December 21, 2009, and the record was left open pending receipt of pertinent documents. As a result of documents received, a telephone conference was held and an additional hearing date was scheduled for March 8, 2010. The March 8, 2010 hearing date was adjourned at the Petitioner's request, to allow recently retained counsel to review the file. The parties reached an amicable resolution of the matter prior to the hearing date and submitted the attached Stipulation of Settlement and Resolution indicating the terms thereof.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that 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 29, 2010

DATE

Kelly J Kirk

KELLY J. KIRK, ALJ

Date Received at Agency: 8-2-10

Date Mailed to Parties: AUG 2 2010

jb

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
1037 Raymond Boulevard – Suite 710
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
City of Clifton Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

F.E. o/b/o minor child, G.B.U., v. CITY OF CLIFTON BOARD OF EDUCATION,	OAL Docket No.: EDUOS 13094-~~299N~~ 09 Agency Ref. No.: 236-9/09 **STIPULATION OF SETTLEMENT**

WHEREAS, on or about March 16, 2010, an Order was entered in Superior Court of New Jersey, Chancery Division-Family Part, providing petitioner F.E. with full custody of minor child, G.B.U. (See **Exhibit "A"**)

WHEREAS, petitioner F.E accepted residential custody of G.B.U as daughter.

WHEREAS, the parties have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue further litigation; and

WHEREAS, this resolution serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW THEREFORE, the parties agree as follows:

1. Petitioner F.E. agrees to withdraw the Petition with prejudice.

2. In complete and full satisfaction of her appeal, petitioner F.S. will have full custody of G.B.U. at her Clifton, New Jersey residence.

3. Petitioner G.B.U. will attend and have full access to a free and appropriate educational setting within the City of Clifton Public schools, while residing in Clifton, New Jersey

4. Petitioner F.E. acknowledges that she has entered into this Agreement voluntarily and entirely of her own free will and that she was not subject to any duress and/or coercion. Petitioner F.E. further acknowledges that she has been advised to seek the advice of counsel in connection with the execution of this Stipulation.

5. This Agreement is subject to and contingent upon the approval of the Clifton Board of Education.

6. This Agreement is subject to and contingent upon the approval of the Administrative Law Judge and the Commissioner of Education. In the event such approval is not secured, this Agreement shall be null and void and the parties returned to their respective positions prior to the execution of this Agreement.

Adams Stern Gutierrez & Lattiboudere, LLC

Derlys M. Gutierrez, Esq.
Attorney for Respondent
Dated: 7/1/2010

Damaris M. Solomon
Attorney At Law

Damaris M. Solomon, Esq.
Attorney for Petitioners
Dated:

CLIFTON BOARD OF EDUCATION
RESOLUTION APPROVING STIPULATION OF SETTLEMENT
GBU v. CLIFTON BOARD OF EDUCATION

OAL DOCKET NO. EDUOS 13094-~~299~~09
Agency Ref. No. 236-9/09

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N.J.
LAW
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July 14, 2010

WHEREAS, in September 2009, Petitioner F.E. on behalf of the minor student G.B.U. filed a Petition of Appeal challenging the residency decision of the school district administration denying G.B.U. admission to the Clifton Public Schools; and

WHEREAS, on or about March 16, 2010, an Order was entered in Superior Court of New Jersey, Chancery Division-Family Part, providing petitioner F.E. with full custody of minor child, G.B.U.; and

WHEREAS, petitioner F.E accepted residential custody of G.B.U as daughter; and

WHEREAS, Petitioner and the Board have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue further litigation by permitting G.B.U. to attend the Clifton Public Schools since she is now a resident of the City of Clifton under the care of F.E. who is also a bona fide resident of the City of Clifton; and

WHEREAS, this settlement agreement serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW, THEREFORE, BE IT RESOLVED that the Board of Education hereby approves and authorizes the settlement of this matter; and

BE IT FURTHER RESOLVED that the Board authorizes the Superintendent, the Board Secretary and the Board Attorney to take whatever steps are necessary to effectuate the purposes of this resolution.

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
1037 Raymond Boulevard – Suite 710
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
City of Clifton Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

F.E. o/b/o minor child, G.B.U., Petitioners, v. CITY OF CLIFTON BOARD OF EDUCATION, Respondent.	OAL Docket No.: EDUOS 13094-~~299N~~ 09 Agency Ref. No.: 236-9/09 **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioners and Respondent, through their respective attorneys, that the Complaint against Respondent is hereby dismissed in its entirety with prejudice. By virtue of this stipulation, the Respondent hereby agrees to waive their rights to pursue any claim against the petitioners stemming from the within matter.

Adams Stern Gutierrez & Lattiboudere, LLC

Derlys M. Gutierrez, Esq.
Attorney for Respondent
Dated: July 1, 2010

Damaris M. Solomon
Attorney At Law

Damaris M. Solomon, Esq.
Attorney for Petitioners
Dated:

#391-10

OAL DKT. NO. EDU 3408-10
AGENCY DKT. NO. 45-3/10

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN BLEVIS,	:	COMMISSIONER OF EDUCATION
LYNDHURST SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	

The record, settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner observes that the Superintendent, Tracey Stellato, signed the settlement agreement on behalf of the Board. The settlement agreement was not signed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor does the file contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf. Therefore, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/16/10
Date of Mailing: 9/17/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 03408-10

AGENCY DKT. NO. 45-3/10

IN THE MATTER OF THE TENURE HEARING OF JOHN BLEVIS, LYNDHURST SCHOOL DISTRICT

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

Karen M. Reis, Esq., for respondent (Francis J. DeVito, P.A.)

Record Closed: August 6, 2010 Decided: August 6, 2010

BEFORE **JOANN LASALA CANDIDO,** ALJ:

This matter involves tenure charges of incapacity, conduct unbecoming and policy violations based upon John Blevis (Blevis) hostile and aggressive behavior, certified by the Lyndhurst Board of Education (Lyndhurst) against Blevis under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Blevis is a tenured teacher employed by Lyndhurst. Lyndhurst accused Blevis of deviation from normal physical and mental health, resulting in fear for the safety of students and staff. Lyndhurst requested a physical examination and psychiatric evaluation.

On or about January 11, 2010, Lyndhurst 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 24, 2010 for a hearing as a contested case.

After numerous discussions pertaining to the OAL matter, the parties agreed to have an independent psychiatric evaluation to determine Blevis' fitness. The parties have agreed and have prepared a Preface and Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein, as approved by the Superintendent, Tracey Stellato.

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. Blevis has been employed as a teacher in the Lyndhurst school system since 1986.

2. The nature of the charges has been documented by the submission of a Statement of Charges.

3. It is anticipated that the hearing in this matter would be protracted and costly.

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 against an employee who has forfeited his custodial position and who is barred from obtaining public employment in the future.

5. Under the proposed settlement, Blevis will be paid back pay and benefits if determined to be fit for duty with a credit to Lyndhurst of any earnings to Blevis during his suspension earned during regular school hours.

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
7. 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 preface and settlement fully disposes of all issues in controversy.
10. The proposed settlement agreement is with the consent of all parties.
11. By the terms of the proposed settlement agreement, the charged party has entered into this agreement with a full understanding of his rights.

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.

August 6, 2010
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: August 6 2010

Date Mailed to Parties: AUG 9 2010
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

PREFACE

WHEREAS, **Petitioner**, Lyndhurst Board of Education ("Board"), filed tenure charges against **Respondent,** teaching staff member, John Blevis, under AGENCY DKT. NO.:45-3/10 on or about January 11, 2010; and

WHEREAS, Respondent, John Blevis filed an answer to those charges and is prepared to vigorously defend the same; and

WHEREAS, the parties recognize the substantial expense associated with bringing the matter to trial, including the cost of production of lay and expert witnesses, counsel fees, document production and the lost productivity of administration and staff. The parties also recognize the unpredictability of litigation, the likelihood of appeals and costs in terms of time, resources and expense of this endeavor; and

WHEREAS, the parties have come to an agreement that addresses the principal concerns of the Petitioner in bringing the charges and provides the Respondent of a means to address these issues without the expense in time and resources described above; and

WHEREAS, the parties are also involved in a civil action pending in the United States District Court filed on or about October 10, 2006 and served on Petitioner on or about November 28, 2006 in which Respondent is the Plaintiff and Petitioner is a Defendant arising out of the same facts and circumstances described in the charges which also is diverting the parties time, effort and resources from the business of education;

As a result of the foregoing, Petitioner and Respondent have reached a global resolution of all the matters in difference for the following reasons:

1. Petitioner's principal concern in bringing the subject charges was the Respondent's fitness to teach in the District;
2. The parties have agreed on a plan that includes the selection of and examination by an independent forensic psychiatrist, that will assure Respondent's fitness for work before re-entering the classroom thus alleviating Petitioner's principal concern;
3. By way of background, Respondent is a tenured science teacher in petitioner's employ, and, has been so employed since 1986.
4. There have been no previous proceedings involving the Respondent, in his entire tenure with the district, regarding either his performance or conduct prior to the initiation of these charges. There have never been any disciplinary charges or performance related increment withholding proceedings initiated against him.
5. There is a civil action pending in the United States District Court in which Respondent is the Plaintiff and Petitioner is a Defendant arising out of the same facts and circumstances described in the charges. In said action, Petitioner is charged with various civil violations of Respondents rights and there are claims for money damages. The defense of this action and the uncertainty of the result have also led the parties to reach a global settlement in the best interests of Petitioner, respondent and the public.
6. As a result of all of the above, Petitioner and Respondent have reached the following agreement.

SETTLEMENT AGREEMENT

This settlement Agreement and Release ("Agreement") is made this 22nd day of July 2010 by and between John Blevis ("Blevis") and the Lyndhurst Board of Education ("Board"),

WHEREAS, Blevis and the Board have been engaged in civil litigation in the United States District Court (Civil Action No. 06-4857), in which Blevis was a Plaintiff and the Board is a Defendant and in administrative proceedings before the Commissioner of Education of New Jersey under AGENCY DKT. NO.:45-3/10 and in which the Board is the Petitioner and Blevis was the respondent; and

WHEREAS, the parties desire to make a full and final settlement of all of the claims, defenses and issues between them and to suspend and forever withdraw their claims between them and against each other in their mutual interest; and

WHEREAS, the parties declare that the settlement and withdrawal of all of the claims between them, as contemplated by this agreement, does not constitute an admission of liability, wrongdoing, guilt, malfeasance or nonfeasance by any party to this agreement and is made for the sole purpose of terminating all proceedings.

NOW WHEREFORE, in consideration of the promises, agreements, undertakings and representations contained herein, the receipt and sufficiency of which the parties acknowledge, the parties hereto, covenant and agree to be legally bound as follows:

1. Counsel for the parties, with the consent of their clients, have selected an independent psychiatrist with appropriate credentials to perform a forensic "fitness for duty" examination for Mr. Blevis and provide a report setting forth his findings to

the parties. The selected physician has no connection with any party, doctor or attorney in this or the federal litigation and is deemed to be truly independent.

2. Each party will pay for one half (1/2) of the fee charged by the psychiatrist for his services so there is no issue as to the allegiance of the doctor. Counsel for the parties have collectively reviewed the Curriculum Vitae and credentials of a number of qualified psychiatrists and selected a physician from among those deemed to be qualified for this engagement.

3. Counsel for the respective parties have contacted the selected psychiatrist and confirmed his willingness and availability to perform an exam and issue a report with reasonable promptness. Mr. Blevis has contacted the selected physician and made an appointment for the examination and report contemplated by this agreement.

4. All communications with the selected physician shall be made jointly by counsel for the respective parties. (Except that Mr. Blevis or counsel may contact the physician for the purpose of arranging and attending the examination)

5. The examination will be completed in 1 day with the expectation that a report be submitted shortly thereafter.

6. The parties have notified the independent psychiatrist, that the examination contemplated by this agreement, be completed in one day and that Mr. Blevis will make himself available for the entire day as may be required by the physician. The selected psychiatrist has been contacted by the parties and he has agreed to this procedure.

7. The physician will be provided with the reports of Dr. Head (11/10/2008,11/25/2008 &1/6/2010 reports), Dr. Sostowski (undated) and Dr. Gallina, (12/3/2009) for use in the examination and report process in such fashion as said

physician shall determine. If additional records are requested by the doctor, the parties shall confer and determine which documents shall be submitted with the intention of presenting a fair and balanced record for the physician's use. It is preferable that the doctor could reach his determination without outside influence.

8. Upon Mr. Blevis submitting to the subject examination, the Board agrees to withdraw the pending administrative tenure charges against the Respondent with the consent of the Administrative Law Judge to whom the matter is assigned. Upon approval of this settlement by the Commissioner of Education, Mr. Blevis will dismiss the pending Federal law suit without receipt of any payment. The parties will notify the federal court judge of the pending settlement with the expectation that the trial will be deferred until the Commissioner of Education acts. In any event, Blevis agrees not to seek any compensation in the federal court action if the settlement is ultimately approved by the Commissioner or the parties are otherwise satisfied with the resolution of the matter. The parties shall execute such additional documents as may be necessary to effectuate the intentions of this paragraph. The parties understand that should the Commissioner of Education not approve this agreement, the administrative tenure charges and federal court action will be reinstated.

9. If the results of the referenced examination establish that Mr. Blevis is "fit to teach", he will be immediately reinstated to a position with the Petitioner (Lyndhurst Board of Education) with back pay and benefits (pension contributions, sick and personal days, etc.) and be assigned to a teaching position within the scope of his certifications effective September, 2010. In calculating back pay, the Board will be credited with the

amount of any earnings by Blevis during his suspension period earned during regular school hours.

10. If the subject examination and report results in a finding that Mr. Blevis is currently unfit, Mr. Blevis will be granted the two year statutory period from the date of the determination to prove his fitness to work. Upon establishing, his fitness, by certification of an independent professional, or such other person upon whom the parties mutually agree, Mr. Blevis will be reinstated. During the leave period, while Mr. Blevis is receiving professional assistance, he may use his accumulated sick leave and accrue sick leave as provided in the collective negotiations agreement between the Lyndhurst Education Association and Board policy and remain as an active employee of the Board. If counseling or other professional assistance is required either while working or in advance of reinstatement, Mr. Blevis will follow that direction. Mr. Blevis shall retain his contractual health insurance benefits during any recuperative period.

11. Upon completion of the requirements of paragraphs 8 and 9, Mr. Blevis personnel file will be purged of all objectionable material as permitted by law.

12. The parties mutually agree that their shall be no retaliation by any party against the other as the result of initiating the proceedings set forth in this agreement or as the result of entering into this agreement. The parties agree to refrain from disparaging each other either orally or in writing as the consequence of anything that has arisen in the underlying litigation described herein or based upon the facts or assertions set forth therein or upon which said actions were based.

13. Applicable Law. Any dispute about this Agreement that cannot be resolved by agreement shall be decided under the terms of the general contract law of the State of New Jersey.

14. Promises of Confidentiality. Blevis, the Board agree and will instruct their individual agents, servants, employees and representatives not to divulge the contents of this Agreement. Blevis and the Board agree not to publically disseminate the matters raised in this agreement, the civil action and the administrative charges before the Commissioner, including those set forth in the administration's statement dated January 12, 2010, that are the subject hereof, the facts surrounding the same and the terms of this Agreement is of essence of this Agreement. Blevis and Board agree to be bound by the confidentiality provisions of this Agreement. This confidentiality provision shall survive, and be given full force and effect separately from any invalid, unenforceable or inoperative provision of this Agreement.

Neither Blevis nor the Board, publicly or privately, shall characterize the settlement of these matters as either a victory or a defeat. The parties, shall only state that the matters in difference were settled to the mutual satisfaction of the parties.

Blevis and the Board represent and warrant that they have not disclosed or disseminate and will not disclose or disseminate to any person or entity the terms or conditions of this Agreement, nor shall Blevis or the Board disclose or disseminate the facts surrounding the same except that disclosure is permitted:

(1) as necessary with regard to any proceeding for the enforcement of this Agreement,

(2) as may be required by a court order from any court of competent jurisdiction; and

(3) As may be required by law. It shall not be considered a breach of the obligation of confidentiality for Blevis to make disclosure of the terms of this Agreement to his spouse or counsel or to make disclosure of the terms of this Agreement and the underlying events of this Agreement in order to obtain private and confidential professional advice, or to respond to any inquiry from any governmental entity or agency.

15. Non-Retaliation/Non-Disparagement. The parties agree that they shall refrain from retaliating against any other party as the result of the participation in any civil or administrative action or because of the prosecution or defense of any claims in any of the proceedings described in this agreement.

In addition, the parties agree that they will not publicly, orally, in writing or through electronic or other media, make any disparaging remarks, statements or innuendo about any other party either by inclusion or omission in any publication. Neither party will make any statement to the press or public. If asked by the press or public about any of the matters addressed in this agreement, the parties shall respond only that all civil and administrative actions have been dismissed or withdrawn

16. Entire Agreement. The parties hereby acknowledge that no promises or inducement which is not herein expressed has been made, and in executing this Agreement. This Agreement contains the sole and the entire agreement between the parties, and completely and fully supersedes and replaces any and all prior contracts, agreements, discussions, representations, negotiations, understandings and any other communications between the parties pertaining to the subject matter hereof, the parties represent and acknowledge, in executing this Agreement, that they have not relied upon any representation or statement not set forth in this Agreement made by either party 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.

17. Accord and Satisfaction. This Agreement reflects a compromise and settlement of disputed claims in complete accord and satisfaction thereof. Neither the execution of the Agreement or performance of its terms and conditions shall be considered by any party or by any other person as an admission of liability or non-liability of any of the parties. The parties state that each of them has carefully read this Agreement and the attached Releases and that they have been fully explained to each by his/their attorneys, and that each fully understands that upon execution and performance of the covenants herein, are final and binding. The parties agree that they are bound by this Agreement.

18. Attorneys' Fees and Costs. Each party agrees to be responsible for their own attorney's fees and costs associated with this matter.

19. The parties represent that they are fully authorized to execute this agreement and that all formalities attendant to the execution of this agreement have been satisfied.

20. This agreement may be executed in counterparts, which when taken together, will constitute a completely and properly executed document.

21. If any provision, paragraph, or clause in this agreement is found to be void or illegal, the remainder of the agreement shall remain in full force and effect. Notwithstanding this provision, the cessation of all administrative proceedings against Blevis and the withdrawal of litigation against the Board are of the essence of this agreement and without which this agreement cannot stand.

The undersigned warrant and represent that they are duly authorized to sign this Agreement, and by doing so, said Agreement has been carefully read, and that the foregoing Agreement is binding on all parties.

JOHN BLEVIS

STATE OF NEW JERSEY :
: SS :
COUNTY OF BERGEN:

I CERTIFY that on July 26, 2010, John Blevis personally came before me and acknowledged under oath, to my satisfaction, that he is named in and personally signed this document.

Alfred F. Maurice
Attorney At Law of N.J.

LYNDHURST BOARD OF EDUCATION

By: Tracey Stellato

STATE OF NEW JERSEY :
:SS:
COUNTY OF :

I CERTIFY that on July 22, 2010, Tracey Stellato personally came before me and acknowledged under oath, to my satisfaction, that he/she is named in and personally signed this document.

Valerie M. Troncone

VALERIE M. TRONCONE
A Notary Public of New Jersey
My Commission Expires Nov. 17, 2014

#392-10R

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 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 charges were stayed pending disposition of a related matter in Superior Court. 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 matter was heard in the OAL in 2007, and the ALJ found that the Board had substantiated its charges. The Commissioner rejected the initial decision, finding that the record did not demonstrate that the Board had satisfied the regulatory requisites for the bringing of inefficiency charges; the Commissioner therefore dismissed these charges and remanded the matter for further factual finding and penalty recommendation on the remaining charges. Pursuant to a motion for reconsideration, the Commissioner ruled that additional testimony and factual findings would be allowed with respect to the Board's motion claim that in actuality it had satisfied the requisites for an inefficiency charge.

On remand, subsequent to receipt of additional testimony and evidence, the ALJ found, *inter alia,* that: on the charge of inefficiency, the Board complied with the requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6A:3-5.1c by providing the respondent with a 90-day remediation period and a modified professional improvement plan, however, respondent failed to correct her inefficiencies and avail herself of the assistance offered to her; on the charge of conduct unbecoming, the Board met its burden to prove that the respondent engaged in conduct unbecoming a public employee that was sufficiently flagrant to warrant her dismissal; respondent failed to follow administrative directives on numerous occasions, failed to timely file required documents, failed to attend counseling sessions, failed to respond to parent complaints, and failed to attend meetings of the child study team – all of which constitute insubordination; and respondent either refused to or was incapable of performing her duties as a social worker, which resulted in serious consequences that put the District out of compliance with the timelines and requirements of the Special Education Code. Accordingly, the ALJ ordered that the respondent be dismissed from her tenured position.

Upon a thorough and independent review of the record, the Acting Commissioner concurred with the ALJ that the Board has sustained its charges against respondent, thereby warranting her termination from tenured employment. Accordingly, the Acting Commissioner adopted the Initial Decision as the final decision in this matter, and terminated respondent as of the date of this decision. The matter was transmitted to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

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

September 16, 2010

#392-10

OAL DKT. NO. EDU 9654-08
(EDU 5793-03 ON REMAND)
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 remanded matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon contemplative consideration of this matter – which included transcripts of the hearing on remand conducted on April 8, April 21 and April 23, 2009 – the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons comprehensively detailed in her decision, that the District has sustained its charges of Inefficiency, Unbecoming Conduct and Insubordination against respondent, warranting her termination from her tenured position.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent is hereby terminated from her tenured social worker position in the Butler School District as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/16/10
Date of Mailing: 9/17/10

[1] 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 09654-08
AGENCY DKT. NO. 152-5/03

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,
Petitioner,
v.
MARIA PARISE,
Respondent.

ON REMAND
OAL DKT. NO. EDU 05793-03

James F. Schwerin, Esq., for petitioner, Board of Education of the Borough of Butler, Morris County (Parker, McCay and Criscuolo, attorneys)

Nancy I. Oxfeld, Esq., for respondent, Maria Parise (Oxfeld Cohen, attorneys)

Record Closed: September 3, 2009 Decided: August 13, 2010

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On March 26, 2008, the undersigned issued an Initial Decision, Board of Education of the Borough of Butler, Morris County v. Maria Parise, OAL Docket Number EDU 5793-03, sustaining the tenure charges filed by The Butler Board of Education (Board or District) that resulted in the removal of Maria Parise (Parise or respondent) a

tenured school social worker. The Initial Decision concluded that the District had presented sufficient evidence to sustain all the tenure charges of 1) conduct unbecoming; 2) insubordination; and 3) incompetence. Further, it was concluded 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).

On August 7, 2008, the Commissioner rejected the Initial Decision and issued a Summary Final Decision that dismissed the inefficiency charge on the basis that the Board had failed to comply with statutory requirements of N.J.S.A. 18A:6-11 and the regulatory requirements of N.J.A.C. 6A:3-5.1(c); collapsed the incompetence charge into the charge of inefficiency; and remanded for further fact-finding, the remaining charges of conduct unbecoming and insubordination.[1]

Thereafter, petitioner moved for reconsideration of the Summary Final Decision. On September 29, 2008, the Commissioner vacated dismissal of the inefficiency charges (and by extension, the incompetence charge) and remanded the matter to the Office of Administrative Law (OAL) for further findings and conclusions of law on " . . . the Board's compliance with the applicable procedural requisites of its inefficiency charges . . . in addition to considering the remaining charges as directed in . . . [the] August 7, 2008, decision." (Comm'r's Decision, p. 3 (September 29, 2008).)

Pursuant to the Commissioner's Decision, remand hearings in the instant matter (OAL Docket Number EDU 0593-03) were held on April 8, 21 and 23, 2009. By letters dated February 27 and March 4, 2009, the parties stipulated that no additional testimony was needed on the issues of insubordination and conduct unbecoming. On or about March 6, 2009 an Order was issued by the undersigned directing the parties to file Proposed Findings of Fact and Conclusions of Law on the Charges of insubordination and Conduct Unbecoming. Consistent with the Order, filings were made by the parties on March 20, 2009. The remand hearings were held exclusively on

[1] The precise wording of the Commissioner's August 7, 2008, Final Decision is as follows:

> "Accordingly the Initial Decision of the OAL is rejected. The charges of inefficiency are hereby dismissed, and this matter is remanded to the OAL for further fact-finding and a recommended penalty determination on the charges of conduct unbecoming and insubordination."

the charge of inefficiency. After receipt of post-hearing submissions, the record closed September 3, 2009. Due to a voluminous caseload, the time for the issuance of this Initial Decision was extended to July 19, 2010.

The Charges of Inefficiency as set forth in the tenure charges allege that Parise:

1. Failed to complete required documents in a timely Manner
2. Failed to coordinate with other members of the Child Study Team;
3. Failed to properly classify;
4. Failed in her dealing with parents;
5. Ignored transportation needs for her students; and
6. Failed in her case management.

GENERAL FINDINGS

I **FIND** the following facts to be undisputed, thus they are adopted as the **FACTS** herein:

1. Maria Parise (respondent) was employed by the respondent, Butler Board of Education (the Board or District) as a full-time school social worker. Parise commenced her employment with the District in 1989 and was granted tenure in 1992.[2]

2. She was also a member of the District's Child Study Team (CST) at the schools where she was assigned.

[2] The employment history of petitioner's tenure with the District was set forth in my previous Initial Decision as was the full Procedural History, as well as testimony of the District Superintendent James Smith, The Director Special Services Kathy Gordon, the Principal of the Richard Butler School Andrea Vladichak, Social Worker Iris Stock, Learning Consultant Judith Rivers and Deborah Priestner, secretary for the Special Services Department. Their testimony and the exhibits entered into evidence in that docket will not be repeated in their entirety herein but is incorporated by reference as if it were fully set forth herein. The exhibits from the previous docket is designated with a "P" while the exhibits in this remand matter are referred to as "PR" for petitioner's remand exhibits and "RR" for respondent's remand exhibits.

3. Dr. James Smith (Dr. Smith or Smith) was the District's Superintendent of Schools from 1997 until 2005, when he retired.

4. Dr. Smith filed tenure charges against Maria Parise in December of 2002.

5. Smith agrees that where one is charged with inefficiency, an individual has a ninety-day remediation period in which to improve.

6. Smith met with the Parise's supervisor, Kathy Gordon the Director of Special Services and Andrea Vladichak, the principal of the Richard Butler School ("RBS) where Parise was assigned. He directed them to evaluate her in certain areas and to prepare a modified Professional Improvement Plan (PIP) so that Parise would have an opportunity to improve the affected areas within the ninety-day period.

7. Smith left it to them to develop modified PIP and to meet with Parise. (PR -2.) Thereafter, he received letters and memos from Gordon which provided that things were not going well. (PR-5, PR-14, PR-38.)

8. In April of 2003, he again met with Gordon and Vladichak and received a final report, which was a summary of what Parise had not accomplished. (P-38; RR-3.)

9. Smith recalled being personally involved in the remediation period, specifically when he was advised that Parise was leaving the school building without informing a superior about her whereabouts. He sent Parise a memorandum about the incident and when he did not receive a response, he sent her a second memorandum.[3] (T1 11:16 to T1 12:7.)

[3] "T1" refers to transcript dated April 8, 2009.

10. On April 3, 2003, Smith advised the Butler Board of Education that in accordance with the "law" Parise was given a modified PIP and a ninety-day period to correct address and remediate the charges of inefficiency. However, Parise failed to correct any of the inefficiencies charges. (RR-2.)

11. Respondent's original PIP is dated September 10, 2002. It consists of five (5) pages and has observations and recommendations in the following areas: record keeping, school procedures and personal attributes. Respondent refused to sign the original PIP. (P-56.)

12. Smith admitted that while the tenure charges allege that Parise failed to secure transportation for her students, there was nothing in the Final report to support the charge. (RR-3.)

13. He could not recall whether the incident regarding the transportation charge preceded the ninety-day remediation period.

Inefficiency

Parise was cited for inappropriate classifications of her students, attendance issues, as well as failure to communicate and get along with other staff members. There was also an allegation that Parise submitted a false report about her whereabouts.

Based on the record, I **FIND** following the **FACTS** on the Count of Inefficiency:

1. The January 2, 2003, PIP consisted of two areas: Record Keeping and Reports and Professional Staff Procedures. (PR-3.)

2. With respect to record keeping and reports, the PIP directed Parise to meet weekly with the director of special services for purposes of reviewing

and refining her Individualized Educational Plan reports (IEP's). One of the objectives in the PIP was "avoid omissions and discrepancies" in Parise's IEPs. (PR-3.) In this regard, Gordon testified that Parise's IEPs were devoid of goals and objectives; devoid of supportive documentation to justify a classification proposed in the IEP; and contained conflicting dates and programs.

3. The PIP required that Parise submit a weekly tracking chart on Fridays of each week to the Principal to help her maintain accurate records for the timely completion of student reviews and reevaluations. After submission of the weekly report, respondent was to meet on Monday mornings with the director of special services to review the chart. (PR-3.) The first meeting took place on January 13, 2003, thereafter, meetings were held on January15, 21, 29, February 10, 19, and 24, and then March 12, 17, 24 and 31, 2003.

4. The PIP also required Parise to coordinate all social educational and psychological summaries with each IEP. (PR-3.)

5. The PIP required Parise to comply with the deadlines as set forth in the State Special Education Code. N.J.A.C. 6A:14-1.1 to -10.2.

6. With respect to professional staff procedures, the PIP set forth nineteen areas of needed improvement. It required Parise to:
   (a) Be familiar with classification criteria for inclusion in her IEP's or social assessment.
   (b) Be familiar with classification categories as set forth in Title 6A of the Administrative Code.
   (c) Conduct eligibility meetings with the parents.
   (d) Be familiar with State requirements for the mainstreaming of students and extended school year programs.
   (e) Complete student transportation forms in a timely fashion for students who were being bused to out of district placements.

(f) Sign-in/Sign-out in the presence of the building Principal and notify the Principal of any in changes in her location during the day.

(g) Revise IEP's during the school year to reflect changes in student programs.

(h) Review IEPs with teachers and meet with them on request.

(i) Communicate daily with other CST members.

(j) Be familiar with her case files and obtain teacher input before parent conferences.

(k) Obtain prior permission from Director of Special Services for an extension of time to complete/submit IEP's.

(l) Attend District and internal building CST meetings.

(m) Follow the chain of command for communicating with the District superintendent.

(n) Refrain from writing personal memorandums during the scheduled work day.[4]

7. In addition to weekly meetings with Gordon and Vladichak, the PIP provided respondent with assistance by offering her computer courses to enhance her "technology skills"; workshops to enhance her organizational and time management skills; and provided five (5) sessions of psychological/social skills counseling to address her interpersonal and problem solving skills. (PR-3.)

8. The PIP had a review date of April 2, 2003, ninety days from its inception date. (PR-3.)

9. On January 29, 2003, Gordon advised Parise that her student, T.B. was due for reevaluation in October 2002 and that an appointment needed to be scheduled. (PR-4.) The memorandum also referred to numerous other reports that were late or other appointments that needed to be

[4] This is not exhaustive but represents a significant portion of the items contained in PR-3.

scheduled. Specifically, PR-4 noted that students J.S., L.B., S.G. and J.Z. were all due for an appointment, annual review and or completion of an IEP. Deadlines were set forth in the memorandum. (PR-4.)[5]

10. On February 21, 2003, Gordon advised Parise that her IEP revisions contained shortcoming and omissions. (PR-5.) For example, PR-5 notes that the IEPS for students T.B., A.B., L.C., A.C., E.E., K.H., J.G. and S.M. were missing schedules, meeting dates, parental signatures and effective dates. In order to meet the regulatory deadline as set forth in Special Education Code, N.J.A.C. 6A:14-1.1 to -10.2, other CST members were required to provide the missing information.

11. PR-5 also noted that IEP revisions were missing for students, S.M., D.S. and J.Z.

13. As part of PIP, Gordon referred respondent to New Bridge Healthcare Services (NBH) for assistance in developing time and organizational strategies. (PR-1, PR-2.) Gordon made the referral on January 3, 2003, and spoke to Parise about the referral at their PIP meeting on January 13 and again on January 15, 2003. (PR-6.)

14. Parise refused the referral to NBH, instead she related that she would use her own counselor. In an effort to monitor Parise, Gordon requested that she sign a Release of Information Form to allow her to get confidential reports from her counselor. (PR-6.)

15. On January 21, 2003, Parise was still having trouble completing her revised IEPs in a timely fashion, thus Gordon advised her again to seek assistance from NBH to help her develop organizational skills. (PR-8.)

[5] Respondent asserts that if it is true that most of these items predate the PIP. However, this contention is rejected as the modified PIP dealt with late IEP reports that needed to be completed, thus they are relevant to the ninety-day remediation period.

16. On January 21, 2003, Parise was still exhibiting difficulties with classifying at least one of her students, J.Z. (PR-9.) Further, Gordon advised Parise that the revised IEPs that she had submitted were not in fact revised at all while others had been previously revised and were already in the file. (PR-8.)

17. Parise asked to videotape their weekly meetings. Gordon advised Parise that her request to videotape their weekly sessions was not approved by the Board's attorney. (PR-7.)

18. On January 23, 2003, Gordon's memorandum to Parise advised her that since she was no longer providing a weekly schedule in accordance with her PIP, she (Gordon) would create a weekly schedule for her to follow. Further, Gordon advised Parise that her failure to attend New Bridge Counseling required Gordon develop a timeline for Parise to submit delinquent assignments. Gordon included a schedule in the memorandum. (PR-10.)

19. On January 23, Gordon's memo to Parise admonished her for failure to follow-up with a parent about her concerns with her child J.S.'s IEP. Gordon set a deadline for Parise to meet with J.S.'s parent. (PR-11.)

20. On January 30, 2003, Gordon advised Parise that her refusal to attend workshop/counseling sessions at NBH to help her develop organization and interpersonal skills results in a perpetuation of IEP inaccuracies and non-compliance issues. (PR-13.)

21. On February 5, 2003, Gordon again admonished Parise about omissions and revisions to her student's IEPs. Attached to this memorandum was a three-page chronology of flawed IEPs and missing evaluations (PR-15). For example, for the month of January 2003, student J.P. was due for annual evaluation in January and a reevaluation in February. As of February 3, no meetings were scheduled. Likewise, for student, W.H. an

annual review was scheduled but Parise was absent on that date and she failed to reschedule the meeting. G.S. was also due for an annual review; however, there was no correspondence about the meeting nor was there a typed IEP. M.C. was scheduled for reevaluation planning meeting, however Parise left the building on the day of the meeting, thus cancelling the scheduled meeting. A parent also requested CST testing for her child and Parise failed to contact the parent. (PR-15.)

22. On February 4, 2003, Gordon removed a student, C.S., from Parise's caseload after receiving a parental complaint about Parise's failure to schedule an appointment with the parent. (PR-16.) The parent had called Parise four times requesting an appointment with her.

23. On February 10, 2003, Gordon advised Parise that her coworker, Amy DeMarco, had failed to receive three (3) IEPs for students on Parise's caseload, thus DeMarco was unable to make any modifications to their classification assignments. (P-17.)

24. In a February 18, 2003, memorandum, Gordon advised Parise that she agreed with the recommendation of two CST members to declassify T.B. where test results and the student's classroom performance did not justify his being classified. (P-19.) Gordon advised Parise if she disagreed with the two CST members she needed to support her recommendation for classification with information related to the student's academic performance.

25. Gordon notified Parise that her PIP required her to improve her management skills, thus she recommended a two-day workshop dealing with case management at Rutgers University on June 19, 2003. (PR-20.)

26. Gordon's February 27, 2003, memo continues to admonish Parise about IEP revisions for students, P.D., E.E., S.M., and J.Z. (P-21). On that same date, a separate memo from Gordon advised Parise that teacher Amy

DeMarco was still waiting for the goals and objectives for the three students in her classroom. (P-17; PR-22.) A second teacher was also waiting for an updated IEP. Gordon advised Parise that her refusal to comply with the teachers requests was a violation of the Special Education Code as it put IEP's out of compliance with statutory and regulatory deadlines. Gordon further advised Parise that her refusal to comply with these administrative requests was insubordinate. (PR-22.)

27. On March 3, 2003, Gordon questioned Parise's management decision on scheduling students for evaluations that were not due until months later while ignoring past due evaluations. Further, Gordon noted the absence of any math goals and objectives in student B.G.'s IEP. (PR-25.)

28. On March 5 Parise and Gordon met with T.B.'s mother regarding his classification. Despite the conclusions in Judith Rivers's educational evaluation and the CST that T.B. should not be classified based on his test results and classroom performance, Parise publicly disputed Gordon during the meeting and gave the parent information to file a Due Process claim. Further, while in the meeting Parise ignored Gordon's (her supervisor) recommendation, as well as the CST and the educational consultant recommendation against classification. When Gordon asked her to justify her recommendation, Parise failed to answer but insisted that Gordon should be creative. Such conduct caused the CST team to look disorganized and inconsistent in the presence of the parent. Further, Gordon looked out-of-control as the director of special services. (PR-26.)

29. In March 2003, Parise was still omitting essential information from revised IEPs, such as parental signatures from the IEPs. (PR-28, PR-31.) Further, she was still not familiar with her caseload. For example, Parise conducted a meeting with a parent about out-of-district placement and identified herself as the case manager when in fact the student was assigned to another CST member. (PR-29, PR-29(a), PR-29(b).)

30. On March 7, 2003, a parent sent a letter to Gordon complaining about Parise's interview at her home which she found to be too long, from 9:15 a.m. to 12:00 noon. The parent stated that Parise was proceeding at an "unusually slow pace." Further, the parent complained that Parise called her several times before the meeting seeking directions to her home. When she arrived, the parent observed Parise driving on the wrong side of the street. (PR-30.) The parent concluded in her letter that Parise "was not sharp enough to occupy a position like this." (PR-30.)

31. Parise would conduct planning meetings without notifying or involving the appropriate CST members, thus necessitating more than one meeting (PR-32, PR-32A.) During a staffing meeting regarding for J.H.'s program, Parise was unprepared, thus wasting her colleague's time. (PR-33.)

32. Parise acted in direct contravention to the District's suicide prevention policy and her actions regarding A.K.'s suicidal ideation, thus necessitating that Gordon remove A.K. from her caseload. (PR-34.)

33. Parise refused to talk to her CST team but elected to write them numerous memorandum. Further, Parise was abusive and abrasive with other CST members (PR-67, PR-38, P-72, P-75, P-76).

34. PR-45, PR-46, PR-50, and PR-52 are notes from meetings with CST members and/or Gordon. They reflect the acrimonious nature of the meeting. Further, they reflect past due revisions for IEPs and Gordon's attempts to schedule daily activities for Parise.

35. On January 10 and 21, 2003, Vladichak wrote memos to Parise reminding her of her obligation to sign in and out of RSB when she arrived at the building and at any time that she left the building. Despite these reminders, Parise refused to adhere to the time requirements set forth in her PIP. (PR-55, 56, 57, 58, PR-63.)

36. Parise signed out to go to the Windsor School when she actually went to a medical clinic. (P-14.)

37. Parise continued to manifest time-management issues, such as missing evaluation conferences with parents (PR-60); and missing parent conference meetings due to her frequent absences (PR-59, PR-60, PR-62, PR-61, PR-46; P-70, P-71, P-78, P-82.)

38. Due to the numerous delinquent IEPs the District had to contract with the Morris County Educational Service Commission to prepare the delinquent reevaluations. (PR-23.)

39. Parise held an IEP meeting with only her and the parent being present in violation of Special Education Code. (PR-32, PR-32(a).)

40. Deborah Priestner (Priestner) has been employed by the Butler BOE as a secretary in the Special Services Department for seven years. She is responsible for reviewing special education documents for classified students to make sure they are completed, and if they are not, she contacts the individual CST member.

41. Priestner related that 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.)

42. Her attempts to assist Parise in learning how to properly revise an IEP were rejected. (P-85.)

43. Judith Rivers (Rivers) has been employed by the Butler BOE as a Learning Consultant for sixteen years and is part of the CST with Parise. Rivers was assigned to many of the respondent's cases that were overdue, incomplete, incorrect, or missing necessary documents. (P-95 to

P-106.) She was aware that the incomplete IEPs left the District open to litigation.

44. 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.)

45. Parise also refused to communicate directly with her. Indeed, Rivers recalled one incident where she called Parise regarding a student's case, and Parise hung up on her. (P-107.)

46. Iris Stock (Stock) has been employed by the Butler BOE as a social worker for fifteen 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.

47. Stock 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.)

48. Stock was forced to request outside help with completing Parise's files. (P-116.)

49. Stock concludes that the respondent barely did any work while she was at Aaron Decker School, the District's elementary school.

DISCUSSION ON INEFFICIENCY

The Legislature has imposed a number of obligations on a local Board of Education that seeks to remove a tenured employee on grounds of inefficiency in this State. N.J.A.C. 6A:3-5.1(c) provides that:[6]

> (c) In the event that the tenure charges are charges of inefficiency, . . . the following procedures and timelines shall be observed:
>
> 1. Initial charges of inefficiency shall be stated with specificity as to the nature of the inefficiency alleged and filed by the appropriate administrator with the secretary of the district board of education or the State district superintendent along with a statement of evidence in support thereof executed under oath . . . .
>
> . . .
>
> 3. The district board of education, through its board secretary, or the State district superintendent shall direct that the employee be informed in writing that, unless such inefficiencies are corrected within the minimal 90-day period, or any longer period provided by the district board of education . . . , the district board of education or the State district superintendent

[6] The enabling statute N.J.S.A.18A:6-11 to N.J.A.C. 6A:3-5.1(c) provides that:

> 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.

> intends to certify charges of inefficiency to the Commissioner pursuant to N.J.S.A. 18A: 6-11
>
> . . .
>
> 4. 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 or -4.4, to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction.
>
> 5. Upon completion of the minimal 90-day period for improvement, or such longer period as may be provided by the district board of education or the State district superintendent, the administrator(s) responsible for bringing such charges to the attention of the district board of education or the State district superintendent shall notify the district board of education or the State district superintendent in writing of what charges, if any, have not been corrected.
>
> . . .
>
> 6. The district board of education or the State district superintendent, upon receipt of the written notification or upon the district board's determination in the case of a chief school administrator, shall notify the affected employee in writing that all of the inefficiencies have been corrected or, in the alternative, which of the inefficiencies have not been corrected. The time from the expiration of the minimal 90-day period, or such longer period as may be provided by the district board of education or the State district superintendent, to the notification of the employee by the district board of education or the State district superintendent shall not exceed 30 calendar days . . . .

The parameters of the regulation and the statute was reviewed by the Appellate Division in Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65 (App. Div. 1985), and it was held that:

> [t]he Commissioner of Education has consistently construed the statutory mandate in the light of this guideline, concluding that "if a board chooses to file tenure charges of inefficiency against any teacher, **the administration bears the heavy responsibility to render positive assistance** to the teacher in an effort to overcome his inefficiencies."
>
> . . .
>
> . . . [u]nder N.J.S.A. 18A:6-11, a local board of education is duty bound to assist a tenured teaching staff member, against whom it has filed charges of inefficiency, in improving his teaching performance before removing him from his teaching position. The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he is still capable of effective teaching. He can only avail himself of that opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills.
>
> [Id. at 71 (citations omitted) (emphasis added).]

Thus, the only question herein is whether the District offered Parise "constructive advice" and "meaningful assistance." The record indicates that a multitude of memos detailing Parise's shortcomings and failures. These memorandums reiterate the tasks she needed to complete. The burden of proof is on the Board to prove its case by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

FINDINGS AND CONCLUSIONS

On the Charge of Inefficiency, I **FIND** that the District provided respondent with a Professional Improvement Plan (PIP) on January 2, 2003. The PIP set forth a ninety-day remediation period. It provided the respondent with counseling and professional service from the New Bridge Mental Health Facility to assist her with organizational strategies for the management of her caseload.

I **FIND** that the PIP set forth guidelines and deadlines for the submission of social histories, IEPs, parental conferences and a weekly schedule to meet with the director of special services and the School Principal Vladichak.

I **FIND** that despite the efforts of the director of special education to assist the respondent, the respondent refused to avail herself of any assistance and as a consequence respondent was late with her IEPs reports, failed to meet with her student's parents in a timely fashion, and failed to complete social histories in a timely fashion. This constitutes Case Management Failure. (PR-17.) I **FIND** that the Board has successfully met its burden of proof on this charge.

I **FIND** as a consequence of respondent's refusal to accept any assistance, other members of the CST had to pick up her work and when the backlog became so onerous the District had to hire an outside social worker to complete overdue IEPs and reevaluations.

I **FIND** that the District gave the respondent a voice-activated computer to assist her in the completion of her work. Further, the PIP provided respondent with computer classes to enhance her technology skills. I **FIND** credible Gordon's unrefuted testimony that the respondent did not use the computer, rather she instructed the school's custodian to "get rid of it."

I **FIND** that a new PIP was created in January 2003 and it superseded the September 10, 2002, PIP. (P-56) While it did not include the word "Modified" in its caption, I am persuaded that it was indeed a modified PIP as it included a ninety-day review period and provided positive meaningful assistance to the respondent. Moreover, it differed from the September 10, 2002, PIP. (P-56)

I **FIND** that the District has proved by a preponderance of the credible evidence that petitioner's work was inefficient.

I **FIND** that respondent failed to meet and coordinate with other members of the CST.

I **FIND** and **CONCLUDE** that the District has complied with intent and the spirit of the requirements to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(c). I am satisfied that the PIP it provided did satisfy the statutory mandate in that there was a ninety-day remediation period; a detailed list of inefficiencies; a corrective plan; and assistance from both inside sources (weekly meetings with the director of special services and the school principal) and outside source (New Bridge Mental Health Facility); and a voice-activated computer to assist her with the production of her IEP, annual reviews and social histories.

While the District did not provide testimony from a parent regarding the charge "Failure in Dealing with Parents," PR-16 is a memo from Dr. Gordon to Parise that details a telephone conversation between Dr. Gordon and a parent. The parent requested—for the fourth time—a meeting to review the need for an evaluation with her child. Dr. Gordon testified that since Parise's non-responsiveness to the parent's requests continued, she transferred the case to another social worker. I **FIND** that the District has met the required burden of this charge.

As to the charge of Ignoring Transportation, Dr. Smith admitted that he could not recall who it was who supplied him with the information upon which he based that charge, and further admitted that there was no indication that Parise failed to improve as regards transportation. (T1, p. 20 (April 9, 2009)). Thus, I **FIND** that the District failed to meet its burden on this charge, and thus this charge is hereby **DISMISSED.**

Based on respondent's failure to correct her inefficiencies and avail herself of the assistance offered to her, I **FIND** and **CONCLUDE** that dismissal was warranted on the charge of inefficiency.

Conduct Unbecoming

On the charge of Conduct Unbecoming, I **FIND** the following **FACTS**:

1. Respondent admits that she falsified her timesheets on at least two occasions. (PR-63)

2. Respondent was rude, abrasive, and non-communicative with members of the CST and her superiors, Gordon and Vladichak. (PR-67.) PR-67 reflects that respondent was rude to the Principal in the presence of a parent; refused to acknowledge the parent's presence and was rude to a Mrs. Bistromowitz. (PR-60.)

3. The testimony of Gordon and Vladichak is urefuted that respondent failed to communicate with her colleagues, choosing instead to communicate by writing voluminous memoranda.

4. Respondent's work was incomplete and inept. Work fell on her coworkers to complete or redo. (PR-34.; P-108 to P-116; P-31.) Further, it caused the Board to hire an outside social worker to complete many of Parise's assignments. (P-116.) .

5. Respondent requested a voice-activated computer and when given one, failed to use it and directed the building custodian to get rid of it. (P-6.)

6. Gordon's testimony that Parise attempted to take a student for ice cream off the school premises in violation of Standard Operating Procedure is unrefuted.

DISCUSSION ON CONDUCT UNBECOMING

In Board of Education of the Borough of Butler, Morris County v. Parise, OAL Docket Number EDU 5793-03, the term "Conduct Unbecoming" a public employee is an elastic one. It includes any conduct which "adversely affects the morale of 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 Atl. City,

152 N.J. 532 (1998.) Further, 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. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch; 159 N.J. Super. 219, 224 (App. Div. 1978).

FINDINGS AND CONCLUSIONS ON CONDUCT UNBECOMING

I **FIND** and **CONCLUDE** that the District has met its burden that respondent engaged in conduct unbecoming a public employee.

I **FIND** that respondent's conduct with other teaching staff members, the CST, and her superiors constitute conduct unbecoming a public employee. Respondent's conduct and treatment of her coworkers was arrogant and contemptuous at best. Her failure to communicate, to complete her assignments, her rudeness, her unchecked comings-and-goings at her pleasure, were all corrosive to employee morale and the CST's efficiency.

Further, I **FIND** and **CONCLUDE** that the respondent's behavior with respect to the computer also constitutes conduct unbecoming. I am persuaded that she intended that the custodian discard the computer.

Respondent admits to falsifying her timesheets on two occasions. Accordingly, I **FIND** that there is sufficient credible and legally competent evidence to support a conclusion that the respondent did falsify her sign-out timesheet.

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 her dismissal. I am mindful that any of these incidents, standing alone, would be insufficient to sustain a removal. However, when viewed collectively, a penalty of dismissal is more than warranted.

Insubordination

In its tenure charges the petitioner alleged that respondent committed acts of insubordination when she (1) habitually and repeatedly failed to abide by District policy when signing in and out; (2) refused to follow a directive that she call in her absences to substitute services; in lieu of calling the District secretary and (3) refused to follow directives regarding the installation and use of her computer equipment.

On the charge of Insubordination, I **FIND** the following **FACTS**:

1. The testimony of Board's witness, Vladichak, and the memorandums support that Parise failed to sign in and sign out in accordance with her January 2, 2003 PIP. (PR-55, PR-56, PR-58).

2. The memorandums of Gordon support that Parise failed to complete IEPs, annual reviews, schedule parent conferences and provide a weekly schedule of her activities as directed in her PIP. (PR-15, PR-11, PR-16, PR-17, PR-22, PR-28, PR-31.)

3. Gordon's testimony that Parise did not use the computer that she requested is unrefuted. Gordon's testimony that Parise instructed the janitor to get "rid" of it is also unrefuted.

4. I find credible Gordon's testimony that Parise ignored her and contradicted her during a parent IEP conference. (PR-26.)

5. Respondent was directed by Smith to call in her absences to substitute services and she failed to adhere to this directive. (P-77.)

6. I **FIND** credible the testimony of Gordon that Parise failed to attend NB counseling nor did she see her own counselor (PR-6, PR-13.)

DISCUSSION ON INSUBORDINATION

It is well established that a failure to follow an administrative directive can constitute insubordination and/or unbecoming conduct by a teacher. In re Bradley, 1990 S.L.D. 790, aff'd, State Bd. of Educ., 1991 S.L.D. 2521 (Bradley). Further, a failure to timely file required documents constitutes insubordination. In re Richardson, EDU 5560-97, Initial Decision (June 1, 1998), aff'd, Comm'r (July 15, 1998), aff'd, State Bd. of Educ. (January 6, 1999). Finally, it is axiomatic that willful disobedience of a substantive nature by a tenured teacher towards a supervisor constitutes insubordination. Bd. of Educ. of the Borough of Edgewater v. Scarpignato, 1983 S.L.D. 311, 317, aff'd, State Bd. of Educ., 1983 S.L.D. 338, aff'd, App. Div., 1984 S.L.D. 2013.

FINDINGS AND CONCLUSIONS ON INSUBORDINATION

I **FIND** credible the testimony of Vladichak that respondent failed to sign in and out in the presence as directed by the PIP.

I **FIND** that respondent failed to call the substitute services on one occasion.

I **FIND** that Parise requested and was given a computer which she did not use. Her directive to the janitor to "get rid" of the computer constituted an insubordinate act, and as previously noted, conduct unbecoming a public employee.

I further **FIND** that pursuant to the PIP, respondent was to meet on Wednesdays of each week to review her performance. The meetings were also attended by a representative from the Butler Education Association. Parise refused to provide a weekly schedule of her activities, contrary to her PIP. (PR-10.) I **FIND** that her refusal to provide said schedule constitutes insubordination.

I **FIND** that respondent also refused to attend New Bridge for counseling, contrary to her PIP. Nor did respondent verify her attendance with her own personal counselor, contrary to the representations that she made to Gordon that she would see

her own personal counselor. I **FIND** that her request to attend any counseling constitutes insubordination.

I **FIND** that Parise failed to respond to a parent complaint despite being directed to do so by Gordon. (PR-16.) Further, she failed to hold a CST meeting with a parent, despite being directed by Gordon to hold the meeting. (Ibid.) I **CONCLUDE** that her conduct herein constitutes insubordination.

I **FIND** that Parise's failure to attend internal CST meetings was insubordinate. See In re Birch, 1978 S.L.D. 63.

I **CONCLUDE** that the petitioner has proven the charges in Count III. I further **CONCLUDE** that the appropriate penalty on this Count is removal.

Other Just Cause

It is important to emphasize that Parise is not a classroom teacher. Thus, there are no formal classroom observations where her performance could be evaluated. Nor are there any lesson plans to review. Rather, as an SW, Parise works on a one-on-one basis with special education students. She is required to work in conjunction with the CST and classroom teachers to help reduce a student's disabilities and to maximize their abilities and help them to effectively cope with their disabilities. As was recognized in the Commissioner's Final Decision in In the Matter of the Tenure Hearing of Margaret Sidberry, School District of the Township of Willingboro, Burlington County, OAL Dkt. No. EDU 0952-97S[.]

. . .

> . . . the untimely preparation and submission of [respondent] reports delayed the initial or re-evaluate placement of students in appropriate education programs and placed the District in unnecessary jeopardy of potential legal action for failure to comply with federal and state statutes and regulations governing the rights of classified students.
>
> [(Comm'r's Final Decision at p. 53.)]

In the Sidberry matter, the respondent therein was a school psychologist and a member of the CST. She failed to submit evaluations and psychological reports in a timely basis. The District offered her time-management audio tapes and attendance at workshops; an aide to assist her; and other assistance. The Commissioner found that:

> . . . Notwithstanding the District significant efforts . . . to encourage her improvement, whether due to unwillingness or inability, respondent failed to reach an acceptable level of performance. Even duly weighing her years of service in District . . . there can be no reasonable expectation that respondent can conform her performance to the level reasonably expected of a CST member . . . in the foreseeable future.
>
> [Id. at p. 54.]

Here, respondent either refused to or was incapable of performing her duties as a SW. Her refusal has serious consequences as it put the District out of compliance with the timelines and requirements in the Special Education Code. I am mindful that petitioner is a tenured long term employee. However, I **CONCLUDE** that this fact alone is insufficient to warrant her continued employment where her inabilities has such a deleterious impact on the CST and the other teachers that she must work with to provide an IDEA to special education students.

ORDER

Consistent with the aforementioned **FINDINGS** and **CONCLUSIONS**, It is hereby **ORDERED** that Charge I is hereby **AFFIRMED,** except as to transportation; Charge II is hereby **AFFIRMED**; and Charge III is hereby **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, 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.

8/13/10
DATE

Irene Jones
IRENE JONES, ALJ

Date Received at Agency: 8/13/10

Date Mailed to Parties: 8/13/10

sej

APPENDIX

WITNESSES

For Petitioner:

Andrea Vladihak

James C. Smith

Kathy Gordon

For Respondent:

None

EXHIBITS

For Petitioner:

PR-1 Memo from Gordon January 6, 2003 (Tab 4)

PR-2 (Withdrawn)

PR-3 Professional Improvement Plan dated January 2, 2003

PR-4 Memo dated January 29, 2003

PR-5 Memo dated February 21, 2003

PR-6 Request from Gordon regarding counseling

PR-7 Memo, Gordon to Parise regarding meetings

PR-8 Memo, Gordon to Parise, January 21, 2003

PR-9 Memo, Gordon to Parise, January 12, 2003

PR-10 Memo, Gordon to Parise, January 23, 2003

PR-11 Memo, Gordon to Parise, January 23, 2003

PR-12 Memo, Gordon to Parise, January 30, 2003

PR-13 Memo, Gordon to Parise, January 20, 2003

PR-14 Memo, Gordon to Parise regarding February 2, 2003

PR-15 Memo, Gordon to Parise, February 3, 2003 with attachments

PR-16 memo, Gordon to Parise, February 4, 2003

PR-17 Memo, Gordon to Parise, February 10, 2003

PR-18 Memo, Gordon to Parise, February 11, 2003

PR-19 Memo, Gordon to Parise, February y18, 2003
PR-20 Memo, Gordon to Parise, February 26, 2003
PR-21 Memo, Gordon to Parise, February 27, 2003
PR-22 Memo, Gordon to Parise, February 27, 2003
PR-23 Memo, Gordon to Parise, February 21, 2003
PR-24 Memo, Gordon to Parise, March 3, 2003
PR-25 Memo, Gordon to Parise, March 3, 2003
PR-26 Memo, Gordon to Parise, March 5, 2003
PR-27 Memo, Gordon to Parise, March 5, 2003
PR-28 Memo, Gordon to Parise, March 5, 2003
PR-29 Memo, Gordon to Parise, March 5, 2003
PR-29A Document regarding Lake Drive School
PR-29B Document regarding Lake Drive School
PR-30 Letter, Kuzbyt to Gordon, March 7, 2003
PR-31 Memo, Gordon to Parise, March 13, 2003
PR-32 Memo, Gordon to Parise re: Planning Meeting
PR32A Memorandum, March 19, 2003
PR-33 Memo, Rivers to Gordon, March 20, 2003
PR-34 Memo, Gordon to Parise, March 24, 2003
PR-34A Memo, Gordan to Parise, March 24, 2003
PR-35 Memo, Gordon to Parise, March 24, 2003
PR-36 Memo, Gordon to Parise, March 24, 2004
PR-37 Memo, Gordon to Parise, March 26, 2003
PR-38 Results of PIP document
PR-39 Program print out of annual reviews dated April 29, 2003
PR-40 Program print out dated April 29, 2003 regarding re-evaluations
RR-4 Memo dated February 26, 2003 with handwritten note by Parise
PR-41 Document dated January 2, 2003
PR-42 Document dated February 3, 2003
PR-43 Document dated March 3, 2003
PR-44 Document Dated April 1, 2003
PR-45 Handwritten note dated January 29, 2003
PR-46 Notes from meeting of February 10, 2003

PR-47 Notes from meeting of February 19, 2003
PR-48 Seven page document
PR-49 Weekly meeting (2 dates, February 24 and February 27
PR-50 Notes from meeting of March 12, 2003
PR-51 Notes from meeting of March 17, 2003
PR-52 Notes from meeting of March 24, 2003
PR-53 Notes from meeting of March 27, 2003
PR-54 Notes from meeting of March 31, 2003
PR-55 Document authored by Andrea Vladichak
PR-56 Sign-in Sheet with memo of January 13, 2003
PR-57 Notes from meeting of January 21
PR-58 Sign memo dated January 22, 2003
PR-59 Memo – January 23, 2003
PR-60 Letter from Andrea Vladichak January 30, 2003
PR-60A Memo dated January 22, 2003
PR-61 Memo – January 30, 2003
PR-62 Notice Re: Special Ed Meeting – January 30, 2003
PR-63 Sign-in/Sign-out memo January 30, 2003
PR-64 Memo dated February, 2003
PR-65 Memo dated February 4, 2003
PR-66 Memo dated February 20, 2003
PR-67 Memo dated February 27, 2003
PR-68 Memo dated April 9, 2003
PR-68 Response to memo of Maria Parise dated April 8

For Respondent:

RR-1 Statement of Charges
RR-2 Status of Charges letter- April 3, 2003
RR-3 Results of PIP for M.P.
RR-4 Memo dated February 26, 2003
RR-5 Amended Answers to Interrogatories
RR-6 Interrogatories on Remand

#393-10

OAL DKT. NO. EDU 5199-10
AGENCY DKT. NO. 88-5/10

N.A. on behalf of minor child, R.A.,	:	
PETITIONER,	;	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE UNIVERSITY ACADEMY CHARTER HIGH SCHOOL, JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Final Settlement Agreement and Stipulation" (Agreement) and the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Acting Commissioner approves the terms set forth in Paragraphs 1, 2, 3, and 6 of the Agreement.[1] The remaining provisions relate to special education and are fully adjudicable by the Administrative Law Judge who heard this matter in the Office of Administrative Law.

The Acting Commissioner adopts that portion of the Initial Decision over which she has jurisdiction as her final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/17/10
Date of Mailing: 9/17/10

[1] Most of the settlement terms reference actions that may have already taken place. and have therefore 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.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05199-10
AGENCY DKT. NO. 88-5/10

N.A., ON BEHALF OF MINOR CHILD, R.A.,
Petitioner,
v.
BOARD OF TRUSTEES OF THE UNIVERSITY ACADEMY CHARTER HIGH SCHOOL, HUDSON COUNTY,
Respondent.

David R. Giles, Esq., for petitioner

Lester E. Taylor, III, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, LLC, attorneys)

Record Closed: August 3, 2010 Decided: August 4, 2010

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

This matter was transmitted to the Office of Administrative Law (OAL) on May 17, 2010, 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 July 9, 2010. The attached Final Settlement Agreement and Stipulation was submitted, 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.

8/4/10
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 8-9-10

Date Mailed to Parties: AUG 9 2010
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

David R. Giles
Attorney at Law
34 Rynda Road
South Orange, New Jersey 07079
973-763-1500 (t); 973-843-0267 (f)

Attorney for Petitioner

N.A. o/b/o R.A.,	:	**NEW JERSEY OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	:	
	:	Agency Ref. Nos.: 88-5/10 & 2010-15851
v.	:	OAL Dkt. Nos.: EDU 5199-10 & EDS 3977-10
UNIVERSITY ACADEMY CHARTER HIGH SCHOOL BOARD OF TRUSTEES,	:	**FINAL SETTLEMENT AGREEMENT AND STIPULATION**
Respondent.	:	

Petitioner, Noritza Andino (N.A.), on behalf of her son, Rafael Andino (R.A.), and respondent, University Academy Charter High School Board of Trustees (the Board), hereby agree and stipulate as follows:

1. The Board shall rescind and expunge from the record R.A.'s suspension of March 9, 2010, for any period of time beyond 10 school days.

2. R.A. will not lose any credit as a result of his suspension and his transcript will reflect the grades and credit earned during home instruction without any indication that he was suspended for more than ten days, or placed on home instruction.

3. The Board will provide R.A. fifty (50) hours of compensatory education in the form of tutoring or home instruction by a properly certified teacher to assist him in his classwork or in preparing for the HSPA at a mutually convenient time and location during the first two (2) quarters of the 2010-2011 school year. If R.A. fails to attend a session without 24 hours advance

notice he shall forfeit/District shall receive credit for the number of hours scheduled during that session. If R.A. fails to utilize all 50 hours during the first two (2) quarters of the 2010-2011 school year he shall forfeit any remaining hours of compensatory education.

4. N.A. agrees that R.A. is eligible for special education and related services as proposed by the Child Study Team.

5. The Board will reconvene the IEP team during this summer at a time mutually convenient for the Child Study Team and N.A. to continue to develop an appropriate IEP and placement for R.A. for the 2010-2011 school year.

6. Unless otherwise agreed to by N.A., R.A. will return to University Charter High School for the 2010-2011 school year.

7. This agreement is subject to approval by the Administrative Law Judge and, if approved, shall be incorporated into an order.

For Petitioner:

Dated:_____ _____
Noritza Andino, Petitioner

Dated:_____ _____
David R. Giles, Esq.

For Respondent:

Dated: 7-8-10 _____
Erie Lugo, Jr., Principal

Dated: 7/8/10 _____
Lester E. Taylor, Esq.

notice he shall forfeit/District shall receive credit for the number of hours scheduled during that session. If R.A. fails to utilize all 50 hours during the first two (2) quarters of the 2010-2011 school year he shall forfeit any remaining hours of compensatory education.

4. N.A. agrees that R.A. is eligible for special education and related services as proposed by the Child Study Team.

5. The Board will reconvene the IEP team during this summer at a time mutually convenient for the Child Study Team and N.A. to continue to develop an appropriate IEP and placement for R.A for the 2010-2011 school year.

6. Unless otherwise agreed to by N.A., R.A. will return to University Charter High School for the 2010-2011 school year.

7. This agreement is subject to approval by the Administrative Law Judge and, if approved, shall be incorporated into an order.

For Petitioner:

Dated: July 8, 2010 _____
Noritza Addino, Petitioner

Dated: _____ _____
David R. Giles, Esq.

For Respondent:

Dated: _____ _____
Erie Lugo, Jr., Principal

Dated: _____ _____
Lester E. Taylor, Esq.

notice he shall forfeit/District shall receive credit for the number of hours scheduled during that session. If R.A. fails to utilize all 50 hours during the first two (2) quarters of the 2010-2011 school year he shall forfeit any remaining hours of compensatory education.

4. N.A. agrees that R.A. is eligible for special education and related services as proposed by the Child Study Team.

5. The Board will reconvene the IEP team during this summer at a time mutually convenient for the Child Study Team and N.A. to continue to develop an appropriate IEP and placement for R.A. for the 2010-2011 school year.

6. Unless otherwise agreed to by N.A., R.A. will return to University Charter High School for the 2010-2011 school year.

7. This agreement is subject to approval by the Administrative Law Judge and, if approved, shall be incorporated into an order.

For Petitioner:

Dated:_____ _____
Noritza Andino, Petitioner

Dated: 7/8/10 _____
David R. Giles, Esq.

For Respondent:

Dated:_____ _____
Erie Lugo, Jr., Principal

Dated:_____ _____
Lester E. Taylor, Esq.

#394-10

OAL DKT. NO. EDU 13095-09
AGENCY DKT. NO. 248-9/09

C. W. M. and G.M., on behalf of minor child, L.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTHERN VALLEY REGIONAL HIGH SCHOOL, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/17/10

Date of Mailing: 9/17/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13095-09
AGENCY DKT. NO. 248-9/09

C.W.M. AND G.M. o/b/o MINOR CHILD L.L.,
Petitioner,
v.
NORTHERN VALLEYREGIONAL HIGH SCHOOL, BERGEN COUNTY,
Respondent.

David R. Giles, Esq., for petitioners, C.W.M. and G.M. o/b/o L.L.

Jamie Plosia, Esq., for respondent, (Appruzzese, McDermott, Matro & Murphy, attorneys)

Record Closed: August 2, 2010 Decided: August 11, 2010

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

This matter was transmitted to the Office of Administrative Law November 9, 2010 for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearing on July 14, 2010 and during that time the parties engaged in settlement discussions and agreed to settle the matter. The Settlement Agreement and Stipulation of Dismissal was prepared and signed by the parties on July 19, 2010 and executed by the Board on July 19, 2010. A copy of the

Settlement Agreement/Resolution was forwarded to the OAL on August 3, 2010 and is attached hereto and made part hereof.

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

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

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

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

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

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

8/11/10
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 8-13-10

Date Mailed to Parties: AUG 13 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

David R. Giles
34 Rynda Road
South Orange, New Jersey 07079
973-763-1500

Attorney for Petitioners

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C.W.M. and G.M. o/b/o L.L.,	:	**NEW JERSEY OFFICE OF ADMINISTRATIVE LAW**
Petitioners,	:	
v.	:	Agency Ref. No.: 248-9/09 OAL Dkt. No.: EDU 13095-2009
NORTHERN VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION,	:	**SETTLEMENT AGREEMENT AND STIPULATION OF DISMISSAL**
Respondent.	:	

RECEIVED
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2011 AUG -2 P 12:55

Petitioners, C.W.M. and G.M., on behalf of L.L., and respondent, Northern Valley Regional High School Board of Education, (together, "the parties") hereby agree and stipulate as follows:

1. Petitioners shall pay within 10 days of the issuance of this Agreement as a Final Decision by the Commissioner of Education and respondent shall accept $10,000 in full satisfaction of any tuition owed for L.L.'s attendance at Northern Valley Regional High School at Old Tapan ("N.V.O.T.") during the 2009-2010 school year.

2. Should petitioners choose to send L.L. to N.V.O.T. for the 2010-2011 school year, respondent shall accept him as a regular full-time student there for the entire school year for a tuition of $10,000. Such tuition would be due on the first day of the school year. However, should L.L. enroll at N.V.O.T., but, for any reason, not complete the entire school year there, respondent will refund to petitioners a proportionate share of the tuition paid based on a per diem

tuition rate of $55.56.

3. The parties stipulate to the dismissal with prejudice of, respectively, their Verified Petition and Counterclaim filed in the above-captioned matter.

4. The parties shall be responsible for their own attorney's fees and waive any right to pursue any claims for the same.

5. This agreement is subject to approval by the Northern Valley Regional High School District Board of Education.

For Petitioner:

Dated: 7/19/10

Carol Watson-Mucciolo, Petitioner

Dated: 7/19/10

Gary Mucciolo, Petitioner

Dated: 7/15/10

David R. Giles, Esq.

For Respondent:

Dated: 7/19/10

Raymond R. Jacobus, Business Administrator (Northern Valley BOE)

Dated: 7/22/10

James L. Plosia, Jr., Esq.

Order

This Agreement and Stipulation has been review and accepted by the Court. Accordingly, the Verified Petition and Counterclaim in this matter are dismissed with prejudice. This Order is being filed as an Initial Decision for consideration by the Commissioner of Education who may issue a Final Decision.

Dated: 8/11/10

Jeffrey A. Gerson, A.L.J.

OAL DKT. NO. EDE 03955-09
STATE BOARD OF EXAMINERS DKT. NO. 0708-207
AGENCY DKT NO. 5-6/10A

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATES OF	:	COMMISSIONER OF EDUCATION
ANTHONY PARASKEVOPOULOS	:	DECISION
BY THE STATE BOARD OF	:	
EXAMINERS.	:	

Order of Suspension Decision by the State Board of Examiners, May 3, 2010

For the Respondent-Appellant, Charles I. Auffant, Esq.

For the Petitioner-Respondent State Board of Examiners, Susan Huntley, Deputy Attorney General (Paula T. Dow, Attorney General of New Jersey)

The Acting Commissioner has thoroughly reviewed the record and the papers filed in connection with respondent's appeal of the State Board of Examiners' order of May 3, 2010, suspending his teaching and administrative certificates for six months.

After full consideration of the record and all submissions, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/22/10
Date of Mailing: 9/22/10

*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
ANTHONY PARASKEVOPOULOS:		ORDER OF REVOCATION
_____	:	DOCKET NO: 0708-207

This case arose when the State Board of Examiners received a tenure case from the Commissioner of Education captioned *In the Matter of the Tenure of Anthony Paraskevopoulos,* Dkt. No. 22-1/08 (Commissioner's Decision, October 1, 2008.) In that matter, the State-Operated School District of the City of Newark (Newark) certified tenure charges against Paraskevopoulos alleging that he had fabricated an allegation that he had seen another music teacher inappropriately touch students on numerous occasions. Paraskevopoulos and Newark settled the tenure case when Newark withdrew the charges and Paraskevopoulos resigned his tenured position in the district. In a decision dated October 1, 2008, the Commissioner approved the settlement and dismissed the tenure matter. (Commissioner's Decision, slip op. at 2.) The Commissioner also referred the matter to the Board of Examiners. *Ibid.* Paraskevopoulos currently holds a Teacher of Music certificate, issued in February 2003, School Administrator and Principal Certificates of Eligibility, both issued in March 2006 and a Supervisor certificate, issued in April 2006. Based upon all of the foregoing information, at its meeting of February 23, 2009, the State Board of Examiners issued Paraskevopoulos an Order to Show Cause why his certificates should not be revoked.

The Board sent Paraskevopoulos the Order to Show Cause by regular and certified mail on February 25, 2009. The Order provided that if Paraskevopoulos desired to file an Answer, it must be filed within 30 days. Paraskevopoulos responded on March 25, 2009.

In his Answer, Paraskevopoulos admitted that Newark had certified tenure charges against him which were later settled but denied the allegation that he had "fabricated any allegation about another teacher." (Answer, ¶ 3.) Paraskevopoulos also asserted that the Order to Show Cause failed to state a claim upon which relief could be granted. (Answer, Affirmative Defense, ¶ 1.) Paraskevopoulos claimed that he acted in good faith at all times. (Answer, Affirmative Defense, ¶ 3.)

After receiving Paraskevopoulos' response, the Examiners transmitted the case to the Office of Administrative Law (OAL). Administrative Law Judge (ALJ) Ellen Bass heard testimony on September 10 and 11, 2009. After receiving post-hearing submissions, the record closed and the ALJ issued an Initial Decision on November 5, 2009. *In the Matter of the Certificates of Anthony Paraskevopoulos.*, Dkt No. EDE 03955-09 (Initial Decision, November 5, 2009.)

ALJ Bass found that on May 7, 2007, Paraskevopoulos had engaged in a heated altercation with another music teacher, Anthony Perales, over the best way to play a piece. *Id.* at 3. When Paraskevopoulos later demanded an apology, he believed that Perales used obscene words and gestures toward him. *Id.* at 5. Paraskevopoulos found this behavior threatening and went to his principal, Carolyn Granato, to intervene. *Id.* at 5. During his conversation with Granato, Paraskevopoulos raised concerns that Perales was excessively touching students. *Id.* at 4, 7. Granato immediately called DYFS, which investigated and ultimately determined that his concerns were unfounded. *Id.* at 7-8. The ALJ found that Paraskevopoulos' concerns were sincere and that, upon further reflection, he regretted sharing his thoughts about Perales with Granato. *Id.* at 8. Paraskevopoulos wrote two letters on May 10 and 11, 2007 retracting his claims against Perales with regard to his behavior with children. *Ibid.* ALJ Bass found that

Paraskevopoulos did not recant his claims about Perales and their altercation and explained that his mispercceptions about Perales were due to his heightened emotional state after their altercation. *Id.* at 8-9.

After reviewing the testimony, ALJ Bass concluded that the Board of Examiners did not meet its burden of proof. *Id.* at 11. She found that "Paraskevopoulos sincerely believed that there might be a reason for concern about Perales' conduct with children." *Ibid.* She also determined, however, that "Paraskevopoulos' allegations about the children, however sincere, disrupted school operations, and were unfair to Perales." *Ibid.* Despite this finding, ALJ Bass concluded that Paraskevopoulos had not engaged in conduct unbecoming a teacher and ordered that no action be taken against his certificates. *Id.* at 11-12, 14.

The Deputy Attorney General (DAG) representing the Board of Examiners filed Exceptions to the Initial Decision and Paraskevopoulos filed Reply Exceptions. In her Exceptions, the DAG argued that ALJ Bass erred when she concluded that Paraskevopoulos was a credible witness whose statements regarding Perales' behavior with students was an exaggeration caused by his emotional state. (Exceptions, pp. 1-5.) The DAG also claimed that the ALJ erred in "not recognizing that [Paraskevopoulos'] statement concerning the nature of Perales' touching of students was tantamount to fabricating an allegation that Perales inappropriately touched students because his report was not motivated by a genuine concern for students but by anger and was made in retaliation for an earlier argument with Perales." (Exceptions, p. 5.) The DAG recounted the testimony of Paraskevopoulos' colleague who had told him prior to the incident of May 7, 2007, that Perales was demonstrative with students because of his cultural background. (Exceptions, pp.6-7.) Finally, the DAG further argued that

Paraskevopoulos' conduct warranted the suspension or revocation of his certificates because his act of reporting a false claim was relevant to his fitness to teach. (Exceptions, pp. 7-10.)

In his Reply Exceptions, Paraskevopoulos urged the Board to give deference to ALJ Bass' credibility determinations. (Reply Exceptions, pp. 2-8.) He also argued that the ALJ correctly concluded that he did not fabricate his concerns regarding Perales' interactions with students and argued that his "testimony was rational and consistent with the evidential record." (Reply Exceptions, pp. 8-9.) Finally, Paraskevopoulos argued that the ALJ correctly found that his actions did not constitute unbecoming conduct warranting a penalty. (Reply Exceptions, pp. 9-12.) Paraskevopoulos noted that ALJ Bass recognized that "none of the conduct alleged here took place in the presence of children" and highlighted his long and successful teaching career. (Reply Exceptions, p. 11.)

The Board must now determine whether to adopt, modify or dismiss the Initial Decision in this matter. At its meeting of March 25, 2010, the Board reviewed the Initial Decision, the Exceptions and Reply Exceptions. After full and fair consideration of the Initial Decision, the Exceptions and Reply Exceptions and the issues raised therein, the Board voted to adopt the findings of fact in the Initial Decision, but modify the conclusions drawn and the penalty assessed.

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. In fact, the Board is convinced, as was the ALJ, that Paraskevopoulos' statements regarding Perales were uttered as a result of his emotional state after their altercation. Where the Board differs from the ALJ, however, is in the conclusion that must be drawn from this behavior. Regardless of Paraskevopoulos' motivation or the fact that all of these interactions occurred solely among

adults, his conduct was inappropriate and merits consequences beyond the loss of his tenured position. As a teacher with exemplary evaluations, Paraskevopoulos should know the standards required of professional behavior. The damage he inflicted on Perales' reputation and the potential harm he could have caused to Perales' career should not be minimized simply because he acted in a fit of pique and later attempted to retract his allegations. Moreover, as ALJ Bass noted, Paraskevopoulos' actions resulted in a DYFS investigation that disrupted school operations. Initial Decision, slip op. at 11. The Board believes that Paraskevopoulos' conduct is unbecoming a teaching staff member and reflects negatively on his ability to act as a role model to both students and colleagues. Thus, the Examiners disagree with the ALJ's conclusion and find that the Board has met its burden of proving that Paraskevopoulos engaged in conduct unbecoming a teacher.

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. Thus, the only issue that remains in this matter is the imposition of the appropriate sanction. Although Paraskevopoulos' behavior falls short of expectation, the Board does not believe that revocation is warranted in this case. Although his impulsive behavior led to some damaging consequences, in this instance, his entire career as an educator should not be sacrificed because of it. Therefore, the Board finds that a six month suspension of all of his certificates is appropriate.

Accordingly, on March 25, 2010, the Board of Examiners voted to modify the Initial Decision and suspend Paraskevopoulos' certificates for a period of six months. On this 29th day of April 2010, the Board of Examiners formally adopted its written decision to modify the Initial Decision in this matter, and it is therefore ORDERED that Anthony Paraskevopoulos' Teacher of

Music and Supervisor certificates and School Administrator and Principal Certificates of Eligibility be hereby suspended for a period of six months effective immediately. It is further ORDERED that Paraskevopoulos 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: 5/3/10

Appeals may be made to the State Board of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.
RRH:MZ:th

OAL DKT. NO. EDU 13084-09
AGENCY DKT. NO. 266-9/09

BLOOMINGDALE EDUCATION ASSOCIATION AND DEBORAH CIAMBRONE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|23|10

Date of Mailing: 9|23|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13084-09

AGENCY DKT. NO. 266-9/09

BLOOMINGDALE EDUCATION ASSOCIATION AND DEBORAH CIAMBRONE,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,

Respondent.

Aileen M. Driscoll, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Jeffrey R. Merlino, Esq., for respondent

Record Closed: August 24, 2010 Decided: August 26, 2010

BEFORE **IMRE KARASZEGI,** ALJ:

On November 6, 2009, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement and Settlement Agreement and the Board's resolution.

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

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

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

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

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

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

Aug. 26, 2010
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8-30-10

Date Mailed to Parties: AUG 30 2010
id

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LINDABURY, McCORMICK, ESTABROOK & COOPER
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Bloomingdale Board of Education

BLOOMINGDALE EDUCATION ASSOCIATION, Petitioner,	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO: EDU OT 13084-09 AGENCY DKT. NO: 266-9/09
vs.	:	
BLOOMINGDALE BOARD OF EDUCATION, Respondent.	:	STIPULATION OF SETTLEMENT

WHEREAS, on or about November 6, 2009, Deborah Ciambrone on behalf of the Bloomingdale Education Association ("Petitioner") filed a Petition of Appeal with the Commissioner of Education alleging the Bloomingdale Board of Education ("Board") does not employ a certified library media specialist in accordance with N.J.A.C. 6A:13-2.1; and

WHEREAS, on or about October 13, 2009, the Board filed an Answer to Petitioner's Petition of Appeal denying the allegations; and

WHEREAS, the matter was assigned to the Office of Administrative Law and a status conference was conducted on June 8, 2010; and

WHEREAS, the parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. The Board agrees to enter into a Shared Services Agreement with the Butler School District for the 2010-11 school year in which certified library media

specialist services will be provided to the Bloomingdale School District as follows:

a. A Butler librarian will meet with the staff of each Bloomingdale School Library and the School Principal (if appropriate) once per the school's marking period during the 2010-11 School Year.

b. The meetings will be scheduled so that an appropriate amount of time is allotted in the participants' schedules so as to afford them the opportunity to conduct productive and meaningful meetings.

c. Minutes of each meeting shall be maintained and distributed in advance of the next meeting. The participants will establish an agenda for future meetings to the extent practicable.

d. The Butler librarian will receive a copy of this Stipulation of Settlement and a copy of the Bloomingdale Library Supervisors' job descriptions.

2. The parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a hearing.

3. In consideration of the settlement of the captioned matter, Petitioner shall release the Board from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, money damages, civil liability, or any other equitable or legal relief with respect to this matter.

4. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

5. This Agreement shall be governed by the laws of the State of New Jersey.

6. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

7. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations. The parties acknowledge that are represented by competent counsel and that are fully satisfied with the legal representation provided by their respective counsel.

8. This Agreement shall remain confidential to the maximum extent permitted by law.

9. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

10. This Agreement shall be incorporated into a Final Order by the Office of Administrative Law and disposes of any and all claims that were raised or could have been raised in the captioned matter. To the extent that this Agreement is not incorporated into a Final Order by the Office of Administrative Law, Petitioner agrees to withdraw the pending Verified Petition of Appeal with prejudice.

11. This Agreement is subject to ratification by the Board.

ON BEHALF OF THE BLOOMINGDALE EDUCATION ASSOCIATION

Deborah C Ciambrone Date: July 28, 2010

Deborah Ciambrone

ON BEHALF OF THE BLOOMINGDALE BOARD OF EDUCATION

Date: 8-16-2010

George Hagl, Board Secretary

BLOOMINGDALE BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Bloomingdale in the County of Passaic, New Jersey, convened in a regular meeting on August 16, 2010, at 7:00 P.M., in the Walter T. Bergen School Library.

The following members were present: Mr. Bross, Mr. Dellaripa, Mr. Kroncke, Mrs. Peterson, Mr. Pituch, and Mr. Samuel

The following members were absent: Mrs. Grecco and Miss O'Leary

The following resolution was offered by Mrs. Peterson, seconded by Mr. Kroncke and adopted by the Board of Education by the following roll call vote: All yes

TITLE OF RESOLUTION:

That the Board approve a Settlement Agreement between the Bloomingdale Board of Education and the Bloomingdale Education Association, Office of Administrative Law, OAL DKT. NO: EDU OT 13084-09, AGENCY DKT. NO: 266-9/09.

COUNTY OF PASSAIC) ss:

I, George Hagl, Secretary of the Board of Education of the Borough of Bloomingdale, in the County of Passaic, 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 16, 2010, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Bloomingdale 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 August, 2010.

Seal

George Hagl
Board Secretary

OAL DKT. NO EDU 1307-10
AGENCY DKT. NO. 374-12/09

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDY CHANDLER,	:	
HIGH POINT REGIONAL HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT, SUSSEX COUNTY.	:	DECISION
	:	

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 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.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9 | 23 | 10
Date of Mailing: 9 | 23 | 10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1307-10
AGENCY DKT. NO. 374-12/09

IN THE MATTER OF THE TENURE HEARING OF WENDY CHANDLER, HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY

Philip E. Stern, Esq, for petitioner High Point Regional School District (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Sheldon H. Pincus, Esq., for respondent Wendy Chandler (Bucceri & Pincus, attorneys)

Record Closed: August 20, 2010 Decided: September 2, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on January 28, 2010 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 scheduled for hearing on August 6, 2010 and during that time the parties engaged in settlement discussions and agreed to settle the matter. The Settlement Agreement and Release was signed by the parties and executed by the

Board on August 17, 2010. A copy of the Settlement Agreement and Release was forwarded to the OAL on August 20, 2010 and is attached hereto and made a part hereof.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 2, 2010

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: September 8, 2010

Date Mailed to Parties: SEP 0 8 2010

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHWARTZ SIMON EDELSTEIN
CELSO & Zitomer LLC
44 Whippany Road, Suite 210
Morristown, New Jersey 07962
(973) 301-0001
Attorneys for the High Point Regional High
School Board of Education

I/M/O Tenure Hearing of Wendy Chandler.,	:	BEFORE THE OFFICE OF THE COMMISSIONER OF EDUCATION
Petitioner,	:	OAL DKT. No. EDUTH01307-2010N AGENCY REF. No. 374-12/09
vs.	:	
High Point Regional High School District Board of Education, Sussex County	:	**SETTLEMENT AGREEMENT AND RELEASE**
Respondent.	:	

This Settlement Agreement and Release is made this 6th of August, 2010 to bind Wendy Chandler (hereinafter "Chandler") who resides at 206 Main Street, Ogdensburg, New Jersey 07439 and the High Point Regional High School District Board of Education, with its principal offices located at 299 Pidgeon Hill Road, Sussex, New Jersey 07461 (hereinafter the "Board");

WITNESSETH:

WHEREAS, Chandler is currently employed by the Board as a tenured secretary; and

WHEREAS, the Board filed a Tenure Charge proceeding against Chandler bearing the caption and docket number as set forth above; and

WHEREAS, Chandler disputes the allegations of the tenure charges; and

WHEREAS, Chandler had further caused to be served on the Board a Notice of Tort Claim and then filed and served a Complaint and Jury Demand in Superior Court of New Jersey Law Division: Sussex County with Docket No. SSX-L-603-10; and

WHEREAS, at the completion of discovery and a full investigation of the facts through available witnesses and taking into account the uncertainty of litigation, each of the parties hereto has concluded that it is in the public interest to enter into a Settlement Agreement in resolution of the charges and litigation stipulating the terms of Chandler's separation from all employment with the Board together with the Release of all her tenure and seniority rights as an employee of the Board and further resolving all of the claims that were the subject of her Affirmative Defenses to the Answer to the Charges, the Notice of Tort Claim, and the Complaint and Jury Demand, 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 Chandler's employment or otherwise arising out of or relating to each of the above-named matters; and,

WHEREAS, the terms of this settlement take into account the public interests and the terms of this Agreement will not present any risk of harm to students and/or the safe operation of the School District; and further it takes into consideration the undue interruption and disruption to the educational programming within the Board due to the absence of administrators, teachers and students who could be required to testify at hearings as well as it takes into consideration the fact that the Board has incurred and will continue to incur substantial financial cost to continue the litigation and that settlement of these claims has been determined to be cost effective at a time when the Board faces substantial budgetary constraints;

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. Simultaneously with the execution of this Agreement, Chandler shall provide an irrevocable letter of resignation from all employment with the Board effective at the close of business on November 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 all of the terms of this Settlement Agreement are not met, but is otherwise irrevocable. The Board waives all statutory and contractual claims for notification of Chandler's resignation. Once resigned, Chandler shall have no right to re-employment and shall not apply for any future employment with the Board.

2. The Board, by resolution, will publicly approve and accept the resignation of Chandler simultaneously with the approval and acceptance of this Agreement.

3. Through and until November 30, 2010, Chandler shall be paid at the salary level (prorated for the 2010-2011 school year) that she is receiving as a tenured secretary pursuant to statutory requirements set forth in N.J.S.A. 18A:6-14; to wit, a total annual salary inclusive of longevity for the 2009-2010 school year in the amount of Forty Six Thousand, Five Hundred Sixty Five Dollars ($46,565.00); and a total annual salary inclusive of longevity for the 2010-2011 school year (which is payable through the effective date of her resignation or no later than November 30, 2010) in the amount of Forty Seven Thousand One Hundred Fifteen Dollars ($47,115) . Subject to paragraph 6 below, all salary shall be paid to Chandler in the normal course of business, net of normal payroll deductions for State and Federal income taxes, pension contributions, etc.

4. As part of approval to this Settlement Agreement, Chandler shall request and be granted a leave of absence, with full pay, for personal reasons and shall continue to be provided with health insurance benefits applicable to secretaries employed by the Board through the effective date of resignation, but by no later than November 30, 2010. The form of Chandler's letter requesting a leave of absence is attached hereto and made a part hereof as Exhibit B.

5. If Chandler obtains other employment prior to November 30, 2010 that provides her with insurance coverage, Chandler shall immediately notify the Board in writing of that fact, as well as the effective date of insurance coverage from new employment, and once the insurance coverage from other employment takes effect, the Board will be relieved of the obligation to continue providing paid health coverage for Chandler, and may terminate same, without further credit or consideration to Chandler.

6. If Chandler obtains other employment, Chandler shall immediately notify the Board in writing of that fact, and the effective dates of her leave of absence and resignation shall be modified to be effective on the date she commences new employment. All salary which the Board would have thereafter been obligated to pay to Chandler during the remainder of the time through November 30, 2010 will be paid in one lump sum, without deductions, within thirty (30) calendar days of the Board Resolution effecting the change to her resignation date. The Board shall provide an IRS Form 1099-Misc. with Box 3 checked (Other Income) reflecting the payment of the lump sum set forth in this paragraph to Chandler no later than February 1, 2011.

7. Upon the termination of Chandler's employment with the Board and provided Chandler does not have insurance coverage from other employment at such time of termination from employment under this Agreement, and consistent with her rights under the Consolidated Omnibus Reconciliation Act of 1986 (also known as "COBRA"), Chandler shall be able to purchase, at her own cost and expense, the insurance coverage presently provided to other staff members employed by the Board. The terms of such exercise of COBRA benefits shall be consistent with law and with that provided to other similarly situated prior employees of the District.

8. The Board hereby agrees that the Tenure Charge in this matter shall be dismissed with prejudice subject to the approval of this Agreement by the Administrative Law Judge and the Commissioner of Education, and further that the Complaint and Jury Demand aforementioned shall also be dismissed with prejudice immediately upon the approval of this Agreement by the Commissioner.

9. Parties acknowledge that this Agreement shall be submitted to the Administrative Law Judge assigned to hear this matter 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 the Administrative Law Judge and Commissioner of Education. In the event that either the Administrative Law Judge assigned this matter or the Commissioner of Education disapproves and/or rejects the terms contained herein, this Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Agreement. In addition, each of the parties shall return to their same position which they held prior to this Agreement and all rights are expressly reserved in such an event.

10. Effective with the signing of this Agreement and its approval by the Board of Education, for submission to the Administrative Law Judge for approval, Chandler agrees to immediately return any and all Board property including but not limited to keys, documents, electronic or otherwise, or any other Board property to the Central Office (Office of the Superintendent). An appointment shall be scheduled and the Board further agrees to permit Chandler to collect any personal effects she may have left in the District at the time of her returning Board property.

11. Neither Chandler nor the Board entering into this Settlement Agreement and Release shall be deemed constitute, nor shall it be interpreted as, an admission of wrongdoing or guilt, or liability in any manner on either party's part.

12. By entering into this Settlement Agreement, Chandler expressly and knowingly waives and releases any and all rights to tenure, seniority, recall, reinstatement, and re-application for employment of any nature with the Board as of the effective date of her resignation. It is further understood and agreed that Chandler shall not, as of the effective date of her resignation, receive any other compensation or benefits or emoluments of employment except as specifically set forth in this Settlement Agreement.

13. In consideration of the above, Chandler agrees for herself and her 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 statue, 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 all claims set out in the Tenure Charge, the Notice of Tort Claim, the Complaint and Jury Demand, and claims under Title VII of the Civil Rights Act of 1965, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans With Disability 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, tortuous interference specifically the filed Complaint, 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 her employment or her termination from employment with the Board.

Notwithstanding the signing of the release by Chandler, the Board shall remain obligated to indemnify Chandler against claims raised by other parties arising on or prior to the date of her resignation in accordance with applicable controlling law.

14. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Chandler from any and all claims wich it may have against Chandler. It specifically releases Chandler 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 any other prohibited basis.

15. The parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Chandler shall be channeled solely to the then

Superintendent of Schools. Responses to such inquiries shall be limited to providing only the dates of Chandler's employment, her position, her salary, and that she left the District voluntarily to pursue other career opportunities. A written letter of recommendation shall also be provided per attached Exhibit C.

16. Nothing in this Settlement Agreement and in the Releases set forth above shall preclude a party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

17. 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).

18. Chandler agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but Chandler does hereby agree to waive this 21 day period by signing the space provided at the end of this Agreement.

19. 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 that each has been informed of their legal rights and obligations. The parties further

acknowledge that the Tenure Charge does not represent a danger to the public welfare or to the School District.

20. This Settlement Agreement and Release shall be subject to the laws of the State of New Jersey.

21. 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.

22. 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.

23. This Settlement Agreement incorporates and settles all claims and disputes which may exist between Chandler and the Board arising from Chandler's employment or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Chandler and Chandler's separation from employment.

IN WITNESS WHEREOF, the parties have signed this Agreement or caused their representatives to sign this Agreement on the dates set forth below.

PETITIONER

Date: 8-6-10 Wendy Chandler

WENDY CHANDLER

HIGH POINT REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION

Date: 8-9-10

WALTER STUMPF, JR., BOARD PRESIDENT

STATE OF NEW JERSEY)
SS:
COUNTY OF Essex)

I CERTIFY that on August 6, 2010, Wendy Chandler, personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and ~~deed.~~

Attorney ~~or Notary Public~~

Exhibit A

Wendy Chandler
206 Main Street
Ogdensburg, New Jersey 07439

August 6, 2010

Walter Stumpf, Jr., President
High Point Regional Board of Education
299 Pidgeon Hill Road
Sussex, New Jersey 07461

Re: Letter of Resignation

Dear Mr. Stumpf:

Pursuant to the terms of the Settlement Agreement between the High Point Regional Board of Education and myself, I hereby submit my irrevocable resignation as tenured secretary, effective the close of business on November 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 Board.

Sincerely,

Wendy Chandler
Wendy Chandler

Wendy Chandler
206 Main Street
Ogdensburg, New Jersey 07439

August 6, 2010

Walter Stumpf, Jr., President
High Point Regional Board of Education
299 Pidgeon Hill Road
Sussex, New Jersey 07461

Re: Letter Requesting Personal Leave of Absence

Dear Mr. Stumpf:

I hereby request of the Board that I be granted a personal leave of absence with full pay according to the terms of the Settlement Agreement, dated August 6, 2010. I request that this leave begin on August 6, 2010 and end at the close of business on November 30, 2010.

Thank you for your consideration of my request.

Sincerely,

Wendy Chandler
Wendy Chandler

LETTER OF REFERENCE FOR WENDY CHANDLER – TO BE PLACED ON DISTRICT LETTERHEAD AND SIGNED BY THE SUPERINTENDENT.

Ms. Wendy Chandler was employed by the High Point Regional High School District from September 17, 1991 through November 30, 2010 in the position of secretary. Her final annual salary, with longevity, during the 2010-2011 school year was $47,115.00. Ms. Chandler left the District voluntarily to pursue other career opportunities.

BOARD OF EDUCATION

HIGH POINT REGIONAL HIGH SCHOOL

299 PIDGEON HILL ROAD – SUSSEX, NJ 07461-2733
fax 973-875-0904 www.hpregional.org

John W. Hannum, Ed.D.
Superintendent
Phone 973-875-7204

Linda A. Alvarez
Business Administrator/Board Secretary
Phone 973-875-7205

To Whom It May Concern:

Ms. Wendy Chandler was employed by the High Point Regional High School District from September 17, 1991, through November 30, 2010, in the position of secretary. Her final annual salary, with longevity, during the 2010-2011 school year was $47,115.00. Ms. Chandler left the District voluntarily to pursue other career opportunities.

Sincerely,

John W. Hannum

John W. Hannum, Ed. D.
Superintendent

JWH:pem

THE MINUTES OF
A MEETING OF THE BOARD OF EDUCATION
OF HIGH POINT REGIONAL HIGH SCHOOL DISTRICT
SUSSEX COUNTY, N. J. AS RECORDED
IN THE OFFICIAL MINUTE BOOK

A Regular Meeting of the Board of Education of the High Point Regional High School District was held on Monday, August 16, 2010 at 7:00 P.M. at the High Point Regional High School Cafeteria on Pigeon Hill Road, Wantage, New Jersey.

MEMBERS PRESENT Mr. Walter Stumpf Jr
Mr. Thomas Case
Mr. Joseph Hoffmann
Mr. Joseph Luna
Mr. Charles Musilli, III
Mr. Edward Vander Berg

MEMBERS ABSENT Mr. Garrett Link, Mr. Kenneth Nelson and Mr. Harold Rowan, III

Also Present: Dr. John W. Hannum, Superintendent; Ms. Linda A. Alvarez, Business Administrator/Board Secretary; and members of the public and High Point staff members.

A motion was made by Mr. Case, duly seconded by Mr. Vander Berg, that the Board approve the following resolution:

RESOLVED, that the Board, upon recommendation of Board Counsel and the Superintendent of Schools, hereby accept and approve the resignation of Wendy Chandler, effective November 30, 2010; a paid leave of absence with benefits through to the effective date of resignation; and the Settlement Agreement and Release, and further approve the Board President is authorized to sign the agreement on behalf of the Board. All documents are on file with the Board Secretary.

The motions unanimously carried by a voice vote.

AYES:	Mr. Walter Stumpf Jr.	Mr. Joseph Hoffmann	Mr. Charles Musilli, III
	Mr. Thomas Case	Mr. Joseph Luna	Mr. Edward Vander Berg

NOES: None

State of: New Jersey
County of Sussex } SS:

I, Linda A. Alvarez, Secretary of the High Point Regional High School Board of Education in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of said district duly called and held on August 16, 2010 has been compared by me with the original minutes as officially recorded in my office in the minute book of said High Point Regional High School Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this the 17th day of August, 2010.

(AFFIX SEAL)

Linda A. Alvarez

401-10E

OAL DKT. NO. EDU 9332-10
AGENCY DKT. NO. 518-9/10

JERSEY CITY COMMUNITY CHARTER SCHOOL INCORPORATED,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON
RESPONDENT.	:	APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on September 14, 2010 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Acting Commissioner adopts the recommended order denying emergent relief as she concurs with the ALJ – for the reasons clearly presented in his Order – that petitioner has not satisfied its burden of establishing any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for a hearing on the merits as contemplated by the ALJ and the parties.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/21/10

Date of Mailing: 9/22/10

Faxed 9/22/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 09332-10
AGENCY DKT. NO. 518-9/10

JERSEY CITY COMMUNITY CHARTER SCHOOL INCORPORATED,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondents.

Bruce A. Seidman, Esq., and **Hillary A. Fraenkel, Esq.** for petitioner (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys)

R. Scott Eveland, Esq., and **Paula Mercado Hak, Esq.** for respondent (Jersey City Public Schools, attorneys)

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the determination by the Jersey City Board of Education that, pursuant to N.J.S.A. 18A:36A-13 (implemented through N.J.A.C. 6A:27-3.1(b)), the requirement to provide transportation to district remote students attending the Jersey

City Community Charter School can be satisfied by issuing bus tickets. On September 2, 2010, petitioner filed a Petition of Appeal with the Commissioner of Education (the Commissioner). Petitioner also filed a motion for Emergent Relief seeking a Stay barring respondents from implementing its policy to issue bus tickets to remote students who attend the Jersey City Community Charter School. In support of the motion, petitioner submitted a memorandum of law and a certification of petitioner (Carletta Martin-Goldston Aff.). Respondents submitted briefs in opposition to the motion, which the undersigned received on September 10, 2010. Petitioner submitted a reply brief on September 13, 2010. Oral argument on the motion was held on September 14, 2010.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented follows.

Carletta Martin-Goldston is the head of the Jersey City Community Charter School (hereinafter referred to as JCCCS). Martin-Goldston Aff. at pp. 1. JCCCS is a non-profit corporation which is organized to provide public education as a charter school pursuant to N.J.S.A. 18A:36A-2. Martin-Goldston Aff. at pp.2. JCCCS provides public education to students in grades K-8. Martin-Goldston Aff. at pp. 3. There are students who attend JCCCS who live more than two (2) miles from the school. Martin-Goldston Aff. at pp 6.

Since 1997 when JCCCS began its operation, the Board of Education for the City of Jersey City has provided transportation to the district remote students who have attended JCCCS. Martin-Goldston Aff. at pp. 7. On July 29, 2010, the respondent sent a letter to Ms. Martin-Goldston advising her that beginning with the inception of the 2010-2011 school year, transportation services as provided in past years would be discontinued. Martin-Goldston Aff. at pp 8. The respondent proposed that they would instead provide bus tickets to all district remote students who attend JCCCS regardless of grade. Martin-Goldston Aff. at pp 9. The Jersey City School District (District) has had students attending public schools located more than two miles from their home. Wojcik Cert. at pp 6. However, the petitioner asserts that upon information and belief, there are no remote elementary students in the Jersey City Public School system

because these students attend neighborhood schools which are situated two (2) miles or less from all students' residences. Martin-Goldston Aff. at pp 14. The District's remote public school students in grades K through 5 receive bus tickets for transportation from their home to school. Wojcik Cert. at pp 7.

Petitioner averts that the District has failed to present any written policy approved by the Board of Education and that the absence of such proof the District cannot maintain the position that the District provides transportation to remote charter students on the same terms and conditions provided to remote district students. The District states that it does not provide school bus transportation for its remote public school students in grades K through 5. Wojcik Cert. at pp 8. The school year has begun on September 8, 2010. Martin-Goldston Aff. at pp 15.

Petitioner states that the District issued a Manual which set forth its transportation policy for students attending charter schools (i.e. that children in grades K-4 will be provided busing on pre-planned bus routes and not via bus tickets). Petitioner claims that it has never been advised that the Manual has been revoked, rescinded or repealed. District responded with evidence that the Board never adopted a resolution approving the Manual and that it was distributed by an overzealous clerk. Simmons Aff. at pp 14 and 15. As such it is the District's position that the Manual does not constitute policy and thus does not bind the District and that its only obligation is to follow state statutes and regulations.

Prior to 2003, the District provided all charter schools in the District with the following options: (1) utilize bus tickets or (2) enter into agreements where the District provides school bus routes in exchange for reimbursement from the charter school covering the difference between the cost of tickets and the cost of school transportation. Wojcik Cert. at pp 9. For the school year 2010/2011 and thereafter, the District ceased its practice of offering charter schools the option of utilizing school bus transportation and instead offered bus tickets for use by the remote students. Simmons Cert. at pp 4. The District argues that this new practice fulfilled its obligation to provide transportation to charter school students "on the same terms and conditions" as transportation provided to remote public school students.

It is against this backdrop that petitioner's application for emergent relief is considered.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in its favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental

Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

Petitioner argues that the respondent's determination provides potential harm to the safety and well-being of the young students. The petitioner raises a number of unfortunate scenarios which "**could possibly unfold"** (emphasis added) which will cause dramatic and irreparable harm to JCCCS. Petitioner further argues that parents will be unwilling to allow their children to be transported (unsupervised) on public transportation. Petitioner asserted that one family has withdrawn a child from its charter school as a result of this transportation issue.

I accept respondents' position that petitioner has failed to demonstrate irreparable harm. Petitioner's Affidavit does not support a finding that the respondent's determination created dramatic and irreparable harm to JCCCS. Rather, as argued by the respondent, the petitioner is in a position whereby it could bid for bus routes during the time the request for emergent relief is heard until this matter is fully heard on the merits and thereafter make a claim to the respondent for the cost of same in the event the petitioner is successful at that time. Accordingly, JCCCS has an adequate remedy at law. Although it may be an inconvenience to petitioner to bid on such bus routes and supply such a service, this does not rise to the level of an irreparable harm. Petitioner's claim of irreparable harm was couched in terms of a possibly and not a certainty. It is well established law in New Jersey that the claim of irreparable harm must not only be imminent, but must also be concrete and non-speculative. Subcarrier Communications v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997). In short, whether petitioner's students from K through 8 will experience the alarming events contrary to their safety

and welfare is speculative in nature. The respondent has presented evidence that the Jersey City School District provides bus tickets to all of its K through 8 public and charter school students without incident. In sum, I **CONCLUDE** that petitioner has failed to meet his burden of establishing a clear showing that it will suffer immediate irreparable injury unless the requested relief is granted.

Apart from this, in order to prevail on an application for an emergent relief, petitioner must demonstrate that the legal right underlying his claim is settled and must make a preliminary showing of a reasonable probability of ultimate success on the merits. Crowe, supra, 90 N.J. at 133.

Both petitioner and respondent agree in their submissions that the charter school students "shall be provided transportation" on the "same terms and conditions as transportation is provided to students attending the schools of the district." N.J.S.A.18A:36A-13. The respondent presented evidence that "school bus transportation has never been provided to any of the district's remote public school students under any terms or conditions, the District, for the school year 2010-2011 and forward, ceased its practice of offering charter schools the option of utilizing school bus transportation." Ms. Melissa Simmons Aff. at pp 4. Simmons further sets forth that "the District's new practice for the school year 2010-2011 and forward is to provide all remotely located regular education students in grades K-8, both charter and public students, with bus tickets for transportation between their homes and school." Simmons Aff. at pp 11. There remains a factual dispute as to whether the District provides bus tickets to public school students.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that the legal right underlying its various claims is settled and that it has a likelihood of prevailing on the merits of its claims. In this regard, petitioner merely speculates "upon information and belief, there are no elementary students residing in Jersey City who are remote from their school of attendance in the Jersey City Public Schools." Martin-Goldston Aff. at pp 13. Such evidence is not sufficient for the petitioner to carry its burden that it is likely to prevail on the merits of its claims.

Finally, in balancing the equities and interests of the parties, the scales tip in favor of respondents. The petitioner has options whereby it can adequately address its transportation issue pending a final hearing on this matter. The claim that the petitioner will lose students, staff, and funding is speculative. The petitioner's claim of irreparable harm have fallen short as the school year has in fact begun and the speculative allegations of such harm have not materialized. The respondent has offered the bus tickets to the petitioner and the petitioner refused to accept same for its remote students K through 5. Wojcik Aff. at pp 16. I further **CONCLUDE** that the petitioner has failed in showing that the equities favor it and will suffer greater harm.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief in this matter. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

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

September 14, 2010
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____
sej

#402-10R

OAL DKT. NO. EDU 6897-10
(EDU 1842-10 on remand)
AGENCY DKT. NO. 15-1/10

H.P. and G.H. on behalf of minor child R.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Settlement Agreement" with accompanying Board resolution, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed, and the Acting Commissioner approves the settlement terms. [1]

Accordingly, the Acting Commissioner adopts the Initial Decision as her final decision in this case, providing that the parties have successfully implemented the settlement terms. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/23/10
Date of Mailing: 9/23/10

[1] Most of the settlement terms reference actions that may have already taken place, and have therefore 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.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT (ON REMAND)
OAL DKT. NO. EDU 6897-10
AGENCY DKT. NO. 15-1/10
ON REMAND OF
OAL DKT. NO. EDU 1842-10

H.P. AND G.H., ON BEHALF OF MINOR CHILD, R.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent

H.P. and G.H., Petitioners (*pro se*)

Cherie L. Adams, Esq., for Respondent (Adams Stern Gutierrez & Lattiboudere LLC, attorneys)

Record Closed: August 11, 2010 Decided: August 16, 2010

BEFORE **TAHESHA L. WAY**, ALJ:

This is an Initial Decision Settlement on Remand of the Commissioner of Education's Decision of June 25, 2010. The Commissioner ruled the Initial Decision of

May 18, 2010, failed to contain a copy of the Board of Education's resolution approving the Settlement and indicating authorization for the Respondent's representative to have entered into the Settlement.

The parties agreed to a settlement and prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1). Also on August 11, 2010, Respondent's counsel submitted the certified minutes of Board of Education's July 22, 2010, approval of the within settlement as set forth in the attached documents. (R-1).

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 16, 2010
DATE

TAHESHA L. WAY, ALJ

Date Received at Agency: 8-18-10

Date Mailed to Parties: AUG 18 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

EXHIBITS:

Joint:

J-1 Settlement Agreement

Respondent:

R-1 Board of Education's July 22, 2010, certified minutes/Resolution #1-07/10

J-1

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
1037 Raymond Blvd, Suite 710
Newark, New Jersey 07102
(973) 735-2742
Attorney(s) for Respondent Hillside Board of Education

H.P. and G.H. on behalf of minor children, R.H., Petitioners, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt. No: ***EDUOS 01842-2010N*** **SETTLEMENT AGREEMENT**

Petitioner, H.P is a resident of Hillside at 1511 Schley Street and has acted as guardian for R.H. Petitioner G.H. resides at 1 Grumman Avenue Newark, NJ and is the natural mother of R.H. Respondent, HILLSIDE BOARD OF EDUCATION ("Board" or "District"), a body corporate of the State of New Jersey, with its primary offices at 195 Virginia Street, Hillside, NJ 07205.

WHEREAS G.H. acknowledges that R.H. has resided with her in Newark during the 2009-10 school year and has not resided with H.P. although he has attended the Hillside schools during this time; and

WHEREAS H.P. and G.H. have agreed to withdraw the current appeal in consideration of the District's willingness to permit R.H. to finish the 2009-10 school year at Hillside High School without payment of tuition; and

WHEREAS, the District has agreed to waive their right to collect back tuition for the period of R.H.'s ineligible attendance at Hillside for the 2009-10 school year specifically contingent upon R.H.'s disenrollment and withdrawal from the district at the end of the 2009-10 school year; and

WHEREAS, the parties wish to amicably resolve the litigation in this matter;

NOW THEREFORE the parties agree as follows:

1. H.P. and G.H acknowledge that R.H. has not resided in Hillside during the 2009-10 school year and that they are liable for tuition for the period of ineligible attendance.

2. H.P. and G.H. agree to withdraw the instant appeal, which will result in R.H. being disenrolled as a resident student in the Hillside school district.

3. The District shall permit R.H. to complete the 2009-10 school year only in Hillside High School without payment of tuition.

4. R.H. shall not return to Hillside High School following the 2009-10 school year except as a tuition paying student. Should G.H. attempt to register R.H. as a student in the Hillside schools at any point after the 2009-10 school year, the District reserves the right to reinstate its claim and collect back tuition for the 2009-10 school year for the period of ineligible attendance acknowledged in this Agreement.

HILLSIDE BOARD OF EDUCATION

By: _____

_____
Hyacinth Pando, Petitioner

_____
Gwendolyn Hall, Petitioner

RESIDENCY/SUSPENSIONS

1. Motion to approve the settlement agreement between Student 4313565108 and the Hillside Board of Education. (Attachment RES #1-07/10)

Motion: Cook Second: Santos

Cook	Y	Robinson	Y
Cortez	Y	Santos	Y
Isaac	Absent	Yafet	Y
Korzeneski	Y	Menza	Y
Mondella	Y		

Motion 1 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 July 22, 2010.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

#403-10

OAL DKT. NO. EDU 13230-09
AGENCY DKT. NO. 281-10/09

PATRICIA HOGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLAND REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/23/10

Date of Mailing: 9/23/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13230-09
AGENCY DKT. NO. 281-10/09

PATRICIA HOGAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL, BERGEN COUNTY,
Respondent.

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

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

Record Closed: August 3, 2010 Decided: August 24, 2010

BEFORE **KELLY J. KIRK**, ALJ:

On October 9, 2009, petitioner, Patricia Hogan, filed a Petition of Appeal with the Commissioner of Education challenging the determination made by the respondent, Board of Education of the Northern Highlands Regional School (Board), to withhold her increment for the 2009-2010 school year. On October 20, 2009, the Board filed an Answer to Verified Petition of Appeal. The Department of Education transmitted this

matter to the Office of Administrative Law (OAL) where, on November 13, 2009, it was filed for determination as a contested case. A telephone prehearing conference was held on December 4, 2009, and hearing was scheduled for March 10, 2010. On the March 10, 2010, hearing date, the parties engaged in settlement discussions and advised that a settlement agreement would be provided. However, the Board rejected the terms of the proposed settlement and a hearing was scheduled for June 7, 2010. The June 7, 2010 hearing was adjourned in light of the June 4, 2010 letter from the Board's attorney, indicating that the parties had reached settlement in the within matter.

On August 4, 2010, the undersigned received the attached Stipulation of Settlement and Board Resolution. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

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

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

August 24, 2010
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 8-26-10

Date Mailed to Parties: AUG 26 2010
db

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SPRINGSTEAD & MAURICE, ESQS.
COURTHOUSE TOWERS
39 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR PETITIONER

PATRICIA HOGAN

Petitioner,

vs.

NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
DOCKET NO. EDUOA 13230-2009N
AGENCY REF. NO. 281-10/09

STIPULATION OF SETTLEMENT

Petitioner, PATRICIA HOGAN ("HOGAN" or "Petitioner") and Respondent NORTHERN HIGHLANDS REGIONAL BOARD OF EDUCATION ("Board") hereby agree to settle the above-captioned matter pursuant to the following terms:

WHEREAS, HOGAN has made certain claims against the Board in the above-referenced action; and

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

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

1. Petitioner agrees to dismiss her Petition of Appeal with prejudice upon the execution and approval of this agreement by the Board and Commissioner of Education, if appropriate.

2. HOGAN agrees to resign her position as a tenured secretary in the Board's employ on June 30, 2011. She will remain in her present position for the balance of her employment term. This resignation shall be final, binding, and irrevocable as of the date of this Agreement.

3. HOGAN's salary shall remain fixed for 2009-2010 (July 1, 2009-June 30, 2010) school year. For the 2010-2011 school year, **(July 1, 2010- June 30, 2011), HOGAN shall receive a three percent (3%) annual salary increase retroactive to July 1, 2010.** HOGAN shall receive all benefits of employment as are customary for confidential employees in the Board's employ for so long as she remains employed by the district. HOGAN will retain the Region I stipend ($1,000 a year) if she continues to make a good faith effort to perform her duties to the best of her abilities and will maintain the opportunity to work after-school assignments which stipends would approximate $4,000 a year. **HOGAN shall retain her current work schedule for the**

balance of her employment with the Board. Her hours shall be 8AM through 4PM Monday through Friday during the regular work year, except that her hours of employment for the day before a holiday shall be 8AM to 3 PM. School vacation work schedules shall be consistent with the hours of other confidential employees in the Board's employ.

4. Upon HOGAN leaving the Board's employ, the Board will provide HOGAN with a favorable letter of reference for use in attempts at future employment and shall respond to any inquires regarding HOGAN in the fashion as set forth in the letter for reference.

5. The parties agree that, to the maximum extent permitted by law, the parties shall keep this Settlement, the discussions leading to this Settlement, and the facts involved in this matter confidential. The Board agrees that this confidentiality provision shall not preclude HOGAN from discussing this matter with her counsel or immediate family.

6. As part of this settlement HOGAN agrees to release Respondent and Releasees from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to, claims arising under the Americans With Disabilities Act, the National Labor Relations Act, the Fair Labor Standards Act, the New Jersey Employer-Employee Relations Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, as amended, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, the Older Workers Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Omnibus Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, New Jersey Wage and Hour laws, and/or any other federal, state or local employment, human rights, civil rights, wage-hour, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public

policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, loss of consortium, or any claims similar thereto against Respondent and Releasees, including any claim for attorneys' fees and/or costs, that Petitioner, his heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct up to and including the date of execution of this Agreement and shall not, from any source or proceeding whatsoever, seek, or in any way personally obtain or accept any monetary award, recovery, settlement or relief therefrom.

7. HOGAN agrees to perform her job duties as a secretary to the best of her abilities for the remainder of her tenure with the Board. The Board agrees not to unnecessarily interfere with, disturb or disrupt HOGAN in the performance of her duties with the Board. HOGAN and the Board have entered into this agreement in good faith with the reasonable expectation of the performance by the other as set forth herein.

8. This agreement has been entered into freely and voluntarily by the parties and by affixing their signatures hereto, acknowledge the same.

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

copy of the letter of reference described in paragraph 5 will also be placed in Petitioner's personnel file

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

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

12. Petitioner and Respondent further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

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

14. By signing this Agreement, Petitioner *and Respondent* acknowledge:

i. *THEY HAVE* READ THIS AGREEMENT COMPLETELY.

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

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

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

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

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

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

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

PATRICIA HOGAN

, Witness

Dated: July ,2010

NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION

Dated: July , 2010

By: Barbara A. Garand

, Secretary

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.

_____

, ALJ

Dated:

Certified Extract of Board Minutes

The following resolution was offered by Mrs. Borzilleri and seconded by Mr. Wei and unanimously adopted by the Board of Education by the following Roll Call Vote:

NAME:	AYES:	NAYS:
Borzilleri, Jean	X	
Federer, Colleen	X	
Garand, Barbara	X	
Gravina, Carolee	X	
Hands, Robert Jr.	A	
Loughnane, Lori	X	
Mulanaphy, James	X	
Pagano, Ann	X	
Senger, Henry	X	
Trumbetti, Gail	A	
Wei, Bob	X	

B-18. Approval of the Settlement Agreement (Attachment B-18) for the NJDOE administrative proceeding filed as Docket Number EDUOA 13230-2009N and authorization of the execution of the agreement by the Board President and Board Secretary.

I hereby certify that the foregoing is an extract of formal Northern Highlands Regional High School District Board of Education meeting minutes for the regular meeting of July 19, 2010.

Roderic B. McLaughlin
Board Secretary

404-10

JODI JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a non-tenured teacher formerly employed by respondent's school district, appealed the Board's determination not to renew her contract for the 2009-2010 school year. Respondent Board filed a motion to dismiss, based on petitioner's failure to timely file her petition.

The ALJ found, *inter alia*, that: a May 14, 2009 letter from the Board advising petitioner that she would not be reappointed for the 2009-2010 school year marked the beginning of the regulatory 90-day period for the filing of appeals; petitioner's appeal, filed in April 2010, is time barred pursuant to *N.J.A.C.* 6A:3-1.3(i); and the Board's motion to dismiss is more appropriately under the purview of a motion for summary decision. Accordingly, the ALJ ordered that summary decision be granted in favor of the Board, and dismissed petition of appeal as untimely.

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in her decision – that petitioner's claim is time-barred and presents no compelling case for relaxation of the 90-day rule. 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.

September 23, 2010

404-10

OAL DKT. NO. EDU 5612-10
AGENCY DKT. NO. 72-4/10

JODI JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Acting Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons presented on pages 3-6 of her decision – that this matter is appropriately dismissed as untimely filed.[1]

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

IT IS SO ORDERED.[2]

Rochelle R. Hendricks
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/23/10
Date of Mailing: 9/23/10

[1] The Commissioner is, however, compelled to clarify an apparent misapprehension of the ALJ reflected in her decision. A Motion to Dismiss in Lieu of Answer is a proper responsive pleading, authorized by *N.J.A.C.* 6A:3-1.5(g), which may be adjudicated at the OAL.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05612-10
AGENCY DKT. NO. 72-4/10

JODI JACKSON,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.
Respondent.

Jodi Jackson, pro se

Karen A. Murray, Esq. for respondent (Elizabeth Public Schools Legal Department, attorney)

Record Closed: July 19, 2010 Decided: August 18, 2010

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner Jodi Jackson (Jackson), a teacher, appeals the determination of respondent, Board of Education of the City of Elizabeth, Union County (Board), that her contract would not be renewed for the 2010-2011 school year.

PROCEDURAL HISTORY

On April 14, 2010, Jackson filed a Petition of Appeal with the Commissioner of Education. On May 17, 2010, the Board filed a Motion to Dismiss the Petition in Lieu of Answer with the Bureau of Controversies and Disputes (Bureau) of the Department of Education (Department). On May 19, 2010, the Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on June 3, 2010. Review of the file revealed that Jackson had not filed a response to the Board's Motion. A telephone conference was held on June 29, 2010, and Jackson was given until July 12, 2010 to file a response, and the Board was given until July 19, 2010 to file a reply, if any. Jackson filed opposition to the Board's Motion on July 8, 2010, and the Board filed a reply on July 19, 2010. Jackson filed an additional submission on July 21, 2010, which does not address the merits of the Board's motion.

The Board's motion was filed as a motion to dismiss, which is not recognized by the Uniform Administrative Procedure Rules (UAPR). Rather, the motion falls within the purview of a motion for summary decision. When required in individual cases, the administrative law 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 judge may render any ruling or order necessary to decide any matter presented which is within the jurisdiction of the transmitting agency or the agency conducting the hearing. N.J.A.C. 1:1-14.6(h). Additionally, 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). In light of the foregoing, the matter is hereby converted to a motion for summary decision, and accordingly is governed by N.J.A.C. 1:1-12.5.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The file contains a letter to Jackson, dated May 14, 2009, from Pablo Munoz (Munoz), Superintendent of Schools (Superintendent), which states, in pertinent part:

> Your current employment contract expires on June 30, 2009. At that time, you will have received your entire annual wage. In accordance with N.J.A.C. 6A 9:6-3 [sic], N.J.S.A. 18A:28-9, and N.J.S.A. 18A:27-10, you will not be offered a contract of employment for your services for the 2009-2010 school year, which begins September 2009.

The file also contains a letter, dated May 14, 2009, from Jackson acknowledging receipt of the May 14, 2009 letter from Munoz, requesting written documentation and an opportunity to meet with someone to discuss the situation. Accordingly, I **FIND** that Jackson received the Superintendent's letter of May 14, 2009 on that same date.

On May 18, 2009, Aida Garcia, Assistant Superintendent for Human Resources sent a letter to Jackson in response to Jackson's request for a statement of reasons for her non-renewal, which letter stated that Jackson was non-renewed for performance based upon administrators' observations.

Jackson filed a Petition of Appeal on April 14, 2010, and I so **FIND**.

LEGAL ANALYSIS AND CONCLUSION

The Board argues that the Petitioner's appeal is untimely, and should be dismissed pursuant to N.J.A.C. 6A:3-1.3(i), which 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. 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.

Pursuant to N.J.S.A.18A:27-10, on or before May 15 in each year, each non-tenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either a written offer of a contract for employment from the board of education or a written notice from the chief school administrator that such employment will not be offered. An employee whose employment contract is not renewed has the right to a written statement of reasons for non-renewal and to an informal appearance before the board. N.J.S.A. 18A:27-4.1(b). Jackson requested a written statement of reasons, but did not request an informal appearance before the board. Nevertheless, there is no dispute that Jackson was notified on May 14, 2009, that her contract was to expire on June 30, 2009 and she would not be offered a contract for the 2009-2010 year. Accordingly, the notice was sufficient to trigger the ninety-day time period, and Jackson would have had until August 12, 2009 to file a Petition of Appeal.

In her opposition to the Board's Motion, Jackson asserts that immediately following her dismissal she contacted either the Board or the Superintendent and requested a statement of reasons for her nonrenewal, and that she contacted her Union. She further asserts that she spent the summer of 2009 pursuing answers and evidence from the Elizabeth Education Association (EEA). She met with EEA attorney, Gregory Syrek, Esq. (Syrek), on August 20, 2009, and asserts that she was not advised by Syrek of "alternative ways to find justice in this issue". However, by the time she met with Syrek, the ninety days to file a Petition of Appeal had already expired. Finally, Jackson asserts that her correspondence in June 2009 through October 2009 was ignored.

Although I found that the May 14, 2009 letter triggered the ninety-day time period, even if the May 18, 2009 letter setting forth the reason for her non-renewal triggered the ninety-day time period, she would have had to file her Petition of Appeal by August 16, 2009. Moreover, although Jackson contends that correspondence in June 2009 through October 2009 was ignored, even ninety days after October 2009 would have required that she file a Petition of Appeal no later than the end of January

2010. Yet, Jackson did not file a petition until April 14, 2010, eleven months after she received notice that she was not being offered a contract for the 2009-2010 school year. Thus, even giving Jackson the benefit of any favorable inference, the filing of the Petition of Appeal was nevertheless untimely.

In Kaprow v. Bd. of Educ., 131 N.J. 572, 583 (1991), New Jersey Supreme Court discussed the ninety-day limitation period, and determined that such period "represents a reasonable procedural requirement," provides "finality in education matters," and has withstood tangential review. Additionally, the court opined:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.
>
> Kaprow, supra at 587. [Citations omitted].

In Kaprow, the petitioner attempted to resolve his claim through negotiations with the Board. However, the Supreme Court found that such attempt did not negate that he had received adequate notice on a date certain, nor did it roll the running of the limitations period. Similarly, in the present matter, Jackson contends that she pursued "alternative ways to find justice," and attempted to resolve her dispute by contacting the EEA and/or school personnel. However, she nevertheless received adequate notice on May 14, 2009, that her position was not being renewed by the Board, and her attempts to resolve her dispute did not toll the running of the ninety-day limitations period within which she was permitted to file a petition of appeal.

A contested case before the Office of Administrative Law "can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed

material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 63 (1988). N.J.A.C. 1:1-12.5(b) provides, in pertinent part:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is not 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.

Based upon the foregoing, I **CONCLUDE** that this matter is appropriate for summary decision, as Jackson has failed to set forth any specific facts which demonstrate that there is a genuine issue requiring a hearing. Although the Board's motion was filed as a motion to dismiss, I **CONCLUDE** that pursuant to the regulations, the matter may be converted to a motion for summary decision. There is no dispute that Jackson was advised on May 14, 2009 that her contract would not be renewed, but she failed to file a Petition of Appeal until April 14, 2010, eleven months later, and long after the applicable ninety-day limitations period had expired. Accordingly, I **CONCLUDE** that Jackson's Petition of Appeal was untimely filed, and her Petition of Appeal should be dismissed.

ORDER

It is hereby **ORDERED** that summary decision be **GRANTED** in favor of the Board, and that Jackson's 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.

August 18, 2010
DATE

Kelly J. Kirk
KELLY J. KIRK, ALJ

Date Received at Agency: August 18, 2010

Date Mailed to Parties: AUG 19 2010

Laura Dardes
~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

db

#405-10A

STATE BOARD OF EXAMINERS DKT. NO. 0304-277
OAL DKT. NO. EDE 5320-05
COMMISSIONER APPEAL NO. 3-3/09A

IN THE MATTER OF THE TEACHING CERTIFICATES OF RUTH MEGARGEE, NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES.	:	COMMISSIONER OF EDUCATION DECISION

Appellant challenges the determination of the New Jersey State Board of Examiners (Board of Examiners) that her actions warranted the suspension of her teaching certificates for one year.

The facts underlying this controversy will not be completely detailed in this decision, as they are amply set forth in the various adjudications – including a decision by the Superior Court, Appellate Division – of the tenure charges brought against appellant. The Acting Commissioner has, however, thoroughly reviewed those facts, the legal arguments made below, and the evidence and legal discussion presented in the proceedings before the Board of Examiners. Upon consideration of same, as well as the parties' appellate briefs and appendices, the Acting Commissioner concurs with the Board of Examiners' holdings.

An examination of appellant's papers reveals little of merit. First, the Acting Commissioner finds that appellant's contention that the Board of Examiners bore – and did not sustain – the burden of proof is a red herring. The finding of appellant's unbecoming conduct was established in the tenure proceeding. The Board of Examiners provided appellant with the opportunity to present information that might militate against action on her certificates. To the extent that the Board bore the burden to show that appellant's unbecoming conduct warranted a one-year suspension of her certificate, it did so by identifying as grounds appellant's

intractability and the effect it had upon the Department of Human Services' (DHS) ability to effectively deliver educational services.

Second, the Acting Commissioner rejects appellant's suggestion that the Board of Examiners was required to prove that she was unfit to instruct. Under *N.J.A.C.* 6A:9-17.5, a finding of unbecoming conduct may serve as the basis for revocation or suspension of certification. As referenced above, in the tenure proceeding against her, appellant was found to have engaged in unbecoming conduct – not due to instructional incompetence, but rather to her unreasonable rejection of teaching assignments to the detriment of the DHS's ability to efficiently deliver instructional services. That is unquestionably grounds for a finding of unbecoming conduct, even where medical issues exist. *See, e.g. In the Matter of the Tenure Hearing of Frances R. Metallo, School District of the City of Union City, Hudson County,* Commissioner Decision No. 244-03, May 12, 2003; *In the Matter of the Certificates of Frances Metallo,* State Board of Examiners Dkt. No. 405-123 (May 5, 2005).[1] Hence, no finding of poor pedagogy was or is necessary.

The Commissioner's and Appellate Division's finding of unbecoming conduct based on excessive absenteeism is the law of the case and will not be relitigated here. The Board of Examiners independently and justifiably found that appellant's unbecoming conduct rose to a level that supported suspension of her certification.

Third, appellant suggests that because respondent – at the hearing in the Office of Administrative Law (OAL) on behalf of the Board of Examiners – did not present witnesses to rebut her testimony, the Administrative Law Judge (ALJ) and Board should have found in her

[1] The Acting Commissioner rejects appellant's argument that *Metallo* can be distinguished because in that case, respondent – in addition to being charged with excessive absenteeism – was also accused of suggesting improper tactics to students participating in a mathematics competition. In both the Commissioner of Education and State Board of Examiners decisions, however, the respective arbiters found that the evidence of Metallo's excessive absenteeism independently supported a finding of unbecoming conduct. Commissioner Decision at 18 and Board of Examiners Decision at 4.

favor. However, the ALJ and Board correctly determined that the evidence about appellant's unbecoming conduct supported a certificate suspension, her testimony about her teaching record and her frame of mind notwithstanding. The Acting Commissioner further notes that appellant was given a significantly shorter suspension than Metallo received, despite respondent's demands for a greater penalty.

In summary, the Acting Commissioner is not persuaded that there is any basis to disturb the decision of the Board of Examiners suspending her certificates for a year. Accordingly, it is affirmed for the reasons set forth therein, and the appeal is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/23/10

Date of Mailing: 9/24/10

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

COPY

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
RUTH MEGARGEE	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 0304-277

At its meeting of June 10, 2004, the State Board of Examiners reviewed a decision forwarded by the Commissioner of Education dismissing Ruth Megargee from her tenured position with the Department of Human Services (DHS) for charges of unbecoming conduct. *In the Matter of the Tenure Hearing of Ruth Megargee,* Docket No. 196-6/00 (Commissioner's Decision, December 31, 2001). DHS had alleged that Megargee was absent from her teaching position without permission. Megargee currently holds a Teacher of the Handicapped certificate, issued in June 1978 and a Teacher of Nursery School certificate, issued in October 1980.

This case originated when DHS certified tenure charges against respondent, Ruth Megargee. Megargee was employed as a Teacher at various DHS facilities during her long tenure. DHS charged her with unbecoming conduct for repeatedly refusing to return to work after an injury even though reasonable accommodations had been made for her.

The Commissioner of Education transmitted the case to the Office of Administrative Law (OAL). Administrative Law Judge (ALJ) Lillard Law heard testimony for seven days over a three-month period in 2001. After receiving post-hearing submissions, the record closed and the ALJ issued an Initial Decision on November 8, 2001. *In the Matter of the Tenure Hearing of Ruth Megargee and Ruth Megargee v. New Jersey Department of Human Services,*Dkt. Nos. EDU 4693-00 and CSV 8265-00 (November 8, 2001.)

In that decision, ALJ Law focused on whether Megargee's unauthorized absence from duty constituted conduct unbecoming a teacher and, if so, whether her absences warrant her dismissal from her tenured position? (Initial Decision, slip op. at 65). ALJ Law concluded that Megargee was a disabled individual under the New Jersey Law Against Discrimination, *N.J.S.A.*10:5-1 *et seq.*, due to a work-related injury, who was entitled to a reasonable accommodation at work for her handicap. (Initial Decision, slip op. at 65-66.) The ALJ also noted that the DHS went beyond Megargee's restriction of not being able to lift anything over 40 pounds and offered her positions that required no lifting at all. (Initial Decision, slip op. at 66-67.) Moreover, the ALJ found credible DHS' contention that "the heaviest thing [Megargee] would have to lift all day is a piece of chalk and a textbook." (Initial Decision, slip op. at 68.)

ALJ Law determined that the tenure charges against Megargee were established and that her unauthorized absence from work constituted unbecoming conduct. (Initial Decision, slip op. at 69.) In fact, the ALJ held that DHS "has endured respondent-appellant's absence from duty to the detriment of its obligation to maintain its efficiency." (Initial Decision, slip op. at 70.) According to the ALJ, Megargee's refusal to resume her employment "on unfounded and unsubstantiated grounds" warranted her removal from her tenured position. (Initial Decision, slip op. at 70.) The ALJ therefore entered summary judgment for DHS and removed Megargee from her tenured position with DHS. (Initial Decision, slip op. at 71.)

In a decision dated December 31, 2001, the Commissioner of Education affirmed the ALJ's Initial Decision as to the tenure charges against Megargee. The Commissioner agreed with the ALJ that Megargee "was guilty of unbecoming conduct

when she refused to return to work despite ample forewarning by her superiors that tenure proceedings would ensue if she did not." (Commissioner's Decision, slip op. at 82.) The Commissioner further opined that DHS had offered a reasonable accommodation to Megargee that required no lifting or restraining of pupils even though Megargee was not restricted from the latter activity. (Commissioner's Decision, slip op. at 82.) The Commissioner found that Megargee's claim that she was brought up on tenure charges for a three day absence to be disingenuous. (Commissioner's Decision, slip op. at 82.) According to the Commissioner, "the record supports the determination that, in addition to a history of extensive absences, there were problems related to respondent's acceptance of assignments and/or returning to work, which were antecedent to the filing of the tenure charges." (Commissioner's Decision, slip op. at 83.) Accordingly, the Commissioner affirmed Megargee's removal from her tenured employment with DHS and transmitted the matter to the State Board of Examiners for appropriate action regarding Megargee's certificates. Both the State Board of Education and the Appellate Division of the Superior Court of New Jersey affirmed the decision to terminate Megargee's tenure.

Thereafter, on June 10, 2004, the State Board of Examiners issued Megargee an Order to Show Cause as to why her certificates should not be suspended or revoked. The Order was predicated on the charges of unbecoming conduct that had been proven in the tenure hearing.

The Board sent Megargee the Order to Show Cause by regular and certified mail on July 27, 2004. The Order provided that Megargee's Answer was due within 30 days. Megargee filed an Answer on August 26, 2004. In her Answer Megargee admitted that

DHS had brought tenure charges against her. She also stated that the tenure charges were based on only a three day absence from her work and that the absences were legitimate. (Answer, ¶ 3.) In the remainder of her Answer, Megargee admitted the outcome of the tenure proceedings, but denied that there was any basis to revoke or suspend her certificates. (Answer, ¶¶ 4-6.) Megargee also argued that she had always proceeded in good faith, that the tenure charges against her were brought in retaliation for a lawsuit she had brought against DHS for discrimination and retaliation, and that she had applied for a disability pension after the tenure charges were filed and a State doctor found her to be totally disabled. (Answer, Affirmative Defenses.)

After receiving Megargee's response, the Examiners transmitted the case to the Office of Administrative Law (OAL) for the limited purpose of determining whether Megargee's unbecoming conduct warranted action against her certificates. Administrative Law Judge (ALJ) Maria Mancini LaFiandra heard testimony and after receiving post-hearing submissions, the record closed and the ALJ issued an Initial Decision on December 8, 2008. *In the Matter of the Certificates of Ruth Megargee,* Dkt No. EDE 5320-05 (Initial Decision, December 8, 2008).

In that decision, ALJ La Fiandra determined that the "only issue remaining to be resolved in this matter is whether the unbecoming conduct in which Respondent engaged is so serious or egregious as to merit suspension or revocation of her working certificates." (Initial Decision, slip op. at 5.) The ALJ further noted that Megargee's certification hearing "is not one in which respondent may relitigate the tenure case, which respondent clearly attempted to do in the presentation before me." (Initial Decision, slip op. at 6.) The ALJ summarized that the Commissioner, State Board and Appellate

division all found that Megargee's conduct was more serious than just absence without authorization for three days." (Initial Decision, slip op. at 6.)

ALJ La Fiandra found that the testimony and evidence Megargee presented, much of it hearsay, was unpersuasive given the nature of Megargee's conduct. (Initial Decision, slip op. at 6-7.) The ALJ held that while Megargee's conduct did not endanger the well-being of students, it was recalcitrant: "[s]he not only resisted authority in refusing to return to work, she flouted it as well by ignoring the caveat that tenure charges would follow if she failed to return to work." (Initial Decision, slip op. at 7.) The ALJ therefore ordered Megargee's teaching certificates suspended for one year. (Initial Decision, slip op. at 7.)

Both the Deputy Attorney General (DAG) representing the Board of Examiners and Megargee filed Exceptions to the Initial Decision.[1] The DAG argued that while the reasoning of the Initial Decision in collaterally estopping Megargee from relitigating the issues surrounding her tenure removal was correct, the penalty the ALJ imposed was too lenient. (DAG Exceptions, pp.1-3.) The DAG urged that the Initial Decision should be modified to impose a more stringent penalty. (DAG Exceptions, p.3.)

In her Exceptions, Megargee argued that there was no authority to suspend her certificates based on her absenteeism for bona fide medical reasons. (Megargee Exceptions, pp. 8-18.) Megargee also argued that the Board of Examiners had not met its burden of proving that she was unfit to be a teacher. She noted that "but for the dispute over her absence caused by her disability (and whether the accommodation offered to her was reasonable or not), respondent was an exemplary teacher, who had no blemish on her

[1] Although Megargee's Exceptions were untimely, at its meeting of January 13, 2009, the Board of Examiners voted to accept and consider them.

career spanning over two decades." (Megargee Exceptions, p. 18.) Accordingly, Megargee argued that the Initial Decision should be modified to provide for no action against her certificates. (Megargee Exceptions, p. 20.)

In Reply Exceptions, the DAG claimed that ALJ LaFiandra properly rebuffed Megargee's attempt to reintroduce facts that were fully decided during the tenure matter, hearsay evidence unsupported by legally competent evidence and evidence concerning events which occurred subsequent to Megargee's unbecoming conduct. (Reply Exceptions, pp. 2-4.) The DAG also argued that the Examiners did not need to present fact witnesses regarding Megargee's conduct since that was already proven in the tenure hearing. (Reply Exceptions, p. 6.) Rather, the only issue that remained before ALJ La Fiandra was one of penalty, which is legal in nature and only called for Megargee to present evidence in mitigation. (Reply Exceptions, p. 6.) Accordingly, the DAG reiterated her argument that the Initial Decision should be affirmed for its reasoning and a stricter penalty imposed. (Reply Exceptions, p. 7.)

The Board must now determine whether to adopt, modify or dismiss the Initial Decision in this matter. At its meeting of January 13, 2009, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the decision and the issues raised therein, the Board voted to adopt the Initial Decision. Since Megargee's unbecoming conduct was established in the tenure proceedings, the only issue remaining here is whether that conduct is sufficient to warrant sanctions against Megargee's certificates.

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.

Contrary to Megargee's assertions, she is not being "punished" merely for missing three days of work or being unable to physically perform her job. As ALJ LaFiandra made clear in her decision, it was Megargee's recalcitrant behavior in cooperating with DHS that warranted the one-year suspension of her teaching certificates. (Initial Decision, slip op. at 7.) Moreover, in examining the entire record in this case, the Board notes (as did the Commissioner, State Board and Appellate Division) that Megargee clearly evinced no desire to return to her employment unless the job presented none of the "imagined" pitfalls Megargee ascribed to it. Her intractability undermined DHS' ability to effectively function and the Examiners therefore agree with the ALJ's assessment that the proper sanction in this case is a one-year suspension of Megargee's certificates. (Initial Decision, slip op. at 7.)

Accordingly, on January 13, 2009 the Board of Examiners voted to suspend Ruth Megargee's Teacher of the Handicapped and Teacher of Nursery School certificates for one year. On this 23rd day of February 2009 the Board of Examiners voted to adopt its formal written decision and it is therefore ORDERED that the one-year suspension of Megargee's certificates be effective immediately. It is further ORDERED that Megargee return her 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: 2/25/09

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-28.
RRH:MZ:

408-10R

OAL DKT. NO. EDU 4593-10
(EDU 6385-09 ON REMAND)
AGENCY DKT. NO. 155-7/09

COLLEEN K. COVERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision of the Office of Administrative Law have been reviewed by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon review, the Assistant 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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|29|10

Date of Mailing: 9|29|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4593-10

(ON REMAND EDU 6385-09)

AGENCY DKT. NO. 155-7/09

COLLEEN K. COVERT,

Petitioner,

v.

BOARD OF EDUCATION
OF THE BOROUGH OF RUMSON,
MONMOUTH COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Dennis McKeever, Esq. for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: August 24, 2010 Decided: September 2, 2010

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 20, 2009, 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 21, 2010, a fully executed Settlement Agreement was received from the parties, and on April 21, 2010, an Initial Decision approving settlement was entered into by this tribunal.

On May 17, 2010, the commissioner of Education remanded the case because the Commissioner did not, pursuant to paragraph 5 therein, have jurisdiction to offer relief on appeal in the event of breach of the Settlement Agreement.

On August 24, 2010, a fully executed Addendum to the Settlement was received from the parties, amending paragraph 5 of the Settlement Agreement to refer any jurisdiction for relief on appeal to the superior Court of New Jersey, in accordance with the remand of the commissioner of Education.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Addendum to Settlement Agreement (together referred to as the "Settlement") indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

I **CONCLUDE** that this 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.

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.

September 2, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

/bdt

ADDENDUM TO SETTLEMENT AGREEMENT

THE SETTLEMENT AGREEMENT between Petitioner Colleen K. Covert (hereinafter "Ms. Covert"), and Respondent Rumson Board of Education (hereinafter "Board"), which has previously been approved and signed by the parties, and

WHEREAS, the Settlement Agreement was accepted by the Honorable Edward Delanoy, Administrative Law Judge, and

WHEREAS, the Settlement Agreement was submitted to the Commissioner of Education for who rejected it based upon a jurisdictional objection, and

WHEREAS, the parties have agreed to conform the Settlement Agreement to meet the Commissioner's objection, and

NOW THEREFORE, the Settlement Agreement shall be amended as follows:

Paragraph 5 shall be, and is hereby, amended be deleting any reference to the Commissioner of Education and to refer any dispute that arises as a result of a parties breach to this Settlement Agreement to the Superior Court of New Jersey.

Signed hereunder by each of the Parties and their respective attorneys:

Dennis McKeever, Esq.
Attorney for Rumson Board of Education

SCOTT FEDER, Superintendent of Schools
Dated:

Keith Waldman, Esq.
Attorney for Colleen K. Covert
6/10/10

Colleen K. Covert
COLLEEN K. COVERT
Dated: 6/7/10

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SETTLEMENT AGREEMENT

This settlement agreement ("Agreement") is being entered into between Petitioner, Colleen K. Covert ("Ms. Covert"), and Respondent, Rumson Board of Education ("Board"), with regard to Colleen K. Covert v. Rumson Board of Education & Kathleen Dec, Intervenor, OAL Dckt. No.: EDUOA 06385-2009S, Agency Ref. No.: 155-7/09 having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. Effective April 1, 2010, Ms. Covert will be returned to a full-time secretary position. Ms. Covert shall receive her pro-rated sick and vacation days for the period of time that she was a part-time secretary. Ms. Covert agrees to waive any claim to back-pay as part of this settlement. The parties acknowledge that as of April 1, 2010 Ms. Covert will have 14 years, 0 months, 11 days seniority in the position of secretary. It is expressly understood by and between the parties that Ms. Covert will be initially assigned to the Child Study Team. The parties acknowledge that the Board, at all times, retains the right to reassign Ms. Covert.

2. The consideration described in Paragraph 1 above shall constitute the entire monetary settlement of the matters encompassed by this Agreement.

3. In exchange for the promises and undertakings of the Respondent, Rumson Board of Education, as set forth in Paragraphs 1 and 2 above, Petitioner agrees:

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

A. To execute a General Release and Waiver ("General Release") to the Respondent in the form annexed. Petitioner expressly acknowledges that this Agreement and the General Release and Waiver are intended to extinguish and to waive all claims which she may have against any person or entity identified as a releasee in the General Release and Waiver

resulting from anything which has happened up to the date of the execution of the General Release and Waiver and which were or could have been asserted, including those claims unknown to her and claims for medical expenses, attorneys fees and costs. Petitioner hereby acknowledges that the execution of this Agreement and the General Release and Waiver which accompanies it shall absolutely bar any such claim, action or suit against any releasee identified in the General Release and Waiver. This release specifically excludes any pension based or workers compensation claims. Ms. Covert is unaware of any factual basis for such claims.

B. Petitioner agrees and promises to cause her attorney to file a Stipulation of Dismissal with Prejudice with respect to her claims and causes of action with the Commissioner of Education in this action.

4. All documents and information obtained during discovery in this case shall be deemed "confidential." The parties and their counsel agree that no such documents or information shall be provided or disclosed to or shared with any third party for any purpose whatsoever. This provision shall not apply to third parties and to documents previously filed with the Commissioner of Education, but this shall not permit Petitioner or Petitioner's counsel to provide copies of such documents to third parties. Petitioner and her counsel further agree that none of them will use or will permit to be used in any other action or matter any information about the Respondents in this action which they obtained as a result of, during the course of or in connection with their involvement in this action. Petitioner shall not voluntarily assist third parties in the pursuit of litigation against Respondent.

5. The parties agree that any breach of any obligation under this Agreement will constitute a breach of this Agreement. In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Commissioner for a willful violation of any term of this Agreement. In the event that either party is required to commence an action in law or equity to enforce its rights under this Agreement and it prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attorneys fees and costs in addition to any damages which may be recoverable.

6. It is understood that neither the execution of this Agreement nor any other action taken by the Respondent in connection with this settlement constitutes an admission by the Respondents or any other person or entity identified in the General Release and Waiver as a releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to the employment of Petitioner was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Respondent specifically disclaims any liability to Petitioner or any other person. The parties have entered into this Agreement solely to compromise disputed claims. No findings of any kind have been made or issued by the Commissioner on the merits of the claims in this action and neither party purports to be the prevailing party in this action.

7. The parties to the within lawsuit agree not to make disparaging statements concerning each other or to defame each other in any manner to any person or entity. The parties also agree not to authorize any person or entity to make any disparaging statements about each other to any person or entity.

8. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed to be the drafter or

provider of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party.

9. This Agreement and the General Release and Waiver referred to herein set forth the entire agreement between Petitioner and the Respondents. This Agreement supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

10. Petitioner acknowledges that she has consulted with her attorney regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; that the terms of this Agreement and the General Release and Waiver have been explained to her by her attorney; and that she has represented to her attorney that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Petitioner has also acknowledged that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

11. Any notice or other communication under this Settlement Agreement shall be in writing and shall be considered given when mailed by regular mail or delivered personally, to the parties at the following addresses:

To Petitioner:

Keith Waldman, Esq.
Selikoff & Cohen
700 East Gate Drive
Mount Laurel, New Jersey 08054

To Respondents:

Dennis McKeever, Esq.
Lindabury, McCormick, Estabrook
& Cooper
53 Cardinal Drive, P.O. Box 2369
Westfield, New Jersey 07091

or at such other address as a party may specify by notice to the other.

14. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Settlement Agreement.

15. Conditioned upon the entry of an initial decision and the Commissioner's approval of this Settlement Agreement without modification, the parties will submit a stipulation of dismissal with prejudice and without costs.

16. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals.

The foregoing terms and provisions are hereby agreed to and accepted:

Dated: March 16, 2010

Colleen K. Covert

Dated: 4-12-10

Keith Waldman, Esq.
Selikoff & Cohen
Attorney for Petitioner

Rumson Board of Education

Dated: _____

By: _____

Dated: 4-12-10

Dennis McKeever, Esq.
Lindabury, McCormick, Estabrook & Cooper
Attorney for Respondent

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OAL DKT. NO. EDU 6077-09
AGENCY DKT. NO. 92-5/09

KENNETH R. PORTER,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT	:	DECISION
	:	
RESPONDENT.	:	

Subsequent to the Agency's receipt of the recommended decision of the Office of Administrative Law (OAL) in this matter, by letter dated August 26, 2010 and copied to counsel for the Department, counsel for petitioner reported: "Without a lengthy explanation, the impediment which we asked to be removed in the petition has been accomplished because of a change in the expungement law. Therefore, the issue asked to be adjudicated in the petition is now moot and I ask that it be withdrawn."

Having received no objection from counsel for the Department – either as to the mootness of this matter or its consequential withdrawal at this point in time – the Commissioner accepts petitioner's withdrawal of his petition of appeal on the ground of mootness.

Accordingly, as there is no justiciable controversy in need of resolution in this matter, the recommended Initial Decision of the OAL is rejected as unnecessary.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/1/10
Date of Mailing: 10/1/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6077-09
AGENCY DKT. NO. 175-5/03

KENNETH R. PORTER,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Ned P. Rogovoy, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum, & Friedman, attorneys)

Joyce Atkins, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: July 5, 2010 Decided: August 18, 2010

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 4, 2009, petitioner filed a verified petition with the New Jersey Department of Education dated May 4, 2009 (C-1), asserting that the current version of N.J.S.A. 18A:6-7.1 is being applied retroactively, thus causing a "manifest injustice," and violating "notions of fundamental fairness." (See, C-1 at 3.) The Department transmitted this matter to the Office of Administrative Law (OAL) on June 16, 2009, for hearing as a contested case. In lieu of an answer, respondent submitted a motion to dismiss the petition, dated June 12, 2009, based on its position that "petitioner has failed to state a claim upon which relief can be granted." (See R-1 at 2.) In response, petitioner filed a brief in opposition to respondent's motion, dated July 22, 2009 (P-1). Respondent filed a reply letter brief in reply to petitioner's opposition to the motion to dismiss dated July 28, 2009 (R-2).

In response to my letter of September 3, 2009, expressing my concern that the record may be incomplete, I conducted a telephone conference on September 23, 2009. At that conference attorney for respondent requested an opportunity to contact petitioner's employing school district to confirm petitioner's claims. Following additional submissions by the parties (R-3 and P-2), I scheduled oral argument on the motion, which occurred on December 9, 2009.

On January 15, 2010, I received a letter from attorney for petitioner (P-3) advising that a new Expungement Act (P.L. 2009, c.188) had been signed into law on January 12, 2010, and requesting that I stay my decision in this case pending the outcome of petitioner's expungement request under the new law. I conferred with counsel on February 3, 2010, and determined to grant this request. However, after researching this issue, I decided to close the record and issue this initial decision.

The issue in this case is whether, in cases involving criminal record checks of public school teachers, the version of N.J.S.A. 18A:6-7.1 in place at the time the record

check was conducted or the version in effect at the time a teacher was hired should govern the teacher's disqualification.

STATEMENT OF FACTS

After reviewing the facts and allegations, I have determined that this case should be decided as a motion for summary decision rather than as motion to dismiss. That which follows is a brief summary of the relevant facts of this case, all of which are undisputed.

In 1977, petitioner was charged with, and convicted of, possession of marijuana with intent to distribute. (See C-1 at 1.) Approximately nine years later, in 1986, petitioner obtained a teaching position with the Ocean City School District. (Id. at 2.) Petitioner held this position until 2009, when he was disqualified pursuant to N.J.S.A. 18A:6-7.1, for having a criminal record. (Ibid.)

Prior to 1989, petitioner's conviction was not a disqualifying offense under N.J.S.A. 18A:6-7.1. (Ibid.) A 1989 amendment to the statute made petitioner's 1986 conviction a disqualifying offense. (Ibid.) The amendment also provided that, although a conviction may be disqualifying, an employee could avoid being disqualified if he or she could demonstrate rehabilitation. (Ibid.) In 1998, the Legislature amended the statute yet again, and removed the rehabilitation provision. (Ibid.)

In 2009, the New Jersey Department of Education's Criminal History Review Unit required petitioner to be fingerprinted so that a criminal record check could be conducted. (Ibid.) Petitioner asserts that the Department never conducted a criminal record check prior to 2009, and this assertion has not been disputed by respondent. The background check revealed petitioner's 1977 drug conviction. (Ibid.) Petitioner was subsequently dismissed from his teaching position with the Ocean City School District based on the discovery of his prior criminal conviction. (Ibid.)

Based on the guidance given in prior administrative decisions in similar cases,[1] on September 3, 2009, I sent a letter to the attorneys expressing my concern that the record in this case may be incomplete. (C-2.) The basis of my concern was that, at that point, neither party had presented any evidence concerning petitioner's performance after being hired nor did either party address whether petitioner had been asked to provide a criminal background at the time of hiring, and whether any misrepresentation concerning a past criminal record had been made. (C-2.)

In response to my concerns, attorney for respondent submitted a letter dated October 23, 2009 (R-3), providing a photocopy of petitioner's application for a teaching position in the Ocean City public schools. (Attachment to R-3.) In that application, signed by the petitioner on July 21, 1986, there is the question "Have you ever been convicted of a crime? Yes____No____." The application further states "If 'Yes', please fill in the following:" The application then asks when, where and what offense. The completed application supplied with the letter contains no responses to these questions, indicating that the petitioner failed to respond. It is noted that these questions are on the same page of the application as petitioner's dated signature.

In his letter dated October 28, 2009 (P-2), attorney for petitioner does not dispute this, and acknowledged the petitioner did not answer the above questions. He also correctly points out that the school district ignored petitioner's incomplete application at the time of hiring. (P-2.)

Finally, by letter dated January 14, 2010, attorney for petitioner notified this tribunal and attorney for respondent of the enactment of P.L. 2009, c.188, effective date March 15, 2010, codified at N.J.S.A. 2C:52-2. This legislation provides for the expungement of criminal records in certain circumstances. Attorney for petitioner asserts that this new expungement act allows the criminal history review unit to remove petitioner's disqualification if ordered by a judge of the Superior Court, thus having the effect of rendering the within case moot. Attorney for petitioner indicated that on March 12, 2010, he forwarded the expungement petition to the Superior Court.

[1] These cases are discussed in the Legal Discussion section of this initial decision.

LEGAL DISCUSSION AND ANALYSIS

The first issue in this case is, which version of N.J.S.A. 18A:6-7.1 should be applied regarding petitioner's disqualification, the version in effect at the time petitioner was originally hired, or the version in place at the time petitioner's criminal record check was conducted?

A second issue raised is whether the expungement of petitioner's disqualifying conviction during the pendency of this case should have an effect on the outcome?

As to the first issue, the current version of N.J.S.A. 18A:6-7.1 reads, 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 . . . unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such a 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
>
> . . .
>
> 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.;

. . .

> 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.) . . .
>
> [N.J.S.A. 18A:6-7.1 (emphasis added).]

In general, the courts of this State favor a prospective application of statutes rather than a retroactive application. The New Jersey Supreme Court recently held:

> We "have long followed a general rule of statutory construction that favors prospective application of statutes." This preference is based on our long-held notions of fairness and due process.
>
> Although the rule favoring prospectivity is, "a sound rule of statutory interpretation," "if the Legislature expresses an intent that the statute is to be applied retroactively, the statute should be so applied." As we have recently commented, the Legislature may express its intent explicitly or by implication "in that 'retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation.'"
>
> Consequently, the preference for prospective application is not applied mechanistically to every case. To be sure, retroactivity is appropriate, in general, when it is expressed, when an amendment is curative, or when the expectations of the parties so warrant. Only if one of these grounds is present, will we give a statute retroactive effect.
>
> [Cruz v. Central New Jersey Landscaping, Inc., 195 N.J. 33 (2008) (citations omitted).]

When the Ocean City School District originally hired petitioner, the offense for which he was convicted in 1977 was not listed in N.J.S.A. 18A:6-7.1 as a disqualifying offense. The offense was added to the statute in 1989, approximately three years after petitioner was hired. Petitioner asserts that since his conviction was not "disqualifying" at the time he was hired, it is improper to apply the 2009 version of the statute, in which petitioner's offense is listed as disqualifying, because it would be a retroactive application of the statute.

Respondent contends that the language contained in subsection g. of the statute is prospective, not retroactive. The provision explicitly states that the section will apply only to "criminal record checks conducted on or after the effective date . . ." The criminal record check in this matter was conducted in 2009, approximately eleven years after the statute became effective (P.L. 1998, c. 31). Therefore, according to respondent, the statute is clear on its face and is not being applied retroactively.

According to the relevant case law regarding this type of case, the determining factor is the date that the criminal background check is conducted. The version of the statute in effect at the time the criminal record check is conducted generally applies. Thus, the statute applies prospectively. In Cidoni v. Bd. of Education of the City of Camden and Department of Education, Office of Criminal History, EDU 6088-03, Initial Decision (December 22, 2005), adopted Comm'r (February 27, 2006), the administrative law judge (ALJ) found that the statute was clear on its face and that the petitioner was properly disqualified after a criminal record check was performed and uncovered a conviction which was not disqualifying at the time the petitioner was originally hired. The ALJ and the Commissioner both held that it was the date that the criminal record check is conducted which is important, not whether or not the prior conviction was a disqualifying offense at the time petitioner was hired. If the prior conviction is a disqualifying offense at the time the criminal record check is conducted, the teacher is disqualified. See Cidoni v. Bd. of Education of the City of Camden and Department of Education, Office of Criminal History, EDU 6088-03, Final Decision (February 27, 2006), at 5, footnote 1; see also, Nunez v. Department of Education, EDU 3689-02, Initial Decision (June 9, 2006) (The ALJ and Commissioner both held that the date that the criminal record check is conducted is determinative.).

Based on this, I **CONCLUDE** that in the absence of circumstances giving to petitioner an equitable entitlement to relief, since petitioner's prior conviction was a disqualifying offense at the time the criminal record check was conducted, petitioner should be disqualified.

I will now address whether the circumstances of this case entitle petitioner to equitable relief. Although the version of the statute in effect at the time the criminal record check was conducted was found to apply in the majority of cases according to both Cidoni and Nunez, the Commissioner also acknowledged "the possibility of an equitable entitlement, demonstrable on appeal, for a petitioner to have his or her corrective action check re-evaluated by the Department on a nunc pro tunc basis, and, assuming a favorable outcome, to make a claim for reinstatement by the employing board of education." Cidoni, supra at 5-6. The Commissioner further held that, the question turns on whether the petitioner "demonstrated such an entitlement." Id. at 6.

In Nunez, the ALJ and Commissioner both found that petitioner was entitled to equitable relief because he had been working for the school district for over two (2) years and "fulfilled all requirements of the application process, including completing all of his responsibilities and turned all documents for the background check over to [r]espondent" at the time he was hired. Nunez, supra.

In Cidoni, it was held that petitioner was not entitled to "equitable entitlement" because he was less than forthcoming regarding his past criminal record. Petitioner made several misrepresentations concerning his prior conviction; including denying that he had ever been convicted of any crime or misdemeanor. Cidoni, supra at 7. Therefore, in that case, the Commissioner found that the petitioner was not entitled to equitable relief. Id. at 6.

In the present matter, petitioner's attorney alleged that he possessed an unblemished record throughout his approximately twenty-three year career with the Ocean City School District. At first, neither party presented any evidence concerning petitioner's conduct after being hired. After my inquiry of September 3, 2009, the respondent did not dispute this assertion by petitioner's attorney. Therefore, I will accept that petitioner's record is unblemished during his service as a teacher. Petitioner also asserts that the Department never asked him to submit his fingerprints for a criminal record check prior to 2009. This also was not disputed by the respondent.

However, based on the submitted copy of petitioner's application for a teaching position in the Ocean City public schools, (Attachment to R-3), it is clear that petitioner was not forthcoming in response to the school district's question whether he had ever been convicted of a crime. In that application, signed by the petitioner on July 21, 1986, the petitioner never responded to the question "Have you ever been convicted of a crime? Yes____No____." He also never responded to the further inquiry "If 'Yes', please fill in the following:" asking when, where and what offense. The petitioner's application contains no responses, and the petitioner does not dispute that he did not respond. Because these questions are on the same page of the application as petitioner's dated signature, it cannot be argued that he missed seeing them. Therefore, based on the undisputed fact that petitioner failed to respond to the school district's inquiry into his criminal background, I **CONCLUDE** that petitioner misrepresented the absence of any past criminal record by his failure to respond. I further **CONCLUDE** that under these circumstances he is not entitled to equitable relief from the version of N.J.S.A. 18A:6-7.1 in place at the time of the criminal record check.

Finally, there is the question whether the subsequent expungement of petitioner's disqualifying conviction renders this case moot. Based on the guidance in Cidoni and Nunez, supra, I **CONCLUDE** that since the conviction in question was a disqualifying offense at the time the criminal record check was conducted, petitioner is disqualified notwithstanding there may be a subsequent expungement of the disqualifying conviction. An order of expungement cannot nullify the fact that at the time of the criminal record check, the petitioner was burdened with a disqualifying conviction.

DECISION AND ORDER

For the reasons stated above, I **ORDER** that respondent's motion seeking an order of dismissal of petitioner's petition is hereby **GRANTED**, and the petition is **DISMISSED**.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 18, 2010
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Date Received at Agency: 8/18/10
AUG 25 2010

Date Mailed to Parties:

mph

APPENDIX

LIST OF EXHIBITS

ALJ Exhibits:

C-1 Verified Petition, filed May 5, 2009

C-2 Letter to Counsel, dated September 3, 2009

For petitioner:

P-1 Letter brief, dated July 15, 2009

P-2 Attorney for petitioner letter, dated October 28, 2009

P-3 Attorney for petitioner letter, dated January 14, 2010

P-4 Attorney for petitioner letter, dated March 12, 2010

For respondent:

R-1 Letter brief in support of motion to dismiss, dated June 12, 2009

R-2 Reply letter brief, dated July 28, 2009

R-3 Attorney for respondent letter, dated October 23, 2009

R-4 Attorney for respondent letter, dated October 28, 2009

OAL DKT. NO. EDU 8653-10
(EDU 10720-09 ON REMAND)
AGENCY DKT. NO. 307-11/09

IN THE MATTER OF THE TENURE	:	
HEARING OF KURT HALVORSEN,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION ON REMAND
CITY OF TRENTON, MERCER COUNTY.	:	

The record of this matter, the parties' revised settlement agreement, and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On August 6, 2010, the Commissioner remanded this matter to the OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") did not include the requisite Board of Education approval.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. The Commissioner also concurs with the ALJ that the proposed settlement is consistent with the established standards governing the settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/06/10
Date of Mailing: 10/07/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 8653-10
(ON REMAND) EDU 10720-09
AGENCY DKT. NO. 307-11/09

IN THE MATTER OF THE TENURE HEARING OF KURT HALVORSEN, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY.

Rocky L. Peterson, Esq., and **Dana M. Lane**, Esq., appearing for petitioner, Board of Education, City of Trenton (Hill Wallach, attorneys)

Richard P. Flaum, Esq., appearing for respondent, Kurt Halvorsen, (DiFrancesco, Bateman, Coley, Yospin , Kunzman, Davis and Lehrer, attorneys)

Record Closed: August 31, 2010 Decided: September 10, 2010

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

This is a remand from a previously submitted initial decision settlement under OAL DKT. No. EDU 10720-09.

In this matter, petitioner, the Board of Education of the City of Trenton, Mercer County (hereinafter "Trenton") preferred and filed tenure charges with the

Commissioner of Education on November 5, 2009, against respondent Kurt Halvorsen (hereinafter "Halvorsen") in which it charged Halvorsen, a tenured teacher, with insubordination and unbecoming conduct, as a result of which it sought his removal. He appealed that action. The matter was transmitted to the Office of Administrative Law (hereinafter "OAL") on November 18, 2009, 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. An in-person prehearing conference was held on January 7, 2010, at which time Halvorsen was then represented by Arnold M. Mellk of the firm of Wills, O'Neal and Mellk. The due process hearing was then set to be heard on February 4, 5, 8 and 10, 2010, at the OAL, Trenton, New Jersey, and a prehearing order relative to same was thereafter issued on January 11, 2010.

On the first scheduled hearing date, the parties orally agreed under oath and on the record to all of the terms of a settlement and which was to be followed up with an appropriate resolution by Trenton thereafter. Edward A. Cridge, Esq, appeared on behalf of the Wills firm at that time with Halverson. However, when the executed agreement was not forthcoming, Trenton moved to have the terms of the agreement enforced, which motion was stayed pending the substitution of counsel on behalf of Halvorsen after the Wills firm moved for withdrawal on his behalf on April 15, 2010. At the same time, although the substitution of attorney was granted by this tribunal, it was also ordered that any entitlement to back pay would be stayed and that he would remain in no-pay status until a final administrative decision on the merits of the pending tenure charges due to the delays occasioned by him in this matter. Halverson and his new counsel, whom he ultimately retained on April 23, 2010, were invited to appear at the OAL to answer the motion for enforcement by Trenton on April 26, 2010. At that time and instead of pursuing that motion, the parties met and agreed to resolve all disputed matters, subject once again to obtaining all of the requisite signatures and the Board resolution by Trenton. Upon receipt of the fully executed original agreement, which included the signatures of the Trenton board President and the Trenton board Secretary (J-1), on July 2, 2010, the hearing record closed and the initial decision incorporating and approving it was forwarded to the Acting Commissioner of Education for final agency approval. It was remanded by Decision of the Commissioner, dated

August 6, 2010. Upon receipt of that decision and after conferring with counsel, this tribunial received the copy of the revised resolution, dated August 30, 2010, along with the original signature and certification of Jayne S. Howard, Board Secretary. The amended resolution, signed by Board president Nicola Tatum and Board Secretary Jayne S. Howard, states, in relevant part: "The Board designates and authorizes the Board President to execute the Stipulation of Settlement on the Board's behalf..." (P-1).

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

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

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

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

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

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

September 10, 2010
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: SEP 10 2010

Date Mailed to Parties: SEP 13 2010

/mev, mamf

EXHIBITS

Jointly submitted

J-1 Copy of Settlement Agreement received at the OAL on July 2, 2010, and submitted to Commissioner of Education under OAL Dkt. No. EDU 10720-09

For Petitioner

P-1 Originally signed and certified copy of Resolution of the Board of Education, as amended/revised on August 30, 2010.

P-1
in evidence
8-31-1

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH KURT HALVORSEN

WHEREAS, the Trenton Board of Education has reviewed the Stipulation of Settlement Agreement between Kurt Halvorsen and the Board of Education in regard to OAL Docket No. EDUTH 10720-2009S; and

WHEREAS, the Board has voted on this date to approve the Stipulation of Settlement Agreement; and

WHEREAS, the Board designates and authorizes the Board President to execute the Stipulation of Settlement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Stipulation of Settlement Agreement between Kurt Halvorsen and the Board of Education

Nicola Tatum
Board President

Jayne S. Howard
School Business Administrator/Board Secretary

Jayne Howard, Board Secretary, certifies that this is a true copy of the original Board Resolution on file with the Trenton Board of Education.

February 8, 2010
ADOPTED

August 30, 2010
REVISED

RECEIVED
2010 AUG 31 A 11:36

P-1
in evidence
7-2-10
SB

HILL WALLACK LLP
202 Carnegie Center
CN 5226
Princeton, NJ 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

IN THE MATTER OF TENURE CHARGES AGAINST KURT HALVORSEN, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO.: EDUTH 10720-2009S AGENCY REF. NO.: 307-11/09

STIPULATION OF SETTLEMENT

WHEREAS, the Board of Education of the City of Trenton ("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 Trenton Public School District; and

WHEREAS, Kurt Halvorsen ("Halvorsen") is a tenured teacher employed by the Trenton Public Schools; and

WHEREAS, the Board drafted a Statement of Tenure Charges and Statement of Evidence against Halvorsen dated August 18, 2009, attached hereto as Exhibit A, with the charges being based upon Insubordination and Unbecoming Conduct; and

WHEREAS, a copy of the Statement of Tenure Charges and Statement of Evidence were forwarded by Jayne S. Howard, Business Administrator and Board Secretary to Halvorsen via regular and certified mail, return receipt requested under cover dated August 18, 2009, attached hereto as Exhibit B; and

WHEREAS, the cover letter from Ms. Howard to Halvorsen dated August 18, 2009 provided Halvorsen with the required fifteen (15) day period to respond to the charges in writing and notified him of his right to attend the meeting of the Trenton Board of Education on September 29, 2009, at which time the

Board would discuss the charges and provide Halvorsen with an opportunity to respond to the Board directly; and

WHEREAS, Halvorsen failed to respond to the charges in writing within the fifteen (15) day period and failed to attend the Board meeting on September 29, 2009; and

WHEREAS, on October 16, 2009, the Board passed a Resolution and executed a Certificate of Determination in approval of a Statement of Tenure Charges and Statement of Evidence against Halvorsen, attached hereto as Exhibit C; and

WHEREAS, the Statement of Tenure Charges and Statement of Evidence were filed with the Commissioner of Education under cover dated November 5, 2009, attached hereto as Exhibit D, under Docket Number EDUTH 10720-2009S; and

WHEREAS, Halvorsen, through counsel, filed an Answer to the Statement of Tenure Charges dated November 10, 2009, attached hereto as Exhibit E, generally denying all allegations; and

WHEREAS, the parties have exchanged discovery; and

WHEREAS, said discovery demonstrated that the tenure charges concerned allegations that Halvorsen did not complete mandatory requirements of teachers regarding the academic assessment of students, and not any allegation of malicious conduct, nor conduct involving moral turpitude; 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 and the public interest, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Commissioner of Education; and

WHEREAS, Halvorsen has been advised by counsel of the Commissioner's sole discretion to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate; and

WHEREAS, Halvorsen will submit a letter of resignation of his employment to the Board, effective February 8, 2010, upon execution of this agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Dismissal of All Claims

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The parties agree and consent that upon approval of this Stipulation of Settlement by the Commissioner, the within tenure charges shall be dismissed. Halvorsen agrees to resign from his employment with the Board effective upon the adoption of this agreement by the Board of Education. Halvorsen further waives any right to, and will not, seek reinstatement in his tenured position, and releases any and all claims that could have been raised in the tenure proceeding. Halvorsen agrees that he will not apply for any future position of employment with the Board. Halvorsen further acknowledges that he is permitted to keep and negotiate four (4) payroll checks that he erroneously received from the Board subsequent to the filing of the tenure charges against him. However, Halvorsen and the Board agree that the 120-day period of unpaid suspension directly following the filing of tenure charges will now begin on December 22, 2009 instead of on November 6, 2009. The Board has no objection to, and will not oppose, any application by Halvorsen for unemployment benefits. The Board agrees to fulfill its obligations under applicable law with respect to Halvorsen's COBRA rights and benefits. 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. Public Interest

Settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation where all parties agree to these terms of settlement. The parties are in agreement that it is in the best interests of all parties for Halvorsen to resign from his employment with the Board. Therefore, the parties agree to move forward with a prompt settlement, which causes the Board no financial prejudice, and which avoids further unnecessary litigation.

3. No Admission

The execution of this agreement does not constitute any admission by either party as to the nature, quality, veracity, or demonstrability at trial of the allegations set forth in the tenure charges. The parties mutually acknowledge that this

matter has been litigated and resolved in good faith, and agree that Halvorsen is resigning from his employment with the Board in good standing. The Board shall respond to any inquiry by a prospective employer by providing Halvorsen's dates of employment, position, and salary history, and shall indicate that his reason for leaving his employment was "resignation in good standing."

4. Board Approval

The Board President has been duly authorized by the Board at its Executive Session on February 8, 2010 to execute this Agreement on behalf of the Board of Education. The Board will execute a Resolution adopting the terms of settlement shortly after the February 8th Board Meeting.

5. Assent to Terms

Both parties hereby acknowledge having entered into this agreement with a full understanding of their rights and that they were fully informed of the implications of this agreement by legal counsel. Neither party enters into this agreement under duress. Both parties enter this agreement by their free will and volition. Both parties were given the opportunity to fully consider the terms and conditions of this settlement. Either party may revoke their consent to this Stipulation of Settlement within seven (7) days from the execution thereof by delivering written notification of revocation to the other party. It is understood that if this agreement is revoked, it will not be effective or enforceable. By signing this Stipulation of Settlement, Halvorsen acknowledges the Commissioner's sole discretion to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

6. Entire Agreement

This agreement represents the entire understanding of the parties as to the settlement 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.

7. 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 parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

PETITIONER

TRENTON BOARD OF EDUCATION

By: Nicola Tatum
~~L. DIANE BANKS CAMPBELL~~
Board President NICOLA TATUM

DATED:

RESPONDENT

KURT HALVORSEN

By: Kurt Halvorsen
KURT ~~H~~ALVORSEN

DATED: May 25, 2010

ATTEST:

By: Jayne S Howard
JAYNE S. HOWARD, Board Secretary

DATED: June 28, 2010

TRENTON BOARD OF EDUCATION

All Together — Better!

Rodney S. Lofton
Superintendent of Schools

Kathleen Smallwood Johnson, Esq.
Executive Director of Human Resources, Negotiations, and Legal Affairs
609.656.5459 • 609.989.2682 fax
kjohnson@trenton.k12.nj.us

May 13, 2010

Mr. Kurt Halverson
2219 Old York Road
Bordentown, NJ 08505

Re: Health Benefits

This letter serves to clarify your eligibility to the health benefits you hold pursuant to your employment with the Trenton Board of Education. You have entered into a Stipulation of Settlement with the Trenton Board of Education regarding your termination of employment. Pursuant to the settlement, you have resigned from your employment effective February 8, 2010. However, due to the nature of the settlement negotiations, the finalization of settlement terms and final execution of the Stipulation of Settlement, you remained suspended from your employment through April 26, 2010. Therefore, you are entitled to medical insurance coverage under the benefits policy you had as an employee of the Trenton Board of Education through April 26, 2010.

Sincerely,

Kathleen Smallwood Johnson, Esq.

Cc.
Jayne Howard, Business Administrator

#427-10A

OAL DKT. NO. EDE 05768-08
STATE BOARD OF EXAMINERS DKT. NO. 0708-163
COMMISSIONER APPEAL NO. 4-6/10A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF WILLIAM CASTEL BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, April 29, 2010

For the Respondent-Appellant, Harold N. Springstead, Esq.

For the Petitioner-Respondent State Board of Examiners, Bryant Horsley, Jr., Deputy Attorney General (Paula T. Dow, Attorney General of New Jersey)

The Acting Commissioner has thoroughly reviewed the record and the papers filed in connection with respondent's appeal of the State Board of Examiners' Order of April 29, 2010, revoking his teacher and supervisor certificates and his Principal Certificate of Eligibility.

After full consideration of the record and all submissions, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/12/10
Date of Mailing: 10/12/10

*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
WILLIAM CASTEL	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 0708-163

At its meeting of February 21, 2008, the State Board of Examiners reviewed information the Division of Criminal Justice had forwarded indicating that William Castel had been accepted into a Pre-Trial Intervention Program (PTI). The Bergen County Prosecutor had charged Castel with Endangering the Welfare of a Child and Harassment for making numerous phone calls and leaving messages for a former eighth grade student. As a condition of entry into PTI, Castel was required to forfeit his tenured position in the East Rutherford School District. Castel currently holds a Teacher of Industrial Arts certificate, issued in October 1983, a Teacher of Elementary School certificate, issued in September 1994, a Supervisor certificate, issued in August 2006 and a Principal Certificate of Eligibility, issued in August 2006. On March 27, 2008, the State Board of Examiners issued Castel an Order to Show Cause as to why his certificates should not be revoked. The Order was predicated on the conduct underlying the criminal charges.

The Board sent Castel the Order to Show Cause by regular and certified mail on April 4, 2008. The Order provided that Castel's Answer was due within 30 days. Castel filed an Answer on April 25, 2008. In his Answer, Castel admitted that he had been charged with Endangering the Welfare of a Child and Harassment, but denied the charges. (Answer, ¶ 3.) He admitted making the phone calls to the student, but denied that they were harassing. (Answer, ¶ 3.) Castel stated that he did not enter a plea of guilty to any charge and denied that his conduct provided just cause for consideration of the revocation of his certificates. (Answer, ¶ 4.)

Thereafter, on May 5, 2008, the Board transmitted the matter to the Office of Administrative Law (OAL) as a contested case. A hearing was conducted before Administrative

Law Judge (ALJ) JoAnn LaSala Candido on June 23 and October 27, 2009. After the record closed, ALJ Candido issued her Initial Decision on February 16, 2010. *In the Matter of the Certificates of William Castel*, Dkt. No. EDE 05768-08 (Initial Decision, February 16, 2010). In that decision, ALJ Candido determined that Castel developed a friendship with two middle school students, S.R. and V.V., which began in school when he was their shop teacher. *Id.* at 19. Castel would discuss personal matters with S.R. and would contact her by cell phone on many occasions. *Id.* at 19. At one point when she was not returning his calls, Castel became frustrated and called her approximately ten times. *Id.* at 12. Castel also invited S.R. and V.V. to his house to swim on one occasion. *Ibid.* Castel also apparently pulled S.R. and V.V. out of their science class to talk to them. *Id.* at 8-9. The ALJ found that S.R. and V.V. gave credible testimony and did not believe that they "harbored a motive or bias to fabricate their testimony." *Id.* at 13. In fact, ALJ Candido found that S.R.'s credibility "was enhanced by her candid admission that she had lied to her mother when she went to respondent's home in New York." *Ibid.* The ALJ also held that Castel's testimony lacked credibility. *Ibid.*

ALJ Candido concluded that Castel had engaged in conduct unbecoming a teacher and that his conduct constituted just cause for revocation of his teaching certificates. *Id.* at 22. She held that Castel's voice messages to S.R. were "reprehensible and totally inappropriate" particularly for a teacher. *Ibid.* Moreover, she noted that even if Castel was motivated, as he claimed, by a desire to help S.R. through a difficult time, he had other more appropriate avenues available to him such as referring her to a counselor or talking to her parents. *Id.* at 23. The ALJ concluded that Castel exhibited "extremely poor judgment" by developing a personal relationship with a student and the lack of evidence of a sexual or romantic involvement did not mitigate the seriousness of his actions. *Ibid.* Finally, the fact that Castel's behavior "was not

confined to a single incident but evolved into a pattern which continued through S.R. and V.V.'s eighth grade school year" led ALJ Candido to conclude that all of his certificates should be revoked. *Ibid.*

Both Castel and the Deputy Attorney General (DAG) representing the Board of Examiners submitted Exceptions and the DAG also submitted Reply Exceptions. The DAG's Exceptions included a list of corrections of minor factual errors in the Initial Decision. (Exceptions, p. 3.) In his Exceptions, Castel argued that the ALJ's credibility determinations were based upon a faulty review of the testimony and documentary evidence. (Exceptions, pp. 4-13.) Castel noted that although the ALJ stated that his evaluations were satisfactory, she neglected to mention that his supervisor said they were good and that a satisfactory rating was the highest anybody could get. (Exceptions, p. 5.) Castel also contended that the ALJ erred when she did not note that the students testified they thought Castel was joking when he offered them a beer while they visited his house. (Exceptions, pp. 6-7.) He maintained that since S.R. never had a cell phone in eighth grade, the ALJ's recitation of the facts was misleading in implying that Castel called S.R. constantly on her cell phone during the school year. (Exceptions, pp. 8-9.) Castel also stated that S.R. changed her testimony regarding her father's reason for taking her cell phone away. (Exceptions, pp.10-11.) In addition, Castel claimed that the ALJ did not mention or consider certain exhibits. (Exceptions, p. 11.) Finally, Castel argued that revocation was too severe a penalty, especially in view of his long career of dedicated teaching and coaching. (Exceptions, pp. 13-14.)

In his reply, the DAG argued that "The Findings of Fact and witness credibility assessments are well supported by the record." (Reply Exceptions, pp. 4-12.) He noted that there was consistent, credible evidence that Castel pulled both V.V. and S.R. out of their science

class repeatedly so he could spend time with them. (Reply Exceptions, pp. 4-6.) The DAG also stated that the record supported the ALJ's finding that Castel repeatedly made unsolicited comments about V.V.'s and S.R.'s physical appearance. (Reply Exceptions, pp. 6-7.) The DAG further claimed that ALJ Candido's finding that Castel offered the two minor girls a beer while in his home was amply supported by the record and argued that Castel's intentions, whether joking or not, were immaterial to the issue of the inappropriateness of the offer. (Reply Exceptions, pp. 7-8.) He also noted that S.R. credibly testified as to having a cell phone at the end of eighth grade and cited Castel's own testimony that he spoke to S.R.'s mother on S.R.'s cell phone. (Reply Exceptions, pp. 9-11.) The DAG argued that the ALJ was correct in determining that a penalty of revocation was warranted here due to Castel's repeated phone calls to S.R. asking her to "hang out" and "get together," his pattern of pulling S.R. and V.V. out of class and his decision to become personally involved with a student. (Reply Exceptions, pp. 13-18.) Finally, the DAG argued that Castel was in error in arguing that mitigation of his penalty was warranted because he had good teacher evaluations and his relationship with S.R. was not sexual in nature. (Exceptions, pp. 18-20.) The DAG noted that Castel's own Superintendent described the evaluations as "cookie-cutter" and "not meaningful." (Reply Exceptions, pp. 18-19.) Moreover, the DAG recalled ALJ Candido's statement that even if Castel's actions were motivated purely out of concern for S.R., "there were other measures he should have taken, such as contacting S.R.'s parents or referring her to counseling services offered by the school,...." (Reply Exceptions, p. 20.) Accordingly, the DAG noted that "the record demonstrates that Castel's unbecoming conduct warrants revocation of his certificates." (Reply Exceptions, p. 23.)

The Board must now determine whether to adopt, modify or dismiss the Initial Decision in this matter. At its meeting of March 25, 2010, the Board reviewed the Initial Decision,

Exceptions and Reply Exceptions. After full and fair consideration of the Decision, Exceptions and Reply Exceptions and the issues raised therein, the Board voted to adopt the Initial Decision.

As a preliminary matter, the Board must note that members of its Legal Committee listened to the voicemails Castel left for S.R. that were admitted into evidence at his hearing before the OAL. The frequency and tone of the voicemails belies any claim Castel can make that his interest in S.R. was merely "concern." Rather, his persistence in contacting her and his increasing petulance and anger at not hearing from her was disturbing and gave the adults listening to the tape pause. It is frightening to think of the effect those calls would have on a middle school student.

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. As noted above, ALJ Candido found that Castel engaged in inappropriate and, at times, reprehensible conduct with regard to his relationship with two students. (Initial Decision, slip op. at 22, 23.) The record is replete with examples of Castel's behavior that fall so wide of the mark of a role model that there is no justification for any penalty other than revocation. In fact, his behavior was harmful to these students both for the inappropriate nature of the contact he maintained with them and because they lost valuable instructional time when he was pulling them out of their science class. The Examiners therefore agree with the ALJ's conclusion that the only appropriate response to Castel's breach is the revocation of his teaching certificates. (Initial Decision, slip op. at 23.) Furthermore, the Board is convinced that Castel's administrative as well as instructional certificates should be revoked as there is a sufficient nexus between his unbecoming conduct and his ability to supervise effectively. In short, his behavior was inappropriate for a holder of any type of certificate.

Accordingly, on March 25, 2010, the Board of Examiners voted to adopt the Initial Decision and revoke Castel's teaching certificates. On this 29th day of April 2010, the Board of Examiners formally adopted its written decision to adopt the Initial Decision in this matter, and it is therefore ORDERED that William Castel's Principal Certificate of Eligibility and his Teacher of Industrial Arts, Teacher of Elementary School and Supervisor certificates be hereby revoked effective immediately. It is further ORDERED that Castel 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: 5/3/10

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDE 05768-08
AGENCY DKT. NO. 0708-163

IN THE MATTER OF THE CERTIFICATES OF WILLIAM CASTEL.

Brian Horsely, Jr., Deputy Attorney General, for petitioner (Paula T. Dow, Attorney General of New Jersey)

Harold N. Springstead, Esq., for respondent, William Castel (Springstead and Maurice)

Record Closed: January 7, 2010 Decided: February 16, 2010

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education, State Board of Examiners (Board), seeks the revocation or suspension of William Castel's (Castel) Principal certificate of Eligibility and Teacher of Industrial Arts, Teacher of Elementary School and Supervisor certificates under N.J.S.A. 18A:6-38 and the implementing regulation, N.J.A.C. 6A:9-17.5, for conduct unbecoming a teacher or other just cause. The Board found Castel guilty of unbecoming conduct by taking advantage of a former fourteen-year-old student

by frequently calling her, taking her to his home in New York, and otherwise making inappropriate contact with her. More specifically by:

1. Calling S.R. at late hours of the evening and asking her to go out to lunch, dinner and to party with him;
2. Pulling S.R. out of class on various occasions;
3. Engaging in intimate conversation with S.R. regarding personal details of his life including wanting a girlfriend;
4. Taking S.R. across state lines to his home in Nanuet, New York without parental consent; and
5. By telling S.R. that "Spanish girls are pretty."

The Board also found Castel guilty of unbecoming conduct by taking advantage of another former fourteen-year-old student V.V. by:

1. Taking V.V. across state lines to his home in Nanuet, New York without parental consent, and
2. Repeatedly calling V.V. on her cellular phone and requesting to know the whereabouts of S.R.

Castel disputes the charges, asserting that the purported misconduct never occurred.

On March 27, 2008, the Board issued an Order to Show Cause (OSC) why Castel's teaching certificates should not be suspended or revoked. On or about April 23, 2008, Castel filed an Answer to the Order to Show Cause denying any wrong doing. The OSC reflects that the Division of Criminal Justice provided information to the Board regarding allegations set forth in charges that had been brought against Castel by the Bergen County Prosecutor for endangering the welfare of a child in violation of N.J.S.A. 2C:24-4(a), and harassment in violation of N.J.S.A. 2C:33-4(a), by making numerous phone calls and leaving messages to a former eighth grade student. (P-1.) With regard to those criminal charges, Castel enrolled in the Pre-Trial Intervention Program (PTI) for ten months and was required to resign from his teaching position with the East

Rutherford Board of Education. He did not enter any plea as a condition of his PTI. (P-2.)

The Board transmitted this matter to the Office of Administrative Law for determination as a contested case. A hearing was held on June 23 and October 27, 2009. At the conclusion of the hearing, the record remained open for the receipt of transcripts and post-hearing submissions. The parties submitted briefs and reply briefs as well as a stipulation of the facts, the last of which was received on January 7, 2010, on which date the record closed.

ISSUE

The issue presented is whether Castel engaged in conduct unbecoming a teacher or other just cause warranting the suspension or revocation of his teaching certificates.

TESTIMONY

The Board presented testimony from Gayle Strauss, superintendent of Byron Township Schools. Strauss testified that she was contacted by the principal of the middle school sometime in December 2006 and advised of charges being filed against Castel. Strauss, after listening to a voicemail from Castel's cellular phone (cell phone) provided to her during her investigation, contacted the Board attorney and scheduled an emergency meeting with the Board for determination of a suspension. The cellular-voicemail messages were played during Strauss' testimony. The following was heard:

> **Sergeant Eladio Cruz:**
>
> Today is Tuesday, December 12th, 2006. My name is Sergeant Eladio Cruz, Bergen County Prosecutor's Office. The following recording will be voicemail from cellular telephone number 201-456-XXXX.
>
> **Voicemail Prompt:**
>
> The following is the original recording.

Voicemail Prompt:

Received Sunday, November 12th at 3:59 PM.

William Castel:

Hello Stephanie, how're you doing? This is Mr. C. It's about 3 o'clock on a Sunday afternoon. You know I just got back from the Dominican Republic ah, late last night. Ah, it was a lot of fun. Ah, but the reason I'm calling you, wanted to see if you wanted to get together. Ah, I know we talked already getting together for lunch, but our schedules are different. (Indistinguishable –something about Friday night) This Friday night, I'll even take you to dinner if you want. Hang out, oh, whatever you want to do. We'll hang out. Go to dinner. And ah maybe hang out and party a little bit. Or whatever, you know. Whatever you want to do. You know. I ah, I'd like to, I'd like to see you. So ah, give me a call back when you get a chance. I know you're probably working right now. And tonight you're probably going to be tired when you get home ah from work, from working all day. You probably got in, knowing you, you probably got home late last night. So ah, enjoy your day at work. And ah, hope to talk to you soon. Take care. Bye.

Voicemail Prompt:

Received Wednesday, November 15th at 9:31 PM.

William Castel:

Hey Stephanie, it's Mr. C again. Give me a call back. I'll be home here for a little while yet. So ah, I hope you call back. Ok? Bye.

Voicemail Prompt:

Received Wednesday, November 15th at 9:31 PM.

William Castel:

Hello. Hello Stephanie, this is Mr. C. I just want to let you know, I'm disappointed in you cause twice we spoke, twice ah when we spoke on the phone you said you were going to call me back in five minutes and you never did. I just want to let you know I'm disappointed in you. And ah, I thought I was your friend. So, you know. That's all I want to say. I

know you're at work, so give me a call back when you get a chance. Ok? Bye.

Voicemail Prompt:

Received Sunday, November 19th at 4:08 PM.

William Castel:

Hello Stephanie, it's Mr. C again. I know you probably think I'm a pain in the butt for calling you all the time. The only reason I'm calling you is because you're not returning my phone calls. Ah, you're confusing me. You know ah, I don't understand why you're not returning my phone call. Ah, I really care. I really care about you a lot Stephanie. I think you know that. Ah we've been pretty close ah to each other for the last year and a half, two years. I've always, always been honest with you. I always thought you were honest with me. Uh, I don't know. Maybe you're mad at me or something? If I said something that offended you or came across the wrong way whatever, I apologize. I always said I'd never, I would never want to hurt you. So call me back when you get the chance you know. I want to, you know. (Inaudible) That's what's, that's what's bothering me, that you're not calling me back. All I want to do is be your friend. Nothing more. Ok? And I realize, you know, you're working, you're busy right now probably. And you got your boyfriend. I got my girlfriend. There's no reason why we can't be, talk on the phone occasionally. Ok? Call me up. Be honest with me. Call me up. If I'm calling you up too much, tell me that. I realize I'm calling you up cause you're not, you're not returning my phone calls. And I do want to come when you're in that play I want to come and see you. Ok, you're really, you're really confusing me and it's bothering me. Just like that month when I, when you got in trouble in school because of me. We didn't talk so much. That really bothered me that month. And I think you know that. Stephanie, again, I really care about you. You're like a daughter to me. Hun? So ah, try calling me back when you could. All right? Take care. Bye.

Voicemail Prompt:

Received Thursday, November 30th at 5:10 PM.

William Castel:

Hello, Stephanie, this is Mr. C (Inaudible) I apologize for calling at this time. Uh, just wondering how you're doing. I

haven't heard from you. And uh, I don't know, maybe, maybe you ran out of minutes that's what it seems like, ah, on your phone here because your phone is not even ringing. Ah, you'll probably start new minutes, I think tomorrow. December 1st. You better, I'm expecting you to give me a call back sometime, ah, the beginning of December. Ok? Uh, I'd rather not call you. I don't want to call you before nine o'clock you know. I never hear back from you. So Stephanie, do me a favor and call me back when you get the chance. Ok? All right? Bye.

Voicemail Prompt:

Received Sunday, December 3rd, at 10:02 PM.

William Castel:

Hello Stephanie, I'm ah just calling to say hello and ah wondering how you're doing cause I haven't heard form you. And I was thinking I know your birthday's coming up next month. I think it's January 10th. I think I did want to, I said I wanted to take you out for lunch on your, you know, for your birthday. I was thinking, cause I know it's hard for us to have the same schedule. Ah, I was thinking how about uh, the week we're off from school, between ah, you know, Christmas and New Years. Ah, that week, you know, we're both off. I want to meet you for lunch one day during that week. I think that would be a good time to do it. To get together for lunch. So ah, you know, this way it's during the day, you know. So ah, give me a call back and ah let me know. And ah, I hope everything is going good. Ok? Ok, take care Steph. Bye.

Voicemail Prompt:

This completes the original recording.

[(P-59 to -66.)]

Strauss found this behavior totally inappropriate since there is sufficient time during the school day to speak to the student. Furthermore, a teacher should contact the parents if he or she needs to speak to a student. There is no situation when it would be appropriate for a teacher to contact a student on his or her cell phone. She also found it inappropriate for a teacher to "hang out" and party with a student. A teacher's

job is to educate, not to be a personal friend. If a student needs to talk with a school professional, there are guidance counselors on staff for that purpose.

Strauss prepared the Statement of Charges against Castel. (P-5.) Even though the student is no longer at Faust Middle School, she felt that there was no need for Castel to be in touch with her. She also considered it inappropriate for Castel to remove S.R. from science class on several occasions, causing the student to miss valuable learning time, without checking with the principal's office first. Strauss emphasized that a teacher should never be left alone with a student. Nor should a teacher be making inappropriate comments such as "Spanish girls are pretty."

As to the charges pertaining to V.V., Strauss was told by police and S.R. that Castel called V.V.

Strauss further stated that taking S.R. and V.V. across a state line to his home is unbecoming conduct because the girls' parents were unaware.

Strauss confirmed that Castel's prior evaluations were satisfactory. She based her decision to have tenure charges brought based upon the recordings, the charges by the police, the interview with S.R.'s parents, and upon her belief that Castel's behavior was unbecoming a teacher. She felt that a teacher—especially a middle school teacher such as Castel—should be a good role model for his or her students.

W.R., the father of S.R., testified on behalf of the Board. In December 2006, S.R. played voicemails for him recently left on her cell phone by Castel. W.R. felt his daughter was "scared" of Castel. He took the cell phone to the police station and submitted a statement. (P-22.) Prior to this, he was not aware that Castel had been calling his daughter or that she went to his home in New York. W.R. never gave Castel permission to contact his daughter or take her to lunch or to his home.

H.V., the father of V.V., also testified on behalf of the Board. He never gave Castel his daughter's cell phone number, nor did he give him permission to call his daughter. Nor did he ever give his daughter permission to go to Castel's home.

R.R., the mother of S.R., testified that she did not know Castel; never spoke with or ever wrote to him. She never gave permission for her daughter to speak with Castel or to go to his home in New York.

G.V., mother of V.V., also testified on behalf of the Board. She never spoke with or ever wrote to Castel, nor ever gave him permission to take her daughter to his home in New York.

V.V. testified on behalf of the Board. She is currently a high school student. V.V. was an eighth grade student during 2005-2006 at the same school where Castel was a teacher. Castel was her "shop" teacher in the eighth grade. She also had science class five days a week with Ms. Di Yang. Castel called her out of science class five or six times during the school year. He would come to the science classroom while class was in session and take her and S.R. to the shop classroom. She felt uncomfortable going with him but did so in order to "get out of class." V.V. felt she was given preferential treatment in shop class because she received better grades than what she thought she deserved.

Castel would tell her either that brunettes are pretty or that she looked nice that day, which she estimated occurred approximately once every two weeks.

V.V. further testified that towards the end of the eighth grade school year Castel told her and S.R. not to lose contact with him and he invited both of them to his home to go swimming. Castel would call her on her cell phone, usually after 10:00 p.m., looking for S.R and asking if S.R. was angry with him and generally how she was doing. There were times when V.V. would not answer her cell phone when Castel called looking for S.R. even though S.R. was with her but did not want to speak to him.

V.V. explained that "a couple of days" before she went to Castel's home in New York in the summer 2006 to go swimming, he called her on her cell phone to invite her and S.R. to lunch and swimming. Castel asked her to get her parents permission, but she did not. Castel picked up V.V. and S.R. a few doors down from V.V.'s home. Both

minors got into the back seat of the car. They first went to a diner on the border of New Jersey and New York. They were there for approximately thirty minutes. Castel then brought S.R. and V.V. to his home. He showed them the bathroom and kitchen. V.V. went upstairs and changed into her two-piece bathing suit and went outside to the swimming pool where there were ten people in the pool area. S.R. put her feet in the water and wore shorts. Castel spoke with a retired female police officer at the pool, telling her that V.V. and S.R. were his former students. V.V. went swimming for a few minutes and then went into Castel's home and changed into her clothes before watching television. Then Castel offered her a beer. She thought he was joking.

V.V. testified that Castel told her and S.R. to keep the trip to his home between them because "he could get in trouble for this." She agreed because she did not want any problems.

On cross-examination, V.V. testified that S.R., W.R., and she went to the police station so that S.R.'s father could file a complaint. She acknowledged that she telephoned Castel on July 6, 2006, and spoke with him for twenty minutes. (P-46.) She also telephoned him on July 12, 2006, at 11:02 p.m. (P-48.)

V.V. also acknowledged that when Castel gave her and S.R. detention, causing them to miss a class trip, he apologized for that.

S.R., who was currently completing her junior year in high school, testified on behalf of the Board. During the eighth grade, Castel was her shop teacher. She also had Ms. Di Yang for science, which met five days a week. Castel would come to her science class, tell Ms. Di Yang that he needed help with his computer and take her out of class to his shop class three or four times a week. Castel never had a computer problem but would then tell her about his life and his girlfriend. Castel asked about her grades and they would discuss problems she was having with her family. There were no other adults in the room and Castel would keep the classroom door open. Castel would tell her almost every day, mostly in the morning, that she was beautiful and attractive.

S.R. testified that when she was in "in school suspension" and Castel was the moderator, he would talk about his life and tell S.R. that his girlfriend was jealous of her. Since she would get in "trouble a lot," she was with Castel in in-school suspension every two weeks. Upon graduation, Castel told her that he would miss her and that he would call her.

S.R. said that V.V. had given Castel her cell phone number and he would call her four times a day. If she did not answer, he would call V.V.'s cell phone. V.V. had to call Castel back to tell him to stop calling S.R. When S.R. did talk to Castel, he told her not to tell anyone of their conversations so that he would not get in trouble. S.R. stated that "he would call her constantly" but she did not want to be mean and tell him to stop. At the end of the year, he got her in trouble when he would not give them permission to go into the building and she was not able to go on a field trip. She then told Castel to stop talking to her because she was angry with him.

On a Saturday in July 2006, Castel picked her and V.V. up near V.V.'s home and took them to a diner in New Jersey before going to his home to go swimming. Castel told S.R. to get her parents' permission to go to his home. S.R. told Castel that she did, when in fact she did not. She felt uncomfortable going to his home. While at his home, S.R. stated that Castel told a guest who was a retired police officer that she and V.V. were there on a field trip because they were good students.

S.R. further testified that at one point her father was going to take her cell phone away and she asked if she could check her voicemail before he took the phone. She listened to her voicemails via speaker phone and her father was able to hear the messages Castel left for her.[1] S.R.'s father then took her cell phone to the police.

On cross-examination, S.R. reiterated that she had not gotten her mother's permission to go to Castel's home, even though she told Castel that she did. She further confirmed that her father listened to Castel's voicemails before taking her cell phone away. S.R. confirmed that Castel had called her to ask her not to tell anyone

[1] The contents of these voicemails are set forth above.

about the calls or he would get into trouble with the police. She initially thought Castel was nice and concerned for her, but as time went on she thought he was "perverted."

No other witnesses testified in behalf of petitioner.

Patricia Chalmers, Castel's live-in girlfriend testified on his behalf. She stated that Castel had plans to take S.R. and V.V. swimming at his home because he felt bad for getting them into trouble at the end of the school year. Castel told her that he obtained permission from both mothers.

Chalmers recalled hearing one message from S.R. and V.V. on Castel's answering machine at his home in New York. She thought that S.R. and V.V. were students who confided in Castel and did not feel it was unusual for Castel to speak to teenagers after 11:00 p.m. She has never met either student.

Castel testified in his own behalf. He holds certificates for principal and supervisor, as well as certificates for industrial/technology arts K-through-eight and elementary education. S.R. had been a student in his shop class from fifth to eighth grade and in basic skills math class for sixth grade. Castel would see S.R. and V.V. in the lunch room and in detention when he was assigned to cover those rooms.

Castel further testified that he asked the science teacher, Ms. Di Yang, to permit S.R. and V.V. to leave class so that they could come to the shop class to help him with the computer. He acknowledged that he once had a conversation with S.R. where he mentioned that Spanish girls are attractive, referring to a former girlfriend of his who was Spanish. Castel gave S.R. a keychain at the end of the eighth grade that he received from Ms. Di Yang earlier in the school year. He further acknowledged that they hugged each other when he wished her well in high school. Castel felt that S.R. had low self-esteem and he cared for her like a daughter.

Castel stated that his relationships with S.R. and V.V. became strained towards the end of their eighth grade school year because he had to write a report denying them permission to leave building during recess. Because of this, S.R. and V.V. were not

permitted to participate in graduation activities. Castel felt bad and a few weeks before graduation invited them to his home to go swimming. He claimed that he spoke with V.V.'s mother using V.V.'s cell phone and obtained her permission for her daughter to go swimming. Castel also spoke to S.R. and while on the phone, she asked her mother for permission to go swimming.[2] On one occasion while covering for the principal, he met with S.R.'s parents to discuss an issue she was having with other girls in the school.

Castel acknowledged that on July 26, 2006, he picked up V.V. and S.R. near V.V.'s home around 10:00 a.m. and proceeded to a diner. Upon arriving at his townhouse complex, he took S.R. and V.V. directly to the swimming pool. After they finished swimming, he took both girls to his townhouse to show it to them. They changed, using the bathroom on the second floor. He then drove them home. He did not speak to either girls' parents after this trip.

Castel admitted that he telephoned V.V. on her cell phone a few times in August. On November 3, 2006, S.R. called him to give him her cell phone number and to tell him she was trying out for the high school play. He called her back on that date. Castel's phone records indicated that S.R. called him again on November 5 and 15, 2006. (P-70 to -74.) Castel called S.R. when he returned from a vacation on November 12, 2006. He wanted to take S.R. out to lunch. (P-59.) Castel left a message on S.R.'s voicemail suggesting they "hang out and party." He claimed that he used those words as a figure of speech. When S.R. was not returning his phone calls, he became frustrated and kept calling her. Castel called S.R. approximately ten times. He likened her to a daughter, and felt he did nothing wrong. He wanted her to do well in school. He mentioned that in hindsight, he should not have kept calling S.R.

Castel stopped calling S.R. when he was arrested on December 11, 2006, and was criminally charged with harassment and two counts of endangering the welfare of a child. He entered into a Pretrial Intervention Program and resigned from his position as a teacher.

[2] S.R.'s mother only speaks Spanish so she asked speaking Spanish.

In evaluating the evidence, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of 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. U.S., 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Based upon these principles, I **FIND** that the witnesses who testified for the Board were deemed credible and forthright. Each was compelling and straightforward. I am not persuaded that they harbored a motive or bias to fabricate their testimony. Similarly, the undersigned is not persuaded by respondent's efforts to infer retaliation by V.V. and S.R., since he had to write them up for misbehavior resulting in their inability to go on a class trip. S.R.'s credibility was enhanced by her candid admission that she had lied to her mother when she went to respondent's home in New York.

On balance, Castel has the greater stake in the outcome of this proceeding since the revocation or suspension of his certificates is involved. I **FIND** that Castel's testimony was deemed lacking in credibility. He claimed that he cared about his students and for that reason he interacted with S.R. and V.V. by taking them out of science during valuable class time only to talk and then bringing them to his home to swim. He also admitted that in hindsight he should not have called S.R. as often as he did.

STIPULATION OF FACTS

The parties entered into a Joint Stipulation of Facts and accordingly I **FIND** that:

1. The New Jersey State Board of Examiners is the Petitioner in this matter.
2. William Castel is the Respondent in this matter.
3. William Castel was born on August 16, 1957.
4. In July 2006, William Castel was 48 years old.
5. In November/December of 2006, William Castel was 49 years old.
6. William Castel is a male, between 6'3" and 6'4" tall.
7. William Castel is the holder of a Teacher of Industrial Arts certificate issued October 1983.
8. William Castel is the holder of a Teacher of Elementary School certificate issued in September 1994.
9. William Castel is the holder of a Supervisor certificate issued in August 2006.
10. William Castel is the holder of a Principal Certificate of Eligibility issued in August 2006.
11. The Borough of East Rutherford is a municipality of the State of New Jersey, Bergen County.
12. The East Rutherford School District is comprised of Faust Middle School and McKenzie Elementary school.
13. In 2005-2006, Dr. Gayle Strauss was the East Rutherford School District Superintendent.
14. In 2005-2006, Di Yang was an eighth grade science teacher at Faust Middle School.
15. William Castel was employed by the East Rutherford Board of Education as a teacher for grades 5-8 for at least the 02-03, 03-04, 04-05 and 05-06 and 06-07 school years. (NJDOE 074-076.)
16. East Rutherford Board of Education had a Teacher's Code of Ethics in 2006. (P-39 - P-41.)
17. S.R. was born January 10, 1992.

18. S.R. was a student at McKenzie and Faust Middle School.

19. S.R. was a minor during the years she attended McKenzie and Faust Middle School.

20. To date, S.R. is still a minor.

21. William Castel was S.R.'s Technology Shop teacher during the school years of 2002-2003 (Grade 5), 2003-2004 (Grade 6) 2004-2005 (Grade 7), and 2005-2006 (Grade 8).

22. William Castel was one of S.R.'s sixth grade math teachers during the 2003-2004 school year. The math class was taught by a team of teachers.

23. William Castel was S.R.'s seventh grade Social Studies teacher during the 2004-2005 school year.

24. In the school years of 2003-2004, 2004-2005, and 2005-2006, William Castel, along with the lunch aides and other school personnel, supervised S.R. and her classmates during their lunch period.

25. S.R. was a student in Di Yang's eighth grade science class in 2005-2006.

26. S.R. graduated from Faust Middle School in June 2006.

27. S.R. attended Becton Regional High School in East Rutherford, New Jersey beginning September 2006.

28. S.R. currently attends Becton Regional High School as a Senior.

29. S.R.'s mother is R.R.

30. S.R.'s father is W.R.

31. V.V. attended Faust Middle School in 2005-2006.

32. V.V. graduated from Faust Middle School in June 2006.

33. V.V. was a minor during the years she attended Faust Middle School.

34. V.V. was a minor in 2006.

35. As of this date, V.V. is over the age of 18.

36. William Castel was V.V.'s seventh grade Social Studies teacher during the 2004-2005 school year.

37. William Castel was V.V.'s eighth grade Technology Shop teacher during the 2005-2006 school year.

38. In the school years of 2004-2005 and 2005-2006, William Castel, along with the lunch aides and her school personnel, supervised V.V. and her classmates during their lunch period.

39. V.V. was a student in Di Yang's eight grade science class in 2005-2006.

40. V.V. attended Becton Regional High School in East Rutherford, New Jersey beginning September 2006.

41. V.V. currently attends Becton Regional High School as a Senior.

42. V.V.'s mother is G.V.

43. V.V.'s father is H.V.

44. William Castel signed S.R.'s Faust Middle School class of 2006 year book. (P-37-P-38.)

45. In 2006, William Castel lived in a townhouse complex in 39 Meadow Lane, Nanuet, New York 10954, Rockland County.

46. Nanuet, New York 10954 is approximately 23.5 miles north of East Rutherford, New Jersey 07073.

47. There is a pool at William Castel's townhouse complex in Nanuet, New York, for use of residents and guests.

48. William Castel invited S.R. and V.V. to go swimming at the pool at his townhouse in Nanuet, New York.

49. In or around July 2006, William Castel picked up S.R. and V.V. in his car to go to his townhouse in Nanuet, New York.

50. While on his way to New York, William Castel paid for S.R.'s and V.V.'s meal at a diner in Rockland County, New York.

51. S.R. and V.V. were inside of William Castel's townhouse in Nanuet, New York. While inside, besides William Castel, no other adult was in the home.

52. William Castel's home phone number in 2006 was 845-356-XXXX.

53. In 2006, V.V. had a family cell phone plan with Verizon Wireless, account number 10878XXXX. V.V.'s cell phone number was 201-638-XXXX.

54. omitted

55. William Castel spoke to V.V. over the phone at least ten times.

56. Regarding V.V.'s Verizon Wireless invoice dated July 16, 2006, William Castel's home phone number appears nine times on lines 730, 767, 929, 933, 968, 977, 980, and 1039, as making or receiving calls. (P-42 - P-49.)

57. Regarding V.V.'s Verizon Wireless invoice dated August 16, 2006, William Castel's home phone number appears seven times on lines 179, 375, 407, 415, 425, 474, and 475, as making or receiving calls. (P-50 - P-56.)

58. Regarding S.R.'s T-Mobile invoice dated November 10, 2006, William Castel's home phone number appears three times 1)11/03/06 (3:26 pm); 11/03/06 (9:06 pm); and 3)11/05/06, as making or receiving calls. (P-69-P-72.)

59. Regarding S.R.'s T-Mobile invoice dated December 10, 2006, William Castel's home phone number appears once on 11/15/06 as receiving a call. (P-73.)

60. Regarding S.R.'s T-Mobile invoice dated December 10, 2006, there are three items marked "Vm Retrieval" on 12/01/06: 1) 7:25 PM; 2) 7:28 PM; 3) 7:38 PM. (P-74.)

61. On December 1, 2006, W.R. complained to the East Rutherford Police Department about William Castel. (P-18.)

62. On December 4, 2006, the East Rutherford Police Department spoke to the administration at Faust Middle School

63. On December 4, 2006, William Castel was suspended with pay. (P-32.)

64. On December 11, 2006, S.R. gave a signed voluntary statement to the East Rutherford Police Department. (P-24 - P25.)

65. On December 11, 2006, W.R. gave a signed voluntary statement to the East Rutherford Police Department. (P-22.)

66. On December 11, 2006, W.R. signed a "Consent to Search" form allowing the East Rutherford Police Department and Bergen County Prosecutors Office to record voicemails from cell phone numbers 201-456-XXXX. (P-26.)

67. William Castel was arrested by the East Rutherford Police Department on December 11, 2006. (P-27.)

68. William Castel was charged with harassment with respect to V.V. and S.R., in violation N.J.S.A. 2C:33-4a. (P-19.)

69. William Castel was charged with Endangering the Welfare of a Child with respect to V.V., violation of N.J.S.A. 2c:24-4a. (P-20.)

70. William Castel was charged with Endangering the Welfare of Child with respect to S.R., in violation of N.J.S.A. 2C:24-4a. (P-21.)

71. As a condition of bail, William Castel was to have "no contact" with S.R., V.V., and their families. (P-19 - P-21.)

72. On December 11, 2006, William Castel was released on his own recognizance. (P-28.)

73. On December 12, 2006, Sergeant Eladio Cruz of the Bergen County Prosecutor's Office recorded six voicemails from S.R.'s cell phone (201-456-XXXX). (P-29 – P-30.)

74. The six messages recorded from S.R.'s cell phone were received on the following dates: Sunday, November 12, 2006 at 3:59p.m; Wednesday, November 15, 2006 at 9:31p.m.; Wednesday, November 15, 2006 at 9:31 p.m.; Sunday, November 19, 2006 at 4:08p.m.; Thursday, November 30, 2006 at 5:10pm; and Sunday, December 3, 2006 at 10:02pm. (P-29 – P-30.)

75. Thursday, November 30, 2006 at 5:10pm; and Sunday, December 3, 2006 at 10:02pm. (P-29 – P-30.)

76. William Castel did not enter a plea in the criminal action. William Castel entered into a ten-month Pre-Trial Intervention Program with the Bergen County Prosecutor's Office on September 5, 2007. (P-34 - P-36.)

77. As a condition of the Pre-Trial Intervention Order, William Castel was required to pay a sum total of $125 in fines, resign from his tenured position with East Rutherford Board of Education, and have "no victim contact." (P-34 - P-36.)

78. Consistent with the Pre-Trial Intervention Order, William Castel resigned from his tenured position with East Rutherford Board of Education on September 5, 2007. (P-33.)

79. On July 2, 2008, the New Jersey Superior Court dismissed all charges against William Castel for completing the Pre-Trial Intervention Program. (P-31.)

80. The Statement of Tenure Charges includes Charge I for unbecoming conduct involving S.R. and V.V. (P-5.)

81. Dr, Gayle Strauss, former Superintendent of the East Rutherford School District, signed the Sworn Statement of Tenure Charges and Sworn Statement of Evidence on January 19, 2007. (P-6 - P-7.)

82. On February 22, 2007, the East Rutherford Board of Education certified tenure charges to the Commissioner of Education ("Commissioner"). (P-11.)

83. The tenure matter was transmitted to the Office of Administrative Law ("OAL") for a hearing on March 21, 2007. (P-11.)

84. On September 27, 2007, the East Rutherford Board of Education accepted William Castel's resignation.

85. On February 7, 2008, the OAL dismissed the tenure charges against William Castel as moot. (P-13.)

86. On March 18, 2007, the Commissioner of Education adopted the Initial Decision of the OAL. (P-15.)

87. On March 27, 2008, the New Jersey State Board of Examiners voted to issue an Order to Show Cause to William Castel for the revocation of all four of Respondent's teaching certificates. (P-1.)

FINDINGS OF FACT

Based upon a review of the totality of the evidence, and having had the opportunity to listen to the testimony, observe the demeanor of the witnesses who testified and assess their credibility, I **FIND** the following additional **FACTS**:

S.R. and V.V.'s initial interactions with Castel occurred only in school. Castel and S.R. formed a friendship and they discussed personal matters such as Castel's relationship with his girlfriend and S.R.'s issues at home. The relationship between Castel and S.R. continued to develop over the course of time during the school year and came to involve V.V. The interactions between Castel and S.R. increased during her eighth grade year that he would, on numerous occasions, take her out of science class and bring her to his shop class to "talk." While there was no physical contact between Castel and S.R., he spoke with her by cell phone on many occasions and left several voice messages as enumerated above.

LEGAL DISCUSSION

The Board of Examiners is entrusted with the issuance and revocation of certificates to teach in public schools under the rules and regulations prescribed by the State Board. N.J.S.A. 18A:6-38. The regulations direct that the chief school administrator of a district must notify the Board of Examiners when "tenured teaching staff members who are accused of . . . unbecoming conduct resign or retire from their positions." N.J.A.C. 6A:9-17.4(a)(1). Following receipt of information from a district pursuant to N.J.A.C. 6A:9-17.4, "[t]he Board of Examiners may issue an order to show cause to a certificate holder if the Board of Examiners believes that the conduct of the holder may warrant the revocation or suspension of the certificate(s) held . . . ."

N.J.A.C. 6A:9-17.6(a)(2). The Board of Examiners must determine by public vote whether to initiate a revocation or suspension proceeding and, should the Board of Examiners move for revocation or suspension, an order to show cause shall be issued. N.J.A.C. 6A:9-17.7(a).

The Examiners need only show by a preponderance of the competent, relevant, and credible evidence that the certificate holder engaged in the conduct alleged in the Order to Show Cause. In re the Certificates of Papdaniil, EDE 8821-00, Initial Decision (March 13, 2002), adopted, State Bd. of Exam'rs (May 9, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>. "Evidence is found to 'preponderate' if it establishes the reasonable probability of the fact alleged and generates a reasonable belief that the tendered hypothesis . . . is true." State Bd. of Exam'rs v. Ferreira, EDE 3390-04, Initial Decision (July 5, 2005), adopted, Exam'rs (Sept. 22, 2005), <http://lawlibrary.rutgers.edu/oal/search.html>. The certificate holder must then demonstrate facts that counter the charges set forth in the Order to Show Cause. State Bd. of Exam'rs v. Brown, 91 N.J.A.R.2d (EDE) 5.

N.J.A.C. 6A:9-17.5 identifies the grounds for revocation and suspension of certification, stating that "[t]he Board of Examiners may revoke or suspend the certificate(s) of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause."

It is well settled that "teachers are held to a high standard of conduct because of the influence they exercise over the students." State Bd. of Exam'rs v. Charlton, 96 N.J.A.R.2d (EDE) 18, 21. "'That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted.'" In re Grossman, 127 N.J. Super. 13, 30 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974) (citation omitted). In the context of tenure proceedings, the Commissioner has frequently emphasized the sensitive position held by teachers and the high standard against which their conduct will be measured. It is recognized that "those persons who enter the teaching profession exercise a significant influence upon those they teach and, consequently, must exhibit a high degree of exemplary behavior." In re Tyler, 13 N.J.A.R. 297, 308.

Teachers "hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinion of their pupils." In re Tordo, 1974 S.L.D. 97, 98-99.

Conduct unbecoming a teacher includes a broad range of behavior that impacts a teacher's ability to perform his duties or otherwise renders him unfit to have the responsibility for the care of children. See Charlton, supra, 96 N.J.A.R.2d 18; In re Fargo, 91 N.J.A.R.2d (EDE) 1. Although "conduct unbecoming" a teacher or other public employee is not defined in the statutes or regulations, it has been described as an "'elastic" phrase that includes "'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). The touchstone of the charge is a teacher's fitness to discharge the duties and functions of his position. See Laba v. Newark Bd. of Educ., 23 N.J. 364, 385-88 (1957). Unfitness to hold a position in a school system may be demonstrated by a series of incidents or a single 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).

Inappropriate conduct between a teacher and students entrusted to the teacher's care has been found to be a sufficient basis to warrant suspension or revocation of a teacher's certificate. See In re Chavez, EDE 11443-03, State Bd. of Educ. (April 9, 2007), <http://lawlibrary.rutgers.edu/oal/search.html> (suspending certificate for two years for unbecoming conduct where teacher engaged in inappropriate horseplay by putting ice down the blouse of a female student and making inappropriate comments to another student); In re Nieves, EDE 3867-04, Initial Decision (November 10, 2005), adopted, State Bd. of Exam'rs (March 8, 2006), aff'd, State Bd. of Educ. (December 6, 2006), aff'd, A-2627-06T3 (App. Div. April 7, 2008), <http://lawlibrary.rutgers.edu/oal/search.html> (revoking certificates where teacher had sent suggestive notes to an eighth-grade student, including a note asking to "hang out" with the student during a school holiday when he said they could get together without anyone knowing); In re Resto, EDE 3869-04, Initial Decision (August 10, 2005), adopted, State Bd. of Exam'rs (October 31, 2005),

<http://lawlibrary.rutgers.edu/oal/search.html> (suspending certificate for two years where teacher had, among other actions, given her cell phone number to a student and exchanged personal text messages with the student over the course of a month and a half); In re Younger, EDE 3111-03, Initial Decision (December 6, 2004), modified, State Bd. of Exam'rs (March 7, 2005), aff'd, State Bd. of Education (January 6, 2006), aff'd, A-2800-05T3 (App. Div. November 15, 2006), <http://lawlibrary.rutgers.edu/oal/search.html> (Board of Examiners concluded that teacher "exercised poor judgment in allowing female students to remain in his hotel room for a substantial period of time, regardless of what behavior occurred" during a track meet while he was an assistant track coach, and the teacher engaged in conduct unbecoming a teacher which warranted a two-year suspension of his certificates); Papdaniil, supra, EDE 8821-00 (teaching certificate revoked predicated on a teacher's sexual relationship with a student); In re Mantone, 96 N.J.A.R.2d (EDE) 5 (certificates revoked stemming from "inappropriate overtures" toward two female students which included, among other things, the teacher writing unsolicited notes and commenting about the student's physical attractiveness); Fargo, supra 91 N.J.A.R.2d 1 (teaching certificate revoked based upon the teacher's sexual and emotionally abusive behavior toward his classified students).

CONCLUSIONS

Based upon the facts adduced and legal principles cited above, I **CONCLUDE** that Castel engaged in conduct unbecoming a teacher. I further **CONCLUDE** that his conduct constitutes just cause for revocation of his teaching certificate.

The voice messages left by Castel on S.R.'s cell phone were reprehensible and totally inappropriate, particularly for someone who was her teacher and who stood in a position of trust and respect. On one such call, for example, on a Sunday afternoon he stated that he wanted "to see if [S.R.] wanted to get together" followed by "This Friday night, I'll even take you to dinner if you want. Hang out, oh, whatever you want to do. We'll hang out. Go to dinner. And ah maybe hang out and party a little bit. Or whatever, you know. Whatever you want to do. You know. I ah, I'd like to, I'd like to see you." In addition to his several cell phone calls, there was his pattern of pulling

S.R., and V.V. out of eighth grade science class for no legitimate purpose but to have contact with them. To make matters worse, he then takes S.R. and V.V. across state lines to his home.

Although Castel claims that the time he spent with S.R. was motivated by his desire to help her when she was going through a difficult time, there were other measures he should have taken, such as contacting S.R.'s parents or referring her to counseling services offered by the school, as noted by Strauss.

In short, Castel's interactions with S.R. and V.V. were totally inappropriate and crossed the permissible line of his duties as a teacher. Castel exhibited extremely poor judgment by becoming an active participant in a personal relationship with a student. The absence of evidence of sexual or romantic involvement does not mitigate the seriousness of Castel's actions. Such poor judgment by an experienced teacher such as Castel cannot be countenanced. As a teacher, Castel occupied a position demanding public trust and was held to a higher standard of conduct. He was required to exhibit exemplary behavior and mature self-control. He was to uphold an image of utmost trust. Instead, his actions were inappropriate, irresponsible and unprofessional. Castel's reprehensible conduct represented a significant departure from what the public is to expect from those who teach their children.

Castel's behavior was not confined to a single incident but evolved into a pattern which continued throughout S.R. and V.V.'s eighth grade school year. Considering the high standard of conduct expected from those entrusted with the care and custody of children, I **CONCLUDE** that Castel's conduct was so unbecoming and flagrant to warrant the revocation of his certificates for principal and supervisor, as well as certificates for industrial/technology arts K-through-eight and elementary education.

ORDER

Based upon the foregoing, I **ORDER** that respondent's teaching certificates be and are hereby **REVOKED**.

I hereby **FILE** my Initial Decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this matter. If the State Board of Examiners does not adopt, modify 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 **SECRETARY OF THE STATE BOARD OF EXAMINERS, 1000 Riverview Plaza, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 16, 2010
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 2/16/2010

Date Mailed to Parties: FEB 17 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

WITNESSES

For Petitioner:

Gayle Strauss

W.R.

R.R.

H.V.

G.V.

S.R.

V.V.

For Respondent Castel:

Patricia Chalmers

William Castel

EXHIBITS

For Petitioner:

P-1	Petitioner's Order to Show Cause; April 4, 2008
P-2 - P-3	Respondent's Answer to Order to Show Cause
P-4 - P-6	East Rutherford Board of Education's Signed Statement of Tenure Charges
P-7 - P-8	East Rutherford Board of Education's Signed Statement of Evidence (without exhibits)
P-9 - P-14	OAL Initial Decision in Castel Tenure Matter; February 7, 2009
P-15	Commissioner of Education's Final Decision in Castel Tenure Matter; March 17, 2008
P-16	Bergen County Prosecutor's Office Incident Report Form; December 26,

	2006
P-17 - P-18	East Rutherford Police Report; December 1, 2006
P-19	Complaint/Summons for N.J.S.A. 2C:33-4a; December 11, 2006
P-20	Complaint/Warrant for N.J.S.A. 2C:24-4a (V.V.); December 11, 2006
P-21	Complaint/Warrant for N.J.S.A. 2C:24-4a (S.R.); December 11, 2006
P-22	Voluntary Statement of W.R.; December 11, 2006
P-23 - P-25	Voluntary Statement of S.R.; December 11, 2006
P-26	W.R. Consent to Search form; December 11, 2006
P-27	William Castel $15,000 bail/ROR; December 11, 2006
P-28	William Castel ROR and Bail Notice; December 11, 2006
P-29 - P-30	Bergen County Prosecutor's Office Memorandum for recording of S.R.'s six voicemails; December 12, 2006
P-31	Completion of PTI Order
P-32	Gayle Strauss letter dated December 4, 2006, to William Castel re: suspension
P-33	William Castel confirmation of resignation letter, September 5, 2007
P-34	Special Notice of Indictment/Conviction form
P-35 - P-36	PTI Orders; September 5, 2007
P-37 - P-38	Faust Middle School 2006 Yearbook signed by William Castel
P-39 - P-41	East Rutherford Board of Education Code of Ethics for Teaching Staff Members; adopted June 25, 2000
P-42 - P-49	V.V.'s Verizon Wireless phone records-billing date July 16, 2006
P-50 - P-56	V.V.'s Verizon Wireless phone records-billing date August 16, 2006
P-57	William Castel Driver abstract; December 6, 2006
P-58 - P-66	Transcript of voicemail recording (see P-67)
P-67	Revised voicemail of recording (see P-29 - P-30)

P-68 to -74 Telephone records of W.R.

For Respondent:

R-1 Evaluation May 12, 2006

R-2 Evaluation March 5, 2004

R-3 Evaluation January 14, 2003

R-4 Annual Performance Report, June 1, 2006

R-5 Sponsor/Mentor Disposition Checklist, December 6, 2005

R-6 Strauss letter re: Administrator's Certificate, January 27, 2006

R-7 Srednick Letter re: math/Science Fair, June 8, 2006

R-8 Letter to Parents re: Science/math Fair, March 16, 2006

R-9 Castel resume

R-10 Letter re: PTI Discharge

R-11 Answer to Tenure Charges

R-12 Evaluation, May 24, 2005

R-13 Strauss Letter, July 14, 2004

R-14 2003 Basketball Team Thank You

R-15 Evaluation, March 19, 2002

R-16 Letter of Thanks, April 14, 1999

R-17 Intern Portfolio sheet, November 17, 2005

R-18 Castel note to Dr. Srednicki

IN THE MATTER OF THE TENURE	:	
HEARING OF GREG YOUNG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

The petitioning Board certified tenure charges against respondent – a school guidance counselor – for conduct unbecoming a teaching staff member, insubordination and other just cause for dismissal. The charges stem from a series of incidents which began in the 2003-04 school year and continued through the 2008-09 school year, wherein respondent: used profane, sexually explicit or inappropriate language in interactions with co-workers; made unwelcome flirtatious overtures toward female co-workers; and repeatedly used obscene language to criticize administration and colleagues. Respondent denied the charges.

The ALJ found that: the Board has carried its burden to prove the charges against respondent by a preponderance of the credible evidence; respondent engaged in a pattern of improper interactions with co-workers over the course of several school years, and continued this unbecoming conduct even after repeated warnings that his behavior was not consistent with the professionalism expected of a teaching staff member; each charge against respondent, standing alone, would not warrant his dismissal from employment; in this case, however, respondent – after repeated efforts by the Board to counsel, transfer, and reprimand him – shows no understanding that his behavior is intolerable and incompatible with the mission of public schools. Accordingly, the ALJ recommended respondent's removal from his tenured employment.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. Respondent was dismissed from his tenured employment, and the matter transmitted to the State Board of Examiners 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.

Mailed 10/15/10

OAL DKT. NO. EDU 9771-09
AGENCY DKT NO. 200-8/09

IN THE MATTER OF THE TENURE	:	
HEARING OF GREG YOUNG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making her determination herein.

Respondent's exceptions essentially recast and reiterate his arguments made before the Administrative Law Judge (ALJ) below. As it is determined that these were fully considered and addressed in the Initial Decision, they will not be revisited here.

Upon comprehensive consideration of the record of this matter, which includes transcripts of the 7 days of hearing at the OAL,[1] the Commissioner concurs with the ALJ's findings and her conclusion that the Board has proven its charges against respondent by a preponderance of the credible evidence and that – based on the totality of the record here – termination of his employment is warranted. In so determining, the Commissioner has given full consideration to all evidentiary proofs which comprise the record and recognized that of

[1] Hearing was held on December 16, 2009, March 25, April 7, April 27, April 29, May 13 and June 8, 2010.

particular importance was the ALJ's assessment of the credibility of the witnesses. Such 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 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))

The Commissioner's reasoned review of the entire record before her provides no basis whatsoever for any alteration of the ALJ's determinations.

With respect to the appropriate penalty, the Commissioner is mindful that "Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner October 14, 1997, slip. Op. at 32, *citing In re Hearing of Ostergren, Franklin School District,* 1966 *S.L.D.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). The charges in the instant matter establish that during the course of his employment in the District, which began in September 2000, respondent has engaged in a pattern of behavior[2] wherein he used profane, sexually explicit or inappropriate language in interactions with co-workers, made unwelcome flirtatious overtures to female co-workers, and criticized

[2] The incidents which formed the basis of the charges against respondent began in the 2003-04 school year and continued through the 2008-09 school year, at which time tenure charges were certified against him.

administration and colleagues repeatedly using obscene language, depriving these individuals of the dignity to which they are entitled as District employees, creating an uncomfortable work environment, and impairing the ability of the individual targets of his improper behavior to effectively discharge their duties. Although the Commissioner is in agreement with the ALJ that each of the seven charges against respondent – standing alone – would not typically warrant his dismissal from his position of employment but, rather, would call for administrative counseling or minor discipline (Initial Decision at 21), she also recognizes that this pattern of conduct persisted over a prolonged period of time, and – despite repeated warnings, reprimands, admonitions and opportunities for improvement afforded him – respondent has remained unwilling or unable to conform his conduct to that which must reasonably be expected from a professional teaching staff member. Additionally, the Commissioner finds particularly disquieting respondent's adamant refusal to accept personal responsibility for his actions and to exhibit any modicum of sincere regret. Rather, he casts aspersions upon the truthfulness of the victims of his actions and attempts to shift the blame for his wrongdoings onto them. Respondent apparently views himself as a victim rather than a perpetrator, claiming that he is being singled out and harassed, and that his character is being defamed. Consequently, based on this record, it cannot be said that respondent's behavior is an aberration; nor can it be said that it is less likely than not that such conduct would be repeated in the future. This does not portend a positive learning environment for students or a harmonious working relationship with District staff. Under these circumstances, the Commissioner cannot entertain the prospect of respondent's return to the District and the resultant potential for the perpetration of an unhealthy educational environment.

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 position with the School District of the Borough of South Plainfield. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/15/10

Date of Mailing: 10/15/10

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

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9771-09
AGENCY REF. NO. 200-8/09

IN THE MATTER OF THE TENURE HEARING OF GREG YOUNG, SCHOOL DISTRICT OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY.

Nicholas Celso, III, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso and Zitomer, attorneys)

William F. Koy, Esq., for respondent

Record Closed: July 23, 2010 Decided: September 3, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Greg Young is employed by petitioner, the South Plainfield Board of Education (the Board), as a guidance counselor under tenure, pursuant to N.J.S.A. 18A:28-5. On July 9, 2009, tenure charges were filed with the Board by Superintendent of Schools Jose R. Negron, and served on Young. Young filed a response, under oath, on August 5, 2009. On August 12, 2009, the Board determined that probable cause existed to credit the evidence in support of the charges, and that the charges, if so credited,

warranted Young's dismissal from his employment. The Board suspended Young without pay, in accordance with N.J.S.A. 18A:6-14.

On August 13, 2009, the Board certified charges of unbecoming conduct, insubordination, and other just cause against Young pursuant to N.J.S.A. 18A:6-10 et seq. An answer was filed and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on August 27, 2009. Hearings were conducted on December 16, 2009, March 25, 2010, April 7, 2010, April 27, 2010, April 29, 2010, May 13, 2010, and June 8, 2010. Post-hearing briefs were submitted on July 23, 2010, at which time the record closed.

Young denies that just cause exists for his dismissal from his tenured position.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Background Facts

The parties stipulated to the following background facts and I **FIND**:

1. Young holds a B.A. in education from Newark State College in Union, New Jersey.
2. Young holds an M.A. in student personnel services from Kean University in Union, New Jersey.
3. Young holds an instructional certificate issued by the New Jersey Department of Education as an elementary teacher; administrative certificates as a supervisor, school administrator, and principal; and an educational services certificate in the area of student personnel services.
4. Young began his employment with the Board on September 1, 2000, as a guidance counselor.
5. Prior to his suspension, Young was a tenured guidance counselor assigned to the elementary schools in South Plainfield.

The Testimony

The Board filed seven charges of unbecoming conduct against Young. These charges allege that he used profane, sexually explicit or inappropriate language in interactions with co-workers, made unwelcome flirtatious overtures to female co-workers, and criticized administration and colleagues repeatedly using obscene language. The charges span several school years, dating back to 2003-2004. Charge Six additionally alleges insubordination, asserting that Young's conduct continued despite warnings and reprimands. Charge Seven asserts that the charges demonstrate a pattern of conduct that warrants Young's removal from his tenured position of employment.

Young testified that he loves his position as a guidance counselor, and has been devastated by the charges against him. He began his career as a teacher of mathematics and science in 1970, but left education for seventeen years to pursue a career in real estate sales. Young returned to education, which he described as his true passion, in 2000, when the Board employed him as a guidance counselor. Young's formal evaluations uniformly describe his performance as satisfactory, and Young often received "commendable" and "exemplary" ratings for his work.

Several witnesses attested to his winning ways with children, and to the compassion and skill he brings to his work as a guidance counselor. Young's evaluations compliment his ability to work well with colleagues. An evaluation at Grant School notes that Young is, "[a] man of integrity, he seeks to correct misunderstandings and mediate conflict." While working at the high school, Young was described as promoting "a positive image of the guidance department to staff, parents and students." An elementary school evaluation states that Young "has worked cooperatively with building principals, teachers and support personnel . . . ." Young additionally shared complimentary notes and cards from a parent and from colleagues. (R-7.)

But the evidence presented by the Board paints quite a different, disturbing picture of Young. Young responded to the tenure charges with firm denials, urging that he never made offensive comments to co-workers. Young strenuously asserted that the

obscene words attributed to him were not a part of his lexicon. A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). In making a credibility determination, it is appropriate to consider contradictory testimony, or testimony impeaching the witness's truth and veracity. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses at hearing, I did not deem Young's testimony to be credible.

Young's presentation was rife with inconsistencies. His testimonial account often differed from his written response to the charges (R-1), and he claimed an inability to recall events with detail, even though his written response is highly detailed, and encompasses approximately twenty pages of text. His answers to interrogatories provide yet another version of the events. (P-26.) Young generally and flatly denied making offensive remarks to his co-workers, but did admit the only remark made in the presence of a witness. Young consistently focused his presentation on the conduct of others. According to Young, his co-workers could not be telling the truth because they did not complain soon enough, or vigorously enough, or continued to maintain professional or friendly relationships with him after he had allegedly offended them. Young urged that it was actually the complaining witness who enjoyed engaging in sexual banter, or favored profane language. Administrators and the outside consultant who investigated Young's conduct disliked him, were plotting against him, or bore grudges that dated back to college days, and fraternity and football rivalries.[1] Persons who could vouch for him were either afraid to testify, or unable to be located.

During the 2003-2004 school year Young was assigned to Grant School, as was teacher Dana Bender Hauk. Hauk testified that she had a cordial relationship with Young, and she considered him a friend. They talked together about non-professional, personal matters in the way that friends might, and were part of a group of teachers that gathered on Fridays after work for drinks at Buzzy's, a nearby establishment. February

[1] Mr. Young is a man in his 60's, and thus many years removed from college.

5, 2004, was a chilly day, and the school had evacuated for a fire drill. As the students and faculty re-entered the building, Hauk recalled that she had her arms folded across her chest, underneath her breasts, to brace against the cold. She was wearing a v-neck shirt. Young was holding the door open, and he looked down her shirt and commented, "I like it when you squeeze them together like that." Hauk testified that she did not reply because she was in shock. Young's comment was made with students less than five feet behind her.

The next day Hauk complained to her principal, Janis Burchell, and she memorialized her concerns in a written statement. (P-1.) Ms. Burchell met with Young and Hauk on February 6, 2004, and Hauk's allegations were discussed. Hauk testified that Young stated that he thought his comment was acceptable because he and Hauk were friends. He apologized and Hauk accepted his apology. Burchell memorialized the discussion at the meeting in a memorandum dated February 6, 2004, (P-2) which was placed in the Grant School files.

Young testified that he did not make an offensive comment to Hauk about her breasts. He contended that, upon observing that Hauk was cold, he simply remarked about the weather and she misunderstood him. Indeed, Young asserted that the statement attributed to him is not a part of his jargon, and he urged, "I don't even know what it means." Young is an adult man, and this testimony strained credulity. His statement is likewise inconsistent with his answers to interrogatories, in which he contended that sexual repartee was "commonplace at Buzzy's on the Friday's [sic] we were there." Thus, by his own admission, Young was not naive about crude conversation.

According to Young, Hauk enjoyed lewd discussions. Young recounted in his interrogatory answers that Hauk and Assistant Principal Robert Richkus bantered during an in-service day about the size of Richkus's penis. Hauk likewise engaged in sexual banter at Buzzy's. Young stated that "I know that Dana Bender [Hauk] would hardly be offended by any type of 'inappropriate' language she THOUGHT I had used." (P-26 (author's emphasis).) The testimony of former Board member Jeff Seider was offered to corroborate Young's assertions that crude conversation was commonplace among

the professional staff in the South Plainfield Public Schools. Seider recounted several occasions when he was at Grant School after school hours and stopped by to greet teachers who were socializing, among them Dana Hauk. According to Seider, crude conversation was the norm. His testimony appeared to suggest that accordingly, Young's alleged remark to Hauk should not have upset her. But this is a surprising defense for someone who honestly commented only about the weather.

Burchell memorialized her meeting with Hauk and Young, stating, "Mr. Young apologized for anything that he may have said that appeared inappropriate and will be more sensitive to the comments that he is making." (P-2.) Young concurred that he apologized to Hauk because he felt badly that Hauk had taken offense to something he had said. But how could a comment about the weather even remotely appear inappropriate, and what about such a comment would require greater sensitivity in the future? Moreover, Young never formally or informally sought to correct Burchell's statement until a year later, and described her memorandum in his written reply to the charges as "fairly amorphous." Young's denials lack credibility. Thus, I **FIND** that Young made a remark to Hauk about her breasts during a fire drill in February 2004, and that this remark was made in a busy school hallway with elementary students present.

Hauk attempted to maintain a professional relationship with Young, and was somewhat successful in doing so until the spring of 2005. Young approached Hauk and asked if she would be willing to agree to have Ms. Burchell remove the February 6, 2004, memorandum from his file. Young explained that he wished to apply for administrative positions in the district, and that the memorandum could be detrimental to his chances for promotion. Hauk replied that she would need to think it over. Young testified that he had initially approached Burchell with his request, and that Burchell had told him that she would have to secure Hauk's approval. According to Young, Burchell directed him to ask Hauk to speak with her. It is uncontroverted that once Young approached Hauk, however, the topic of removing the memorandum was discussed. Young testified that Hauk inquired why she needed to see Burchell, and he explained it was because he sought removal of the controverted memorandum.

Indeed, Young and Hauk offered essentially consistent descriptions of their conversation. While Young adamantly urged that he did not "pressure" Hauk to agree to remove the Burchell memorandum, he conceded that he "asked" her to do so. The semantics of whether Young "asked" Hauk to agree to remove the memorandum or whether Young "pressured" her to do so is a distinction without a difference. Hauk credibly testified that she felt pressure to accede to Young's request, and her feelings are consistent with Young's presentation of his request as having high stakes professional ramifications.

The next day, Hauk met with Burchell and shared her hesitancy to acquiesce to Young's request. After several conversations, Burchell advised that Hauk could not dictate if the memorandum would remain or be removed, and that the ultimate determination whether to grant Young's request was a matter for administration's sole discretion. Hauk was concerned and upset. She turned to her union, which declined to assist her because her complaint was against a fellow union member. Accordingly, she met with the Assistant Superintendent of Schools and Affirmative Action Officer Anthony Massaro. Massaro proceeded to investigate Hauk's complaint.

Massaro advised Young that he had exercised poor judgment when he asked Hauk to agree to remove Burchell's memorandum. Massaro indicated at the hearing, and in a memorandum to Young dated May 5, 2005, (P-5) that Young's request should have been directed to administration. Young was advised to reflect upon his conduct, which Massaro stated did not "enhance our ability as a school system to promote an environment conducive to learning and teaching." Massaro's May 5, 2005, memorandum was placed in Young's personnel file. Young strenuously asserted that Massaro mischaracterized his interactions with Hauk; that he had directed his request initially to administration, and had only approached Hauk at Burchell's request. But Young himself clearly recounted that Burchell did not suggest or instruct that he discuss removal of the memorandum directly with Hauk, but only that Hauk be sent to speak

with her about the issue.[2] Accordingly, I **FIND** that Massaro accurately described Young's conduct in his letter of reprimand.

Hauk testified that subsequent to the request by Young that the letter be removed her relationship with him deteriorated. At a faculty meeting on September 26, 2005, Young publicly criticized the union and its vice-president, Diana Joffe, noting that Joffe was married to Massaro, and that this created a conflict of interest. Furthermore, he stated that staff members were "using their power" to create conflicts with co-workers, a comment which Hauk felt was directed at her, and was a public criticism. Hauk was serving as a union negotiator at the time, and felt humiliated. A co-worker, Allison Schneider, corroborated Hauk's recollection of the events. She likewise took Young's comment as a criticism of Hauk's ability to effectively discharge her union-related duties. Schneider emphasized on cross-examination that the import of Young's comments were that Hauk had slandered him, and did not have the best interests of the union at heart.

Hauk testified that the comments at the faculty meeting came in the wake of escalating tension between her and Young. She felt he was purposefully harassing her. Hauk no longer began to receive important guidance related documents, such as standardized test forms, and student schedules. She felt that other staff members were angry at her, and were snubbing her. She found herself crying daily about her treatment at school. She memorialized her concerns in a September 25, 2005, letter to her principal, Leo Whalen. (P-3.) Hauk stated in her letter that she felt she was working "in an unsafe and threatening environment." Young denied engaging in any harassing conduct against Hauk.

I **FIND** that after Hauk declined to assist in the removal of the Burchell memorandum and complained to Massaro, her relationship with Young deteriorated, and he publicly criticized her at a faculty meeting. Hauk's testimony that Young did not direct guidance memoranda to her attention, and otherwise tried to impede her ability to

[2] Surprisingly, Young's witness, Jeff Seider, testified that he spoke to Burchell, who advised that she had directed Young to ask Hauk if it was all right to remove the letter. Again, Young has offered less than credible and contradictory defenses to the claims against him.

effectively discharge her duties was credible and sincere, but she could offer no real evidence that Young was personally responsible for these misplaced school documents.

By his own admission, Young was quite angry about Massaro's letter of reprimand, and felt mistreated. According to the testimony, he made his feelings known. Robert Rosado testified that, in the spring of 2007, while serving as superintendent of schools, he received a verbal complaint from a high school guidance secretary, Roberta Aiello, regarding Young. The complaint was brought to his attention because he also was serving as the District's Affirmative Action officer.[3] Aiello reported that she felt uncomfortable in the workplace because Young persistently made profane comments in her presence about Diana Joffe and Anthony Massaro. Aiello objected to these comments because she considered Joffe and Massaro friends. She furthermore was most uncomfortable with Young's use of profanity, so much so that she could not actually repeat the words that he used in her presence. Rosado asked that Aiello put her concerns in writing. Aiello had also complained to her building principal, Kenneth May, who likewise asked that she put her concerns in writing, which she did in a letter to May written shortly after meeting with him on August 9 and 10, 2007. (P-9.)

Aiello, who is retired from her employment with the District, testified via telephone at the Board's request, and with the consent of Young's attorney. Aiello served the District as a high school guidance department secretary for twenty-five years. Her job responsibilities included generally assisting the counselors, serving as a receptionist, and assisting with student transcripts. She would have occasion, as part of her job responsibilities, to enter Young's office for filing or to provide information to him.

Aiello's letter, and her testimony, recounted that on the first day of school in September 2006, Young overheard a phone conversation she was having with Anthony Massaro. Young proceeded to malign Massaro, Joffe, and Rosado, who was then superintendent of schools. Young called Massaro a "liar" and a "snake in the grass." He stated that Joffe was "a bitch and couldn't be trusted." Young also stated that

[3] Rosado retired from public education effective December 30, 2007. In or about September 2007 his replacement, Jose Negron, was retained by the Board. From September 2007 until the effective date of his retirement in December 2007, Dr. Rosado served as deputy superintendent with duties that intermittently brought him into the District.

Rosado could not be trusted. He indicated that he had no use for all three, because "sooner or later they will stab you in the back." Aiello advised Young that she found his remarks offensive, but the commentary continued, without any consideration for her feelings. Aiello stated that she would be forced to leave the office to avoid Young's criticism of these administrators and co-workers.

In late April of the 2006-2007 year, while Aiello was typing, Young again sat down next to her and began to speak ill of Massaro and Joffe. In her testimony Aiello remained uncomfortable repeating the words used, but she confirmed that she wrote them accurately in her letter to May. She wrote that, "[o]nce again the name-calling began (i.e. 'prick,' 'dick,' 'bitch,' 'asshole')." Aiello was forced to leave her duties, and walk away. She testified that she found the use of this language upsetting and stress inducing, and that it created an uncomfortable work environment for her. I was unable to observe Aiello, since she testified and was cross-examined via phone, but she nonetheless testified convincingly, and I deemed her testimony to be credible. Her testimony was likewise consistent with the information supplied in her letter to May, and with Rosado's recollection of her complaints.

During her conversations with May, Aiello had declined to name co-workers who could corroborate her allegations. When meeting with Aiello, Rosado renewed the request for names of staff members with similar complaints, and she reluctantly shared with Rosado that Patricia DeSantis and Mark Tweed could verify her concerns. Rosado followed up with DeSantis, who put her recollections about Young in writing in a letter dated November 2, 2007. (P-6.) DeSantis testified that she has been employed since 2006 as a duty aide at the high school. Her responsibilities include ensuring that the children are in class and not causing a disruption. During the 2006-2007 school year, she would assist with the sale of newspapers and Young would pick up a morning paper from her daily.

DeSantis was cordial when Young stopped by each morning, and Young quickly began to share personal information with her about his divorce. In an attempt to be sympathetic, DeSantis replied that her sister was divorcing and she knew it could be a stressful time. Young replied by asking if DeSantis could "fix her sister up" with him, a

suggestion she found disquieting and one that Young nonetheless repeated during subsequent conversations.

DeSantis further testified that on another occasion, he exited the office and referred to Diana Joffe as "that fucking bitch." This comment was made during the school day, in the hallway where students could be present. DeSantis stated that the use of profanity was commonplace in Young's conversation, and that he frequently used the word "fuck" when he spoke to her. DeSantis stated that she became extremely uncomfortable, and moved her post in the hall so that it was not adjacent to the guidance office. She was a credible witness, whose testimony was consistent with her prior written statement.

Finally, Rosado interviewed Grant School teacher, Mark Tweed. Tweed shared with Rosado that in his presence, on a number of occasions, Young had "vented" about Joffe and Massaro using obscene language. While Tweed was very reluctant to become involved he ultimately agreed to sign a copy of a letter written by Rosado, in which Rosado recounts the information supplied to him by Tweed. (P-8.)

Tweed confirmed at the hearing that Rosado had accurately memorialized their conversation. Tweed reiterated that Young had used obscene language, noting that the conversation was private, and did not take place in the presence of either colleagues or students. But Tweed testified quite credibly that Young's language was memorable because it was shockingly profane, and that Young called Joffe a "fucking slut" and a "fucking cunt" in Tweed's presence. Young used the words "cocksucker," "bitch," and "slimeball," in describing his administrator and colleague to Tweed.

Young denied the allegations made by Aiello, DeSantis and Tweed. He testified that he simply does not use the words attributed to him, and has not done so since his college days. Relative to Aiello, he was quick to point out that they had a cordial relationship, and that, in fact, he had driven her home on occasion. He stated that DeSantis was not truthful in her allegations, and that they hardly ever spoke. Young denied asking to be fixed up on a date with DeSantis's sister, urging that he has not dated since his divorce. He urged that Tweed likewise vented about Massaro and Joffe,

because Tweed was disgruntled about a transfer from the high school and he blamed Massaro. Young admitted that "some salty language" was used, but continued to deny that he used the words Tweed described, and asserted that Tweed used some foul language of his own.

Young's denials lacked credibility. Three witnesses attributed vulgar language to him, and in each case Young's offensive epitaphs were directed at two colleagues that Young admittedly disliked. May testified that he has known Young for many years, and that he did not know Young to use foul language in "mixed company." But May did confirm that such language was used by them when they conversed privately, thus demonstrating that Young was less than honest when he urged that obscenities are not a part of his vocabulary. I **FIND** that Young used obscene language when speaking to DeSantis during the 2006-2007 school year, and used such language to describe Diana Joffe. I **FIND** that Young maligned Joffe, Massaro, and Rosado in Aiello's presence and used obscene language when doing so. I further **FIND** that Young maligned Massaro and Joffe using vulgar language in his private conversations with Tweed.

Rosado summarized his findings in a memorandum to his successor, Jose Negron, dated November 13, 2007. (P-11.) Rosado made several recommendations to Negron including advising that consideration be given to an alternative workplace location for Young. Negron testified that he reviewed Rosado's findings, and determined to transfer Young from the high school. However, his planned transfer of Young to the middle school was thwarted by a middle school support-staff member, Linda Giannakis, who, upon hearing of the impending transfer asked to meet with Negron and relate an incident of concern to her. Giannakis met with Negron on November 7, 2007, and presented him with a written account of events which had occurred during the 2003-2004 school year. (P-7.)

Giannakis is currently employed as an administrative assistant in the middle school guidance department, and has served the District in that capacity for ten years. During the 2003-2004 school year she would interact with Young via telephone to conduct school District business. At that time, Young had been newly assigned as a guidance counselor in Grant School, which was being reconfigured as a centralized

school for sixth-grade students. Giannakis, Young and two other school employees traveled that year to a training session in Pennsylvania. They all met at Grant School, and Young drove. On the trip home, Young accidentally struck an animal with his car. He stopped to investigate and discovered that the animal was a family pet. The owner came outside, and shortly thereafter the animal died. It was a most upsetting incident. When they returned to the school, Giannakis was the last to leave the car. She could see that Young was distressed, and so she asked if he was alright. She testified that he replied that he "would feel better if [she] gave [him] a hug and a kiss." Giannakis did not acquiesce to his request. This comment made her uncomfortable, but she testified that she "chalked it up" to a bad situation.

Thereafter, Giannakis's only continued interaction with Young was via telephone. When he would call to conduct school business she would politely ask "how are you," but she testified that he would reply with an overly personal discussion of non-school related matters. During several of these conversations Young invited her out for a drink. Giannakis was married, and she found these overtures unsettling and inappropriate. She would attempt to redirect the conversation to work related topics, and eventually became very terse when he called, tried to quickly address the school business at hand and end the conversation. Although a group of teachers would occasionally go for drinks after school, Giannakis confirmed that she did not typically join this group. Furthermore, Giannakis did not feel Young was inviting her to join the group, but rather was asking to go out drinking with her alone. .

Giannakis shared her uneasiness with administration when she learned that Young would be reassigned to the middle school. She stated that at times she worked late at night, and she felt that Young's presence in her school would make her uncomfortable. She memorialized her concerns in a letter to the Negron. Her testimony was consistent and credible. Giannakis stated that she waited to raise her concerns because she felt that as long as she was not in the same school as Young, she could manage to keep a safe distance from him.

Young responded to Giannakis's testimony with general denials, which again, lacked credibility. He urged that they did hug, and that their embrace was friendly and

mutual, although on further questioning he vacillated—sometimes stating that Giannakis hugged him—sometimes stating he hugged her. He urged that her allegations were remote in time, and that the complained of conduct, even if true, did not rise to any form of harassment. He asserted that their relationship was cordial; describing a friendly discussion about sharing coffee in the office. Young offered testimony by Seider to corroborate his version of the events. Seider testified that he was a social friend of Giannakis and that she admitted to him that she hugged Young, but regretted it, and did not want her husband to find out. Giannakis adamantly denied that she so advised Seider during telephonic rebuttal testimony. Seider's testimony was the less credible of the two. Seider admitted to a lack of clarity for details during much of his testimony, whereas Giannakis wavered not at all in her version of the events.

I **FIND** that Young did ask for a hug and kiss in a manner that left Giannakis feeling uncomfortable and furthermore, thereafter, Young made overtures and comments when they talked via phone that exacerbated those feelings of discomfort.

Negron now felt it inappropriate to simply transfer Young, and accordingly, he suspended him with pay effective November 13, 2007, pending a complete investigation. The Board retained Dr. Louis Centolanza in January 2008 to conduct a comprehensive Affirmative Action investigation and supply the Board with a written report of his findings. Negron stated that he felt that the use of an outside consultant would ensure impartiality. Centolanza is a retired school administrator who had worked in public education since 1969, and is presently an adjunct professor and consultant. He testified that he did not know Negron, Rosado, or Massaro prior to his consultancy assignment for the Board. He did have a prior professional relationship with the Board attorney, Nicholas Celso, but testified convincingly that this relationship in no way impaired his impartiality. Centolanza conducted a comprehensive investigation. He met with Joffe, DeSantis, Giannakis, Tweed, and May. He interviewed Aiello via telephone. Centolanza found the witnesses he interviewed to be credible, and they renewed their allegations against Young.

Centolanza then interviewed Young, who generally denied the allegations against him. Young did admit to making unflattering comments about Joffe and

Massaro to Tweed, but asserted that Tweed joined in the conversation, and made some unflattering comments of his own. Young advised Centolanza that he missed his role as a guidance counselor and wished to be reinstated. He was offered an opportunity to present any additional documents or data to Centolanza, but did not do so.

Centolanza's investigation culminated in a report to Negron dated February 19, 2008. (P-13.) He found that Young had engaged in a pattern of inappropriate conduct, had violated Board anti-harassment policies and should be subject to discipline. An executive summary of the report was prepared by Centolanza for review by the Board. (P-13.) That executive summary was shared with Young via letter dated March 3, 2008. (P-14.) Young responded via letter dated March 10, 2008, and declined to attend a meeting to discuss Dr. Centolanza's findings, citing a need for additional documentation and a disagreement with his attorney regarding the direction they wished to take in responding to the allegations against him. (P-22.)

Thereafter, I **FIND** that Negron sent Young a strongly worded letter of reprimand. (P-15.) He advised Young that his conduct was inconsistent with Board policy and "repugnant to the type of decorum and behavior expected of a professional staff member." Negron stated that "I wish to stress to you in the strongest possible terms that any recurrence of this type of conduct will result in the most severe disciplinary action, up to and including termination." Negron reassigned Young to the elementary schools, to serve as a character education coordinator on a rotating schedule, visiting each of four schools one day per week. The fifth weekday Young was assigned to the central administrative office.

Despite being the subject of an Affirmative Action investigation, and despite having been advised to desist from the complained of conduct, Young's problematic behaviors continued. In March 2009, Young was providing character education to the students in Alicia Vurchio's class at Kennedy School one Tuesday per month. Vurchio is a young woman who is currently in her fourth year as a teacher in the South Plainfield Schools. She stated that her conversations with Young always made her uncomfortable. She gave the example of references he made to a television program, "Two and a Half Men." Vurchio stated that she finds the show's sexual content

inappropriate. Young told her that he lives like the character played by actor Charlie Sheen, who is "a single man always looking for a good time."

Vurchio recounted a conversation that took place outside her classroom, while she attempted to put student work on the bulletin board. He spoke of his divorce, and told her to be careful about marriage. On another occasion, Young apparently overheard Vurchio discussing St. Patrick's Day plans with a friend in the faculty room. They discussed that Vurchio might try her first "Guinness" that day, a reference to a brand of beer. Later, unsolicited, Young attempted to engage Vurchio in a conversation about the proper way to pour beer. This conversation took place in the classroom with children present. Finally, Vurchio recounted that in December 2008 she was taking a lunch count for her children. Young made the unsolicited comment that she should get him a cheeseburger, and asked "does that come with buns?" Vurchio felt this comment contained sexual innuendo, since hamburgers are always served between buns. Vurchio wrote in a statement dated April 3, 2009, that "Young is a much older man than I am and a lot of time when I would have conversations with him, I would leave questioning what he just said to me." (P-16.) These conversations often took place in her classroom, with first-grade children just inches away. Young made Vurchio uneasy, and she always tried to cut their conversations short.

On March 31, 2009, Vurchio had an encounter with Young that finally prompted her to complain to administration. She testified that in the morning he told her how well she looked that day, and he asked if she was dressed up for a special occasion. She was dressed as she typically did for work, but she accepted the comment as a compliment at first. But later in the day a co-worker advised that Young had told her that Vurchio looked good. Vurchio now found it unsettling that he would twice comment on her appearance in one day, and would do so to a co-worker. After lunch, as she was returning to her classroom in a hallway crowded with children, Young passed by and stated "Miss Vurchio with you looking this good today, I wish I was thirty years younger." Vurchio testified that she was now very upset. Another staff member overheard the comment, and gave her a "weird" look. Another suggested that she dress down on Tuesdays to avoid further comments of this nature from Young.

Vurchio's testimony regarding the incident of March 31, 2009, was corroborated by fellow teacher, Carol Christatos, who heard the remark, and recounted it at the hearing in much the same way. Christatos's testimony was consistent with a statement dated April 1, 2009, in which she wrote that she heard Young say "Looking at you today makes me wish I was thirty years younger." (P-17.) Christatos confirmed that Vurchio reacted with much discomfort. This was the one comment attributed to Young that he admitted, although he urged that he meant no harm, and thought the comment was an innocuous compliment. He denied making any other inappropriate comments to Vurchio, and denied engaging in less than appropriate conversations with her.

Vurchio testified that Young's presence in her building made her feel unsafe. She testified that she tried to avoid him, and wrote in her statement that she would lock herself in her classroom on Tuesdays. She clarified through testimony that she did not literally lock the door, but that when the children were gone she would dim the lights and close the door, to give the impression she was not there. She wrote in her statement that "I just cannot stop thinking how unfair it is that I do not feel safe on Tuesdays in my building." Vurchio's testimony was credible, and I **FIND** that Young made repeated unwelcome comments about her personal appearance, and that one of those comments was flirtatious. I further **FIND** that Young discussed personal matters with Vurchio such as his divorce, beer drinking, and television programs with adult content, and that these conversations took place in the presence of children, were uninvited by Vurchio and made her uncomfortable.

Negron testified that his concerns about Young and his conduct became heightened in light of Vurchio's complaints. A review of Young's personnel file brought the allegations earlier made by Dana Hauk to Negron's attention, and Hauk supplied him with a letter dated June 14, 2009, which verified the events at Grant School. (P-4.) Negron investigated Vurchio's concerns with the assistance of the Affirmative Action officer, Frederik Oberkehr. In a letter memo dated April 7, 2009, Oberkehr advised Negron that he felt that there was evidence of sexual harassment. (P-18.) Oberkehr followed up with a memorandum dated May 6, 2009, in which he stated that another teacher, Janine Turrise, had verified that Young had commented to her about Vurchio's appearance on March 31, 2009. (P-19.)

Negron stated that tenure charges were filed because Young had engaged in objectionable conduct at every level of instruction, including the high school, middle and elementary schools. Attempts to resolve each individual complaint by separating him from the staff member he had offended proved unsuccessful; indeed, there were no further District work locations where he could be assigned. Negron asserted, and I **FIND** that Young's conduct continued despite several warnings and reprimands and after three Affirmative Action investigations had substantiated concerns about his interactions with co-workers.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-10, a tenured teaching staff member cannot be "dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or other just cause." The Board bears the burden of proving the charges against a tenured staff member, such as Young, by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 is the greater weight of credible evidence in the case; that is, the evidence having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). After giving careful consideration to the competent credible evidence, I **CONCLUDE** that the Board has met its burden of proof relative to each of the charges it has filed against Young.

"Unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. Karins v. Atl. City, 152 N.J. 532 (1998). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based on an 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." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Educators are held to a particularly high standard of conduct, and allegations of unbecoming conduct call into question their fitness to discharge the duties and functions

of their employment. They are professional employees "to whom the people have entrusted to care and custody of . . . school children with the hope that this trust will result in the maximum educational growth and development for each child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." In re Sammons, 1972 S.L.D. 302.

Young's behavior toward Hauk, Aiello, DeSantis and Vurchio was inappropriate, and inconsistent with the dignity and self-control expected of a professional school employee. His sexually explicit and flirtatious remarks, and his profane language, were all used in school buildings, during the school day, and within earshot of children. Indeed, the Commissioner has held that such conduct is "all the more offensive when displayed before other staff and students." In re Zofchak, EDU 146-02, Final Decision (October 15 2002), <http://lawlibrary.rutgers.edu/oal/search.html>. It is not conduct that students should be encouraged to emulate. Ibid. Young made the work environment uncomfortable for his female colleagues, and impaired their ability to effectively discharge their duties. As a result, his behavior negatively impacted the delivery of educational services to the children of South Plainfield. Accordingly, I **CONCLUDE** that the Board has demonstrated that Young is guilty of conduct unbecoming a teaching staff member relative to the allegations contained in Charges Two, Four, Five and Six.

Young's conduct toward Giannakis likewise was inappropriate. Although they were not with children at the time that he requested a hug and kiss, they were together on school business. His flirtatious behavior continued thereafter, and interfered with Giannakis's ability to perform her job duties, as Young repeatedly took ostensibly professional phone conversations in directions that made Giannakis quite uncomfortable. Indeed, she was so ill at ease that she felt the need to complain when she learned that Young might be transferred to her building. I **CONCLUDE** that the Board has demonstrated that Young is guilty of conduct unbecoming a staff member relative to Charge One.

Charge Three asserts that Young was guilty of conduct unbecoming a teaching staff member by using obscene language in conversations with Tweed. This charge, standing alone, might not rise to conduct unbecoming, as his conversations with Tweed

were private, Young did not use profane language in the presence of children, and it does not appear that his language truly discomforted Tweed, who indeed, never complained and revealed the content of the conversations only when pressed to do so. But the conversations with Tweed need to be examined in the broader context of Young's repeated public and obscene diatribes against Massaro and Joffe, a superior and a colleague, respectively. The Commissioner has recognized that a public school can function effectively only where there is respect for the chain of command. He has consistently found derisive and disrespectful behaviors and speech toward members of administration to constitute conduct unbecoming. Pietrunti v Bd. of Educ. of Brick Twp., 128 N.J. Super. 149 (App. Div. 1974); In re Radwan, EDU 6259-97, Final Decision (January 14, 1999), <http://lawlibrary.rutgers.edu/oal/search.html>. In like measure, a modicum of decency and respect must be afforded to co-workers if the school environment is to remain conducive to learning. While Joffe was not a superior, Young's actions in maligning her and using repugnant and profane language in doing so is intolerable in a public school setting. Accordingly, I **CONCLUDE** that the conversations with Tweed, when considered in the context of Young's pattern of maligning Massaro and Joffe, constitutes conduct unbecoming a staff member, and that the Board has met its burden of proof as to Charge Three.

I **CONCLUDE** that the Board has likewise met its burden of proving that Young is guilty of insubordination. He was the subject of several investigations of his conduct, and told several times that his conduct was unacceptable and must change. He was transferred repeatedly to new work sites, those transfers clearly having been undertaken to separate him from co-workers who had complained about his behavior. He was formally reprimanded. But his behavior continued nonetheless, in clear defiance of directives from his superiors. Rather than responding to Massaro's directive that he reassess his behavior, Young proceeded to directly defy Massaro's authority, by sharing with co-workers, in obscene language, that he felt that Massaro, and the superintendent of schools, both were unfit to lead. Young is entitled to his opinions about administration, but he is not entitled to repeatedly share those opinions by using vituperative language which is distasteful and offensive to co-workers. See Pietrunti, supra, 128 N.J. Super. 149.

Young's assertion that much of the charges are old in time, and thus inappropriately used as evidence of misconduct by him is unavailing. The Commissioner of Education and our courts have recognized that unfitness to teach is best evidenced by a series of incidents. 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); Zofchak, supra, EDU 146-02. Here the Board has told a story of its relationship with Young that spans several years in time, and necessarily so. It has allowed me to observe repeated efforts by administration to redirect Young's conduct and to place him in a setting where he can experience success. Only by looking back over the many years the charges span, was I able to see that despite these interventions, Young's conduct has continued unabated, and I **CONCLUDE** that the Board has proven that Young is guilty of a pattern of improper interactions with co-workers; conduct which has continued after repeated warnings that his behavior is not consistent with the professionalism expected of a teaching staff member. Finally, I concur with the Board that Young's conduct was inappropriate in a school setting, regardless of whether it created a "hostile work environment" as that term is defined by Lehmann v. Toys "R" Us, 132 N.J. 587 (1993).

The Board seeks Young's dismissal. Factors to be taken into account in making a penalty determination include the nature and circumstance of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. In Re King, EDU 4241-00, Final Decision (February 25, 2002), <http://lawlibrary.rutgers.edu/oal/search.html> (citing In re Suitt-Green, EDU 538-07 Final Decision (February 25, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>). Here, each charge against Young, standing alone, would not, in my view, warrant his dismissal from his position of employment. These are the sorts of incidents that would typically warrant administrative counseling or minor discipline. But here, the Board has counseled, transferred, and reprimanded Young repeatedly, yet he shows no understanding that his behavior is intolerable and incompatible with the mission of the public schools. He has responded to the charges against him with denials of personal responsibility and "the transference of blame to others." King, supra, EDU 4241-00. He is unrepentant.

Under similar circumstances, the Commissioner has aptly stated that a teacher's "apparent refusal to accept responsibility for his behavior does not portend a positive learning environment for the students entrusted to his care, or a harmonious working relationship with those administrators who supervise him." Zofchak, supra, EDU 146-02 (citing King, supra, EDU 4241-00). Based on this record, it cannot be said that Young's behavior is an aberration, nor can it be said that it is likely that his behavior will change. Ibid. Accordingly, I **CONCLUDE** that Young's conduct warrants his dismissal from his position as a tenured guidance counselor.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Greg Young be **DISMISSED** from his tenured position of employment with the South Plainfield 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, 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 3, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: September 3, 2010

Mailed to Parties: SEP 09 2010

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Dana Bender Hauk
Allison Schneider
Patricia DeSantis
Linda Giannakis
Anthony Massaro
Alicia Vurchio
Roberta Aiello
Carol Christatos
Robert Rosado
Jose Negron
Louis R. Centolanza
Kenneth May
Mark Tweed

For Respondent:

Gregory Young
Jeff Seider

EXHIBITS

For Petitioner:

P-1 Handwritten Notes by Dana Hauk (now Bender), dated February 4, 2004
P-2 Burchell Memorandum, dated February 6, 2004
P-3 Hauk letter, dated September 26, 2005
P-4 Hauk letter, dated June 14, 2009
P-5 Massaro letter, dated May 5, 2005
P-6 DeSantis memorandum, dated November 2, 2007
P-7 Giannakis letter, dated November 2, 2007

P-8 Rosado letter, dated August 30, 2007

P-9 Aiello letter, undated

P-10 May letter, dated September 11, 2007

P-11 Rosado memorandum, dated November 13, 2007

P-12 Negron letter, dated November 29, 2007

P-13 Centolanza letter, dated February 19, 2008

P-14 Negron letter, dated March 3, 2008

P-15 Negron letter, dated April 9, 2008

P-16 Vurchio memorandum, dated April 3, 2009

P-17 Christatos memorandum, dated April 1, 2009

P-18 Oberkehr memorandum, dated April 7, 2009

P-19 Oberkehr memorandum, dated April 7, 2009

P-20 Oberkehr memorandum, dated May 6, 2009

P-21 Negron letter, dated January 17, 2008

P-22 Young letter, dated March 10, 2008

P-23 Sworn Statement of Evidence in Support of Tenure Charges against Greg Young

P-24 Rosado letter, dated August 30, 2007, with handwritten notes by Centolanza

P-25 Final Judgment of Divorce

P-26 Supplemental Answers to Interrogatories

P-27 Young letter, dated May 24, 2005

P-28 Massaro memorandum, dated May 5 2005, with handwritten note by Young

For Respondent:

R-1 Sworn Response to Tenure Charges

R-1(a) Young letter dated August 23 ,2007

R-1(b) Letters on behalf of Young

R-2 South Plainfield Board of Education Policy 3221

R-3 South Plainfield Board of Education Policy 3222

R-4 Young evaluations, 2000-01 through 2008-09

R-5 Professional Improvement Plans

R-6 May letter with attached letter from Young to Seider, dated September 11, 2007

R-7 Letters and notes of appreciation to Young

R-8 Staff Tenure Form

#432-10R

OAL DKT. NO. EDU 8408-10
(EDU 620-10 ON REMAND)
AGENCY DKT. NO. 228-9/09

B.S., on behalf of minor child, D.L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this remanded 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 now 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/15/10

Date of Mailing: 10/15/10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. 8408-10 (ON REMAND)

EDU 620-10

AGENCY DKT. NO. 228-9/09

B.S. o/b/o D.L.S.,

Petitioner,

v.

EWING TOWNSHIP

BOARD OF EDUCATION,

Respondent.

B.S., for petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: August 20, 2010 Decided: August 24, 2010

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 10, 2010, 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 and Release Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

8/24/10
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/mev

B.S. o/b/o P.L.S.	OAL DKT. No.: EDU 05 620-2010
v.	Agency Ref. No.: 228-9/09
Ewing Bd. of Ed.	Settlement Agreement

Petitioner, Barbara Seigle, pro se, and the Respondent, Ewing Board of Education, represented by Jeffrey F. Belz, Esquire, having resolved the above referenced Petition, hereby agree as follows:

1.) Petitioner shall withdraw P.L.S. from the Ewing school district within 5 days of the last school day of the 2009/2010 school year.

2.) Petitioner shall pay the Ewing Board of Education $3,000.00 for tuition, payable in monthly installments of $50.00 beginning on August 1, 2010 and on the 1st of the month thereafter.

3.) Respondent agrees not to pursue this settlement or any order of the Commissioner approving this settlement as a judgment in the Superior Court so long as Petitioner remains current with the monthly payments. Respondent may pursue a judgment however if Petitioner is more than seven (7) days late on a payment.

4.) This settlement agreement does not represent any admission of liability as the matters at issue.

5.) Each party shall be responsible for their own attorney's fee, if any.

Barbara Seigle 6/14/10
Barbara Seigle, Petitioner Dated

6/14/10
David Mikalauskas Dated
Ewing Bd. of Education, Respondent

8/20/10
Jeffrey R. Belz, Attorney for
Ewing BOE

#433-10

OAL DKT. NO. EDU 7347-10
AGENCY DKT. NO. 142-7/10

JEREMY RASMUSSEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/15/10
Date of Mailing: 10/15/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7347-10
AGENCY DKT. NO. 142-10

JEREMY RASMUSSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent.

Jeremy Rasmussen, petitioner, pro se

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: September 23, 2010 Decided: September 23, 2010

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 24, 2010, 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 is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):

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 days and unless 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, 2010
DATE

W. TODD MILLER, ALJ

Date Received at Agency: SEP 28 2010

Date Mailed to Parties: SEP 29 2010

/sd

Rev.8-16-10

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made by and between JEREMY RASMUSSEN ("Rasmussen") and the VINELAND BOARD OF EDUCATION ("VBE"), in full settlement of all claims alleged by Rasmussen in the Administrative Action entitled "RASMUSSEN v. VINELAND BOARD OF EDUCATION", bearing Docket No. OAL DKT. NO. EDU 7347-10, AGENCY DKT. NO. 142-10, pending in the Office of Administrative Law ("ADMINISTRATIVE ACTION") and in full settlement of any and all other claims , whether or not said claims have been asserted, related to employment actions taken by releasees prior to the date of this agreement.

The parties agree as follows:

1. Dismissal of Administrative Action. Rasmussen, will execute and deliver to counsel for the VBE the original of a Stipulation of Dismissal or a Stipulation of Withdrawal prepared by counsel for the VBE.

2. Releases. Rasmussen hereby waives, releases and gives up any and all existing, asserted and/or potential claims and rights (including but not limited to attorneys' fees and costs of suit), as of the date of this Agreement, against the VBE, its Board members, administrators, employees, agents, representatives, insurers, and anyone who succeeds to the rights and responsibilities of such persons. Collectively, all persons, entities or others

mentioned in this paragraph shall be referred to interchangeably as "VBE" or "Releasees."

Rasmussen specifically releases the following claims as to all Releasees:

(a) Administrative Action;

(b) Any claims relating to Rasmussen's employment, and employment actions by Releasees prior to the date of this agreement, including non-renewal of employment;

(c) Any claims, resulting from any action or failure to act by Releasees that occurred prior to the date of this Agreement, whether under common law; any policies, practices, or procedures of any Releasee; any federal and/or state statute or regulations including, but not limited to:

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.;

Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq.;

Americans With Disabilities Act of 1990, 42 U.S. C. §12101 et seq.;

National Labor Relations Act, 29 U.S.C. 151 et seq.

any contract of employment, express or implied;

any public policy of the United States, the State of New Jersey or any other state;

any provision of the Constitution of the United States, the State of New Jersey or any other state; and

any provision of any other law, common or statutory of the United States, New Jersey or any other state, city, county, or locality.

VBE expressly waives, releases and gives up any and all claims and rights it may have against Rasmussen, including any claims they could assert now, or in the future, resulting from any action or failure to act occurring through the date they sign this Agreement, under common law, under any policies, practices, or procedures of any Releasee, or under any federal and/or state statute or regulations.

3. Consideration. (a) In total and complete settlement of this matter and all claims referred to above, including costs of attorneys' fees, Rasmussen shall be reinstated/re-employed by the VBE in accordance with the terms and conditions set forth in the offer of settlement from Kevin Franchetta, Board Secretary, attached hereto as Exhibit A and made a part hereof.

(b) Rasmussen agrees that he will not seek anything further from Releasees and acknowledges that his reinstatement/re-employment constitutes full consideration of this Agreement.

4. No Other Actions or Proceedings. Rasmussen represents that there are no other pending lawsuits, charges, administrative proceedings, or other claims of any nature whatsoever by Rasmussen against any Releasee, in any state or federal court, or before any agency or administrative body.

5. Agreement Not to Sue. Rasmussen agrees not to assert any claims, charges or other legal proceedings against Releasees, based on any events, whether known or unknown, occurring prior to the date of execution of this Settlement Agreement and General Release, including

but not limited to, any events related to, arising out of, or in connection with Rasmussen's employment, or non-renewal of his employment.

6. Entire Agreement. This Settlement Agreement and General Release contains the sole and the entire agreement between Rasmussen and the VBE and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Rasmussen represents and acknowledges, in executing this Settlement Agreement and General Release, that he has not relied upon any representation or statement by Releasees, or their counsel or representatives, with regard to the subject matter of this Settlement Agreement and General Release, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the parties hereto, and expressly stated to be a modification of this Settlement Agreement and General Release.

7. No Admission of Liability. This Settlement Agreement and General Release is not an admission of liability and shall not be construed as an admission of liability by VBE or by any other Releasees of any of the acts or omissions alleged by Rasmussen in the Administrative Action or of any acts or omissions which could have been alleged in the Administrative Action. Rasmussen agrees that this Settlement Agreement and General Release shall not be offered, used or considered as evidence in any proceeding of any type against or involving the Releasees, except to the extent necessary to enforce the terms of this Settlement Agreement and General Release, or as compelled by a Court of competent jurisdiction.

8. Mutual Non-Disparagement. Rasmussen agrees that he shall not, in writing or orally, disparage, deprecate, discredit, vilify or otherwise say anything negative about the Releasees, with respect to any employment action taken by Releasees to date. The VBE agrees that it shall not,

in writing or orally provide a negative reference regarding Rasmussen to anyone who may contact them for information regarding Rasmussen's employment, but shall merely refer any inquiry to the Executive Director of Personnel who may disclose only dates of employment and positions held.

9. Who is Bound. Rasmussen and VBE are bound by this Settlement Agreement and General Release and those who legally succeed to their rights and responsibilities are also bound.

10. Signature.

BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, RASMUSSEN STATES THAT:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS THAT HE IS GIVING UP IMPORTANT RIGHTS INCLUDING, BUT NOT LIMITED TO, THOSE ARISING UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION, TITLE VII, THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT, THE AMERICANS WITH DISABILITIES ACT OF 1990, 1974, ANY OTHER CONSTITUTIONAL, STATUTORY OR COMMON LAW, ATTORNEYS' FEES AND COSTS OF SUIT, AND ANY PUBLIC POLICY OF THE UNITED STATES, THE STATE OF NEW JERSEY OR ANY OTHER STATE;

C. HE AGREES WITH EVERYTHING IN IT;

D. HE HAS BEEN ADVISED TO CONSULT WITH HIS ATTORNEY PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, AND HAS IN FACT DONE SO;

E. HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY.

F. HE IS COMPETENT TO EXECUTE THIS AGREEMENT

JEREMY RASMUSSEN

STATE OF NEW JERSEY)
ss:
COUNTY OF CUMBERLAND)

Be it remembered that on August 16, 2010, before me the subscriber, personally appeared JEREMY RASMUSSEN, who, I am satisfied, is the person named in and who executed the within Settlement Agreement and General Release, and thereupon he acknowledges that he signed, sealed and delivered the same as act and deed, for the uses and purposes therein expressed.

Signed and sworn to before me on
August 16, 2010

TONI L. FRANCESCONI
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 3/22/2012

NOTARY

ATTEST:

KEVIN FRANCHETTA,
BOARD SECRETARY

VINELAND BOARD OF EDUCATION

RONALD J. FRANCESCHINI, JR.,
BOARD PRESIDENT

Date: 8 September 2010

From:	Kevin Franchetta
To:	"jeremyrasmussensr@yahoo.com"
Cc:	"boardmembers@vineland.org"; "mbanks@vineland.org"; Maryanne Greenfield (mgreenfield@vineland.org); "Bob DeSanto"
Subject:	Reemployment
Date:	Friday, August 06, 2010 12:12:00 PM
Attachments:	Jeremy Rasmussen.pdf

Dear Mr. Rasmussen:

In accordance with the provisions of NJAC 6A:32-4.6 (i), you are hereby notified of the determination of the Vineland Board of Education following your informal appearance before the Board on August 4, 2010. The Board did not vote to unconditionally reemploy you as an English teacher in this district. The Board decided to offer you the opportunity for reemployment as an English teacher in this district subject to certain conditions. These conditions were discussed by our Solicitor with your attorney, Keith Waldman, and are correctly set forth in Mr. Waldman's email date August 5, 2010, attached hereto.

The Board's offer is made with the understanding that the terms of the release must be acceptable to the Board Solicitor. Mr. DeSanto will forward the release form to your attorney for his/her review. The signed release and detailed sworn statement must be received by Mr. DeSanto by 5 pm Tuesday, August 10, 2010 in order to place your reemployment on the agenda for the public meeting on August 11, 2010. If these documents are not received by 5pm Tuesday, the matter will not be considered on August 11. You will then have one more opportunity to accept the offer if the release and sworn statement, together with your attorney's acceptance letter, are received by Mr. DeSanto by 5pm Monday, August 16. The Board will then vote to approve your reemployment at our next public meeting which will Tuesday, August 17, 2010.

This conditional offer of reemployment will expire on Monday, August 16 if you fail to comply with these terms.

Very truly yours,
Kevin Franchetta
Board Secretary

EXHIBIT "A"

A RESOLUTION AUTHORIZING THE SETTLEMENT AGREEMENT AND GENERAL RELEASE OF LITIGATION FILED BY JEREMY RASMUSSEN

BE IT RESOLVED by the Vineland Board of Education that:

1. The terms and conditions of the Settlement Agreement and General Release on file with the Secretary of the Board relating to the Jeremy Rasmussen v. Vineland Board of Education administrative complaint are hereby approved.

2. The President and Board Secretary are hereby authorized and directed to execute the Settlement Agreement and General Release on file with the Board Secretary on behalf of the Vineland Board of Education.

ADOPTED: September 8, 2010

ATTEST:

BY: _____
Kevin J. Franchetta
Board Secretary

VINELAND BOARD OF EDUCATION

BY _____
Ronald J. Franceschini, Jr.
Board President

approved:

_____
Robert A. DeSanto

442-10

JENNIFER BARRETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured assistant superintendent, employed in various capacities by respondent since 1967 – appealed the district's withholding of her salary increment for the 2007-2008 school year. Petitioner contended that the Board's withholding of her increment was arbitrary, capricious and unreasonable, based primarily on the fact that a February 2007 performance review – consisting of a checklist of seventeen "Performance Indicators" – rated her satisfactory in all areas. The Board contends that the increment withholding was justified, predicated upon petitioner's unsatisfactory supervision of school administrators during the 2006-2007 school year.

The ALJ found, *inter alia*, that: an individual contesting a salary increment withholding has the burden of proof to demonstrate that the Board's decision was unreasonable, arbitrary, without rational basis or induced by improper motives; petitioner's supervisor – the superintendent of schools – had numerous conversations with her during the 2006-2007 school year, during which he emphasized that petitioner was not supervising the schools well enough and continued to need too much direction from him; petitioner was aware that the superintendent felt her performance was deficient with respect to supervision and evaluation of principals, and acknowledged having those conversations with him throughout the year; accordingly, petitioner has not met her burden of establishing that respondent's action was arbitrary, capricious, or unreasonable; and respondent had a reasonable basis for its action. The ALJ concluded that the respondent appropriately withheld petitioner's salary increment for the 2007-2008 school year.

Upon independent review and consideration, the Commissioner adopted the Initial Decision as the final decision in this matter, finding that multiple comprehensive discussions took place between petitioner and the superintendent of schools concerning his assessment of her work and his expectations for firmer leadership and improvement in the proactive management of her staff. Accordingly, respondent's action in withholding petitioner's salary increment for the 2007-2008 school year was upheld, and the petition dismissed.

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

Issued 10/18/10
Mailed 10/19/10

OAL DKT. NO. EDU 11723-07
AGENCY DKT. NO. 278-9/07

JENNIFER BARRETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner, an assistant superintendent in the Elizabeth school district, challenged respondent's action in determining not to award her a full salary increment for the 2007-2008 school year. The Administrative Law Judge (ALJ) before whom the hearing was held in the Office of Administrative Law (OAL) determined that respondent's action was not arbitrary, capricious or unreasonable and dismissed the petition. Upon consideration of both the record that was before the ALJ and the substance of petitioner's exceptions, the Acting Commissioner adopts the Initial Decision as the final decision in this matter.

At the outset, petitioner's exceptions to the Initial Decision must be evaluated in the context of her burden of proof, *i.e.* she must persuade the Acting Commissioner that respondent's actions were arbitrary, capricious, and/or unreasonable.

In the first of eight exceptions, petitioner appears to contend that an increment withholding was inconsistent with her performance report, and that the ALJ should therefore have found respondent's action in withholding her increment arbitrary, capricious and unreasonable. She focuses on the one-page performance report, dated February 23, 2007 (Petitioner's Exhibit P-10), consisting of a list of seventeen "Performance Indicators" which may be checked

"Satisfactory" or "Needs Improvement." The "Satisfactory" boxes for all seventeen items were checked. However, the record indicates that petitioner's supervisor, District Superintendent Pablo Munoz, had: 1) discussed with petitioner areas in which she needed improvement; 2) given her goals; 3) explained the rationale of the goals; and 4) provided feedback.

For example, an area of concern memorialized in petitioner's May 2006 Performance Improvement Plan (PIP), Petitioner's Exhibit P-9, was "Thorough & Efficient Management." The designated course of improvement was petitioner's creation and implementation – during the 2006-2007 school year – of accountability tools to ensure that her staff would work toward the strategic plan goals of promoting excellence and closing the achievement gap in the district schools. The PIP was signed by petitioner. (*Ibid.)*

Nine months later, in a March 15, 2007 follow-up memorandum to petitioner's February 23, 2007 performance report conference (Petitioner's Exhibit P-11), Munoz reiterated his concern with petitioner's management performance. In the section entitled "Areas of Future Focus," Munoz identified the need for petitioner to make decisions, accept responsibility and be firm. *(Ibid.)* In the section entitled "Areas of self-reflection," Munoz urged petitioner to regard student achievement as the rationale behind professional (staff) development. And in the section entitled "General Comments and Questions," he articulated the need for petitioner to "create a more proactive agenda with principals" and indicated that her principal evaluations were too soft in light of the student test scores. He directed her to update him more frequently; expressed his desire that she be more commanding; and asked her to reflect on what she was doing to institutionalize excellence and eliminate the achievement gap.[1]

Petitioner's April 30, 2007 PIP for action in the 2007-2008 school year (Petitioner's Exhibit P-12) also reflected Munoz's continuing concern with "Thorough and Efficient

[1] At the OAL hearing, petitioner acknowledged that the foregoing was discussed at her February 23, 2007 conference with Munoz. (1T124)

Management," and an additional concern with petitioner's "Leadership Characteristics." The goals in the PIP, which was signed by petitioner, all related to petitioner's responsibility to make sure the principals knew their roles in monitoring and improving teaching and learning.

Additionally, as noted in the testimony of Munoz and Aida Garcia, Assistant Superintendent for Human Resources, Munoz's view that the principals were responsible for student achievement as measured by certain standardized tests – and that petitioner was responsible to evaluate whether the principals were properly executing that responsibility – was stressed in conversations between Munoz and petitioner, and was reinforced at the weekly "cabinet" meetings that Munoz held with the assistant superintendents. (2T15-17; 3T114-116)[2] In light of the foregoing, petitioner may not rely exclusively on the February 23, 2007, one-page performance report to show that her increment withholding was inconsistent with Munoz's verbal and written communications to her about her performance.

In her second exception, petitioner expresses her disagreement with Munoz's assessment of her performance and argues that – even if his assessment had merit – she was not given enough time to improve. More specifically, she contends that the period of time between Munoz' March 15, 2007 memorandum and the June 26, 2007 "Rice notice" alerting her that the Board of Education planned to discuss her employment (Petitioner's Exhibit P-14) was insufficient to allow her to correct deficiencies.

As to the first of petitioner's assertions, it is neither the ALJ's nor the Acting Commissioner's task – in the context of a controversy concerning the withholding of an increment – to second guess a superintendent's philosophy of educational management and his expectations for the management methods of his assistants. Rather, the question for the ALJ and

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[2] 1T denotes the transcript of the September 11, 2008 hearing in the OAL.
2T denotes the transcript of the June 23, 2009 hearing in the OAL.
3T denotes the transcript of the October 1, 2009 hearing in the OAL.
4T denotes the transcript of the February 23, 2010 hearing in the OAL.

Acting Commissioner is whether Munoz's – and the respondent Board's – actions were arbitrary and capricious.

Munoz testified at length about his training for the superintendency of a large urban district, and his consequent belief that administrator accountability is the key to pulling up school districts that are not properly performing. Munoz saw the mission of the Assistant Superintendent of Schools – the position held by petitioner – as one of constant observation of what was actually occurring in the schools, and of how the administrators were dealing with same. Munoz communicated this to petitioner on multiple occasions. (*See, e.g.* 3T43; 3T103-104)

As to the second of petitioner's assertions in this exception, the record indicates that Munoz had had concerns with petitioner's management skills since at least May of 2006. (Petitioner's Exhibit P-9) Those concerns were reiterated at petitioner's Performance Report conference on February 23, 2007, which was over four months prior to her June 26, 2007 "Rice notice." The Acting Commissioner cannot, under those circumstances, deem arbitrary and capricious either Munoz's conclusion that in four months petitioner had not made sufficient progress, or respondent's determination to accept Munoz's recommendation regarding the withholding of petitioner's increment.

In her third exception, petitioner contends that the ALJ should have found that it was arbitrary, capricious and unreasonable for Munoz to base his recommendation against her salary increment upon the results of annual student achievement testing, which testing determined how many of the Elizabeth Schools had achieved adequate yearly progress (AYP). However, while Munoz freely asserted that student achievement would be the yardstick against which administrative employee performance would be measured, the record reveals specific, independent grounds for his recommendation against an increment for petitioner.[3]

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[3] *See, e.g.* the above discussion of petitioner's first exception.

For example, as referenced above, there are multiple references in Munoz's testimony to his concerns about petitioner's supervision and evaluation of the principals and other administrative staff for whom she was responsible, *see, e.g.* 3T79-80; 3T98-99; 3T103. In that vein, both Munoz and Garcia testified that an investigation had revealed that at least one of the principals whom petitioner supervised had not evaluated staff. Nonetheless, petitioner had not recommended a withholding of the principal's increment. (2T31-34) Indeed, despite the fact that in the 2006-2007 school year many of the Elizabeth schools were in need of improvement, petitioner brought no staff deficiencies to Munoz's attention (3T77), and submitted first-rate evaluations of her staff's performance. (3T80-81) Ultimately, Munoz took the initiative to recommend that increments be withheld from both petitioner and certain principals, assistant principals, house directors and other staff, and respondent accepted the recommendation. (Petitioner's Exhibit P-15 [the Board resolution withholding increments for petitioner and several other certificated employees for the 2007-2008 school year]; 2T30-32)

Munoz also felt that petitioner was not sufficiently diligent about communicating significant issues to him. He was troubled when he heard from the community about problems of which petitioner should have apprised him. (3T101) In summary, the Acting Commissioner cannot conclude that petitioner's increment was withheld due simply to student test results. Ironically, it was the AYP results that restored to petitioner half of her increment.

Petitioner's fourth exception urges that the ALJ erred in finding that petitioner had responsibility for the performance of the high school "House Directors."[4] She reasons that since § 14 of her job description (Petitioner's Exhibit P-5) directs only that she evaluate "principals," and since

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[4] It appears undisputed that Elizabeth High School was comprised of several buildings called "Houses," each of which had a House Director who was in charge of the house in the same way that the principals of the Elizabeth elementary schools were in charge of their school facilities, employees and students. The titular "Principal" of Elizabeth High School – to whom each house director reported – was located in a separate office and was not physically in charge of a school facility. Thus, the house directors were assistants to the principal but served as functional equivalents of building principals.

the principal of Elizabeth High School formally evaluated the house directors, she should not have been held accountable for any lapses by house directors.

However, § 17 of petitioner's job description indicates that one of petitioner's duties was to "[m]ake recommendations to the Superintendent relative to appointments, transfers, promotion, and discipline of certified employees." (Petitioners Exhibit P-5) Accordingly, Munoz testified that petitioner was supposed not only to evaluate principals, but also to make ongoing assessments of vice principals and instructional coaches – thereby monitoring the three levels of leadership and ensuring that the "right people" were leading the schools. (3T59)

If a principal was not properly evaluating his or her subordinates, it was not only the petitioner's responsibility to correct the principal, but also see to it that the principal's subordinates were properly performing their duties. (3T74) Thus, if a principal was not addressing a failure on the part of a vice principal or other subordinate to do evaluations, it was petitioner's responsibility to see that the subordinate was corrected by the principal or by petitioner herself. (3T77) Petitioner herself testified that she could "do evaluations of all administrators and teachers and any of the people working with our students." (1T87-88)

Further, the record reveals that Munoz periodically directed Garcia to run off reports identifying district staff whose evaluations had not been submitted and the principal, vice principal, director or supervisor who was responsible for the evaluation. (3T74) The reports were given to petitioner for follow-up, *i.e.* discussions with and/or discipline of the staff members who had failed to conduct the evaluations. (*Ibid.*) Where no improvement occurred, petitioner was supposed to recommend the withholding of the staff members' increments. (3T76) This was the system in 2006-2007. (3T75-76) The Acting Commissioner must conclude from this that the ALJ did not err in finding that petitioner was responsible for addressing lapses in the performances not only of

principals but also of house directors and other administrators, and was given the information she required to identify the staff who needed correction.[5]

Petitioner's contention in her sixth exception that she had not been apprised – prior to the withholding of her increment – of Munoz's concern about her supervisory performance, and that the ALJ therefore erred in so finding, has been addressed in the discussion of petitioner's first and second exceptions. The Acting Commissioner will not revisit the issue.

Petitioner's seventh exception quotes dictum from the Initial Decision – wherein the ALJ observes that contrary to the expectations of some employees, increments are not automatic – and characterizes the passage as error. The Acting Commissioner finds the passage unnecessary to the adjudication of the issues in the instant controversy, and does not assume that petitioner expected increments without meritorious performance.

However, petitioner also argues in this exception that she should have been evaluated pursuant to her own definition of student achievement, notwithstanding that her supervisor had made his standards clear to her and the other staff. The record shows that she knew or had reason to know that student test results – the measure used by the State to assess school and district performance and perhaps the only objective way of measuring both student achievement and the efforts of teachers and administrators – would be the polestar against which staff performance would be considered.

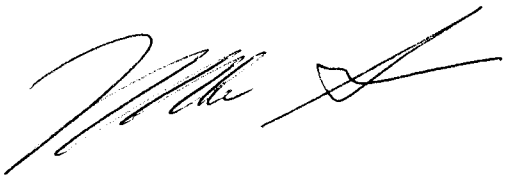
Further, as referenced above, multiple comprehensive discussions took place between Munoz and petitioner concerning his assessment of her work and his expectations for firmer leadership and improvement in the proactive management of her staff. Munoz's testimony made it clear that in the position of Assistant Superintendent for Schools, as opposed to Assistant Superintendents for Human Resources, Community Outreach or Instructional Divisions, staff management was central to the mission of improving student achievement – as reflected in

[5] Petitioner argues in her fifth exception that she did participate in the process of withholding the increment of one principal. The record shows that this participation was not on her own initiative, but rather at the direction of Munoz. (1T156) Accordingly, the argument does not help petitioner.

testing scores. It is consequently unremarkable that it would be the most important component of her performance evaluation.

In summary, the Acting Commissioner concurs with the ALJ that petitioner failed to show that Munoz's recommendation against an increment for her – and respondent's action in withholding the increment – was arbitrary, capricious or unreasonable. Consequently, the action is upheld, and the petition is dismissed.[6]

IT IS SO ORDERED.[7]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/18/10

Date of Mailing: 10/19/10

[6] As the validity of the entire increment withholding is upheld, there is no need to address the argument in petitioner's eighth exception that no authority exists to award partial increment withholdings. That issue, in any event does not appear to have been set forth in petitioner's pleadings.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11723-07
AGENCY DKT. NO. 278-9/07

JENNIFER BARRETT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Andrew Babiak, Esq., for petitioner

Karen A. Murray, Esq., for respondent

Record Closed: June 4, 2010 Decided: July 19, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Jennifer Barrett appeals the denial of a salary increment for the 2007–2008 school year. On September 25, 2007, petitioner appealed to the Department of Education, asserting that respondent's decision to withhold her salary increment was arbitrary, capricious and unreasonable. On October 27, 2007, respondent Board of Education of the City of Elizabeth (the District or Board) filed its answer, asserting that it

had acted appropriately pursuant to N.J.S.A. 18A:29-14. The matter was then transmitted to the Office of Administrative Law (OAL), where on November 7, 2007, it was filed as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Hearings were held on September 11, 2008, January 12, 2009, June 23, 2009, October 1, 2009, and February 23, 2010. The record closed following receipt of the parties' posthearing briefs.

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

FACTUAL DISCUSSION

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

Petitioner has been employed by respondent since 1967, initially as an elementary school teacher. Respondent is an Abbott district, with a superintendent of schools and five assistant superintendents, including petitioner.

In 1996 petitioner was promoted to be a director, reporting to the assistant superintendent at the time. In July 2000 she was promoted to the position of assistant superintendent for schools and reported to Thomas Dunn, the superintendent at the time.

In 2005 Superintendent Dunn took a leave of absence and ultimately retired, and Pablo Munoz became the acting superintendent. Petitioner then reported to Munoz, who served as acting superintendent for one year and was appointed superintendent for schools on July 1, 2006.

On July 1, 2005, petitioner became assistant superintendent for instructional services, and on July 1, 2006, she became assistant superintendent for schools.

Petitioner holds an elementary teacher certificate, a principal/supervisor certificate, and a school administrator certificate.

Following his appointment as superintendent, Munoz was advised by the Board that it wanted to transform the direction and performance of the District, such that the focus of the schools would become one of teaching, learning and student achievement. Munoz thereafter presented a vision statement and mission statement to the Board, both of which were adopted. Student and academic achievement were to be the paramount focus of the District.

Petitioner's duties as an assistant superintendent under Munoz included coordinating instructional programs and curriculum, evaluating the operations of the schools and making recommendations to improve delivery of instruction to the students. She also was responsible to oversee the analysis of District data, and compile, prepare and coordinate State reports, as well as supervise and evaluate principals and make recommendations regarding appointments, transfers, promotion and discipline. Petitioner also was responsible for evaluating house directors, who were principals of the various houses in the high school. Munoz and petitioner had multiple discussions, both during cabinet meetings and individual conversations, regarding her performance, her evaluations and student achievement. Munoz felt that petitioner had not supervised the schools well enough and continually required direction from him. He wanted her in the schools all the time, to evaluate the principals, discuss student achievement data and be certain that principals were held accountable for student achievement.

On June 28, 2007, the Board resolved, at the recommendation of Munoz, to withhold petitioner's 2007–2008 salary increment of $8,000. The increments of two principals and two house directors were also withheld at Munoz's recommendation, notwithstanding their having received satisfactory evaluations from petitioner.

In a July 23, 2007, letter to petitioner, Munoz indicated that as they had discussed, the performance of the administrators is significant in assessing student progress, and since administrator performance was under petitioner's direct supervision she would be held accountable for student improvement. Thereafter, when the Board

received the District test scores, which revealed that 52 percent of the students made "adequate yearly progress" for the 2006–2007 school year, the Board, upon Munoz's recommendation, restored 52 percent of petitioner's increment. Accordingly, Barrett received $4,160 of her 2007-2008 increment.

TESTIMONY

Jennifer Barrett

Jennifer Barrett has a bachelor's degree in elementary education from Kean University and a master's degree in administration and supervision from Kean University. She also holds thirty-two credits beyond her master's degree which can be applied to a doctorate. She was hired to teach in Elizabeth in 1967 and taught first and second grade and remedial reading to middle school students. She was then selected to develop and teach a gifted-and-talented program for kindergarten through fifth grade. She developed the program, and then was an instructor in the program.

In 1988 Barrett applied for a position as a consultant in the Division of Testing and Monitoring, and worked with principals and developed manuals for monitoring. She became interim director of the Division, and was ultimately named director of the Division. Barrett testified that the superintendent approached her in 1996 and asked her if she would start a new division, Best Practices Staff Development. She created the program and the training to be implemented in conjunction with that program. Her staff consisted of a secretary and two staff members from the District. The program grew to be a division and a model recognized by the State as an exemplary staff development model.

Barrett was appointed assistant superintendent in July 2000. She was also an adjunct professor at Fairleigh Dickinson University for two years. She holds three certifications: elementary education, principal/supervisor and school administrator. Barrett testified she also qualified to mentor administrators, and has mentored others in the District.

The title for her position has changed over the years from assistant superintendent for schools to assistant superintendent for instructional services and back to assistant superintendent for schools. In 2006 and 2007 her duties included overseeing the instructional programs, staff development for instructional staff, principals and their budgets, review and approval of field trips, evaluation of principals, attendance at all board meetings, and anything else the superintendent deemed necessary for her to do. The job description of assistant superintendent for schools (P-5) applied to her in the 2006–2007 school year.

Barrett testified that in 1999 she was a director and Donald Stewart was her supervisor, and in his performance evaluation of her that year (P-6) none of the items were designated as "needing improvement." After she was promoted to assistant superintendent her supervisor was Thomas Dunn, who evaluated her in 2002–2003 (P-7), and no items were designated as "needing improvement." Barrett agreed that she was evaluated each of the other years, but she does not have copies of those evaluations. After Dunn was no longer the superintendent, Mr. Munoz took over and evaluated her. When she was the assistant superintendent for instructional services and Munoz was the acting superintendent, he evaluated her (P-8) with the same listed criteria as previous evaluations and the same performance indicators. Nothing was mentioned in the 2005–2006 evaluation regarding student test scores, nor was there anything to indicate she was responsible for student test scores. Barrett stated that she was never told she was evaluated based upon student performance in State assessments.

Barrett testified that each instructional staff member completes a Professional Improvement Plan each year setting goals to enable that individual to grow professionally that year. She did a plan every year, and the superintendent always reviewed it with her and approved and signed it. Her Professional Improvement Plan for July 1, 2006, through June 30, 2007, (P-9) was prepared in the spring for the following year, and after preparing it she met with the superintendent, who approved and signed her plan. Barrett testified that there was no reference made to student test scores or student performance on State assessments. For the 2006–2007 year she was evaluated by Munoz (P-10), and each category was checked off as indicating that her

performance had been satisfactory. The evaluation had the same content as the 2005–2006 evaluation and made no reference to her responsibility to improve scores. After the evaluation was complete, Munoz sent her a letter confirming the conversation at the time of the review of her performance. Munoz also prepared a memo (P-11), which, at the bottom, indicated areas of "self-reflection." Barrett testified that she understood she was to look at the professional development of the teachers to see if there could be more effective teaching in the classroom. She stated that student achievement is different from student test scores. Also in the memo, under General Comments, there was a reference to "status of test scores," and Barrett testified that was a reference to the Abbott district meeting certain criteria. She testified that some schools in the District needed improvement, and the discussion she had with Munoz was on how to develop principals. She testified that the State has benchmarks for districts to meet each year for adequate yearly progress, and that the State assessment results determine whether schools have made adequate yearly progress. The evaluation conference with Munoz was on February 23, 2007, and Barrett testified there was never any discussion regarding her responsibility for improving scores on assessments.

Regarding the Professional Improvement Plan prepared in the spring of 2007 for school year 2007–2008 (P-12), Barrett testified that she prepared it and it was reviewed and approved by the superintendent. Once again there was no reference to student test scores or student performance on State assessments. Barrett feels she achieved all of the goals in her 2006–2007 Plan.

Barrett's contract was renewed in May 2007 (P-13) and was signed by the superintendent, who made no reference to any responsibility for test scores. Barrett testified that her salary for 2007–2008 was $176,000, with a longevity bonus of $2,500, for a total of $178,500 per year. After the contract was sent to Human Resources she received a "Rice Letter" stating that the Board would be discussing her employment (P-14). There was no mention that her increment would be withheld. She attended the Board meeting, then received a copy of the Resolution (P-15) regarding withholding her increment. Barrett testified that she was "taken aback." Petitioner then received a letter (P-16) confirming that her increment was being withheld. She noted that the letter indicated that the District would reconsider the withholding when the District-wide test

scores were received. Munoz gave no explanation for withholding the increment other than saying that he is held responsible for test scores and, therefore, so is she. Barrett said she was not aware of any other assistant superintendents having their increments withheld.

Test scores are received in June, July or August, depending on when the particular grade sat for the standardized tests, which are administered once a year. When the scores arrived no one mentioned to Barrett the possibility of restoring her increment. Thereafter, she received an employment contract (P-17), after her increment was withheld, which lowered her salary by the increment withheld ($8,000). Accordingly, her base salary was to be $168,000, plus a $2,500 longevity bonus, for a total of $170,500.

Barrett received a letter from Munoz (P-18) explaining why she was responsible for the test scores. The letter indicated that she supervises and evaluates principals, and that they are responsible for educational and testing levels of the pupils in their schools. The performance of the principals is under her direct supervision. Munoz indicated in the letter that he would discuss the matter further with her after the statistics were compiled.

Barrett explained that principals are evaluated by six standards, with sub-headings including resource management, teacher evaluations, family/community and social/emotional learning. There were five other assistant superintendents at the time, and now there are four.

On cross-examination, Barrett testified that in 2006–2007 Elizabeth had approximately 22,000 students in the District. She testified that Elizabeth is an Abbott District, and she believes it is the third largest district in the state, with twenty-eight schools in the 2006–2007 school year. The high school had 5,300 students in many buildings; it was considered to be one high school with seven "houses." Each house has a house director and an assistant house director, each of whom functions as a principal. There is one overall principal for the high school. In addition to the high school, there were previously nineteen elementary schools, five stand-alone middle

schools, and three early childhood centers. The early childhood centers still exist, but there are no longer any stand-alone middle schools; all of the elementary schools are grades K through 8. There are now eight houses making up the high school. In 2008–2009 the school buildings changed somewhat. There were 2,000 instructional staff and 2,000 non-instructional staff. Those numbers remain largely constant.

Barrett believed that in the 2005–2006 school year, the first year that Munoz was superintendent, approximately nine schools made adequate yearly progress (AYP). During the 2006–2007 and 2007–2008 school years, fourteen schools made AYP. Thereafter, the State raised the standards, and many schools dropped throughout the state, as all districts had to comply. If the school did not make AYP the State would designate it as "in need of improvement." Barrett testified that a school is designated either as AYP or as needing improvement. The "No Child Left Behind" legislation states that the needs of all children will be met. Barrett indicated that by grade level there are benchmarks, or percentages, that have to be met, and that there are forty-one categories in language arts and math. If a school does not achieve the required percentages in all forty-one categories it is designated as "in need of improvement," and State and federal requirements have to be met.

Barrett testified that since Munoz became superintendent there have been multiple changes in titles and positions. When the four directors reported to her she had no responsibility for evaluating principals. However, once she became assistant superintendent for schools she was no longer responsible for the directors and the divisions, but all of the principals reported to her. At the high school the house directors reported to the principal of the high school, who then reported to her. Certified tenured principals were to be evaluated at least once a year, and non-tenured principals were to be evaluated at least three times a year. The principals evaluated the vice principals, the teachers and the support staff in their schools. After Barrett evaluated the principals she would conference with them, and review and discuss how they could correct lower ratings, as well as plans and strategies going forward. Copies of the evaluation would be sent to Human Resources, to the principal and to Munoz. Barrett also kept a copy. It was up to her to recommend withholding an increment for a principal, and she could also recommend non-renewal if a principal was not tenured.

Barrett testified that she developed a "cluster program" for all principals to meet in clusters to go over strategies and problems. The cluster group met with her once a week. In 2006–2007 most principals were tenured. If a principal was not performing, Barrett would work with that person to help him or her improve, or to discuss other options. Barrett opined that you need to give people time to work out a plan, perhaps six months or one year, and that change does not happen overnight. She testified that all but two of the principals were twelve-month principals.

Referencing the Resolution that contains a list of increment withholdings (P-15), Barrett testified that many of the individuals listed are principals, but none are listed as a result of her recommendation. Her responsibility to evaluate principals includes evaluating how they evaluate people under them. In 2006–2007 she did make recommendations for improvement on her evaluations of certain principals. She indicated that their performance was rated from 3 to 0, and, if the score was less than 3, needed corrections were discussed with the particular individual. Many received ratings of 2 or 1, but she recommended that all of those individuals be renewed. However, the superintendent decided not to renew one of the early childhood principals.

Barrett's job description (P-5) included, under performance responsibilities, "evaluate operations." Barrett stated that she would look for strategies that had been effective, staff development being applied correctly, and delivery of instruction the way the District wanted it to be. She kept up to date on when evaluations by principals were done and if they were properly done, and indicated that staff needed to be evaluated and deficiencies corrected during the year.

Regarding paragraph nine in her job description, "oversee analysis of data and reports," she stated that this item did not deal just with test scores. It included knowing where the test scores are, as well as the attendance data and information, and social and emotional information. She testified that some data is received from the State, some she maintains, and some is received from the superintendent for overall design to improve the educational level of students. She received daily staff attendance reports as well. Paragraph fourteen in her job description, regarding the evaluation of

principals, required that evaluations be consistent with statute, code and collective-negotiation agreements.

Barrett testified that Munoz held "cabinet meetings" where he, the assistant superintendents, controller, business administrator, and assistant board secretary were all present. She was required to attend these meetings and discuss Munoz's vision for the District, including readings on effective instruction and leadership and information regarding what other districts were doing. They also discussed AYP, how to make schools better, and how to help principals be better instructional leaders, among other things. Tasks were frequently assigned at meetings, and Munoz gave her assignments to attend various State or county events.

Barrett's first evaluation in her new position as assistant superintendent for schools was on February 23, 2007 (P-10). It references the Keys to Excellence Strategic Plan, a three- to five-year plan developed by the leadership team, which included Barrett. Her responsibility under the plan had timelines and included academics, athletics and the arts. It was her responsibility to make sure that there were after-school programs in the arts, for remediation and athletic programs. She had no responsibility for construction or maintaining buildings. Under areas of future focus and making decisions, it was noted that Munoz wanted Barrett to continue working with the principals. Under the area of self-reflection, it was indicated that planning for professional-development days should include opportunities for training for teachers and staff and strategies and techniques to serve students. Under the area of general comments, Munoz commented that Barrett should continue to improve and create more proactive agendas with principals. Munoz had discussed with Barrett the evaluations she gave the principals, and he made it clear that he felt she was too "soft." She disagreed with his approach, describing herself as having a "different style" from Munoz; she said she believes in positive pressure. Regarding test scores, Barrett said she believes they should not be the basis for the entire evaluation. She feels that progress equals achievement, and although many schools are not meeting AYP, that does not mean the principals of those schools are bad. Munoz's comment regarding dealing with a strong collaborative management team and exuding a more commanding presence meant that Munoz wanted Barrett to take the lead more; however, she said that her

style is not to always be the first to speak. Munoz also discussed with her the status of student achievement at each school, how each school was performing, and where each school needed to improve.

Barrett testified that after the District test scores were received, her 2007–2008 increment was reconsidered by the Board. Originally the $8,000 increment was withheld. The Board, however, ultimately agreed to give her 52 percent of the increment based upon the scores, made retroactive to the date she would have received the original $8,000 increment, which was July 1, 2007.

Michael F. DiPaola (testifying via telephone from Virginia)[1]

Michael F. DiPaola is a professor of education at the College of William and Mary in Virginia. He teaches graduate courses to individuals preparing to be school administrators. He has taught courses in educational administration and supervisional instruction, which includes evaluation of school personnel. He has taught a variety of courses that focus on school leaders.

DiPaola holds a doctorate in educational administration from Rutgers and a master's in educational administration from Paterson State. He also holds an environmental degree from Montclair State University. He has taught science and was an assistant principal for five years, and also spent six years as superintendent in Pitman, New Jersey. He is certified as a science teacher and school administrator. DiPaola has published a handbook dealing with superintendent evaluation and another book dealing with general supervision and evaluation of all personnel. He testified that he has written approximately six articles on evaluating school personnel and has given seminars to national and state organizations on evaluation of school personnel. DiPaola has also done consulting regarding school-personnel evaluations. He was admitted as an expert on evaluations of school personnel.

[1] No objection was received to the initial request that Dr. DiPaola be permitted to testify by telephone and, accordingly, the telephone testimony was permitted.

DiPaola prepared a report (P-19) based on his review of documents forwarded to him by counsel for petitioner, including the petition and everything listed on the first page of his report. When cross-referenced with the exhibit list it was confirmed that DiPaola's review included review of P-5 through P-12, P-16 and P-21. He also had in his possession during his review a copy of N.J.A.C. 6A:32-4.4, which was sent to him by petitioner's counsel.[2]

DiPaola testified that a superintendent generally has two roles: first, to make recommendations to the board of education on personnel matters; and, second, to supervise others, evaluate their performance, and offer feedback and develop an improvement plan if necessary. Generally this is the role superintendents have in New Jersey, except that the New Jersey Administrative Code requires an annual evaluation, which is not the case everywhere. If an assistant superintendent reports to the superintendent they do the same evaluation and assessment of the assistant superintendent. DiPaola believes that in the within matter, the policy and procedure required that petitioner's evaluation be based upon and linked to her job description, and if she received any unsatisfactory ratings she should be worked with to develop an improvement plan and given time to improve. However, in this instance all criteria were indicated as satisfactory and petitioner did not need improvement. Accordingly, there was no rectifying or remediation needed.

DiPaola testified that he did hundreds of evaluations while residing in New Jersey, and that the purpose of an evaluation is to provide feedback, to indicate unsatisfactory areas of performance if there are any, and to help the individual develop a professional growth plan. He was aware that performance reports in New Jersey are used to determine whether to grant increments or withhold them. If an individual fails to improve after unsatisfactory performance and has a Professional Improvement Plan and fails to improve, an increment could be withheld. DiPaola testified that if petitioner's evaluation (P-10) is a reflection of her performance, then it was not appropriate to withhold her increment. He testified that this document shows that petitioner was

[2] Dr. DiPaola and petitioner have never met. He was retained by the New Jersey Association of School Administrators, which also paid his fee to testify as an expert.

performing satisfactorily on every indicator. After reviewing the memo from the superintendent (P-11) which follows up on the performance report, his opinion remained unchanged, i.e., it was not appropriate to withhold petitioner's increment, as there are no references to any unsatisfactory performance.

DiPaola testified that the Professional Improvement Plan developed by the employee and supervisor should set forth goals and timelines, and give the employee an opportunity to remedy unsatisfactory performance, with some responsibility resting in the employer to assist the employee. Petitioner's Professional Improvement Plan shows two areas of concern, but it does not address specific unsatisfactory performance, and, accordingly, DiPaola testified that his opinion was unchanged.

On cross-examination, DiPaola testified that he is a full-time tenured professor at William and Mary and teaches in the graduate school of education, training individuals to train school leaders. The students' he teaches are all doctoral or master's candidates in education leadership and administration.

DiPaola has not done any work with New Jersey Abbott school districts, but knows about them from the Abbott v. Burke case, where the State took responsibility for some districts in New Jersey. He has never worked in an Abbott school district.

When DiPaola was the principal in Manahawkin he did evaluations, and he in turn was evaluated by the superintendent during those years. His evaluation was different from those he did as principal and set forth different performance indicators. When he was the superintendent in the Pitman School District there were two assistant superintendents whom he evaluated annually. He also observed and conferenced with the non-tenured assistant all year.

DiPaola testified that he has never met petitioner nor spoken to her, but was consulted by petitioner's attorney. DiPaola indicated that he has never testified as an expert in any education case and has never been involved in an increment-withholding case. He testified that when he was the superintendent in Pitman he withheld increments for two or three teachers based on unsatisfactory performance, but he did

not withhold increments for any administrators. He never had his own increment withheld. When DiPaola was a high school principal he withheld the increment of at least one teacher based on unsatisfactory performance. He said that withholding increments is a way of taking some punitive action where it is warranted, where the shortcoming is not serious enough to bring tenure charges. DiPaola testified that he views withholding an increment as a punitive action and a last resort to help a person understand the seriousness of his or her unsatisfactory performance. He also testified that he is not aware of anything requiring an increment withholding to be based on an evaluation, and he only based his opinion on the documents he reviewed.

DiPaola has not spoken to anyone in the District, and he revealed that his fees to testify as an expert are being paid by the New Jersey Association of School Administrators. His report is based on his review of the documents he was provided with. He does not know who developed the Professional Improvement Plan (P-12). He agreed that petitioner's evaluation (P-10) says nothing about working with principals and nothing about withholding increments of principals, assistant principals or house directors, and that the performance report is very general and does not contain a lot of specifics. He agreed that many of the items in the job description (P-5) are not listed on the performance report. He agreed that Exhibit P-5 is petitioner's job description, yet the evaluation (P-10) does not reflect those details. The evaluation is very generic. DiPaola also agreed that the letter from Munoz (P-11) to follow up on the performance report has few items that overlap those in the performance report. The letter discusses petitioner's evaluation of principals and the status of test scores, yet neither one is mentioned in her job description. DiPaola had no information regarding how many students, schools, or staff there are in the District.

DiPaola testified that he assumes the Board looked at petitioner's job description and job performance in determining to withhold her increment, but stated candidly that he had no idea what the Board looked at. He also had no idea that the Board reviewed her performance after the standardized test scores came in and restored more than half of her increment; indeed, he had no idea until testifying that she received 52 percent of her increment.

DiPaola stated that he receives a New Jersey education magazine several times a year, but that other than that he does not receive any New Jersey information specifically, and he reiterated that all of his opinions are based upon the documents he reviewed.

On redirect examination, DiPaola stated that having been paid to offer his testimony did not influence his opinion. He also noted some overlapping words that appeared in both the letter from Munoz (P-11) and the evaluation (P-10), agreeing that approximately five or six items out of seventeen overlapped in some fashion.

Aida Garcia

Aida Garcia is the assistant superintendent for human resources (HR) at the District, where she first began working in 1987 as a bilingual first-grade teacher, a position she held until 1998. She then became a language teacher, and thereafter in 1999 was appointed a supervisor of early childhood. Two years later she became principal of the early childhood center, and in 2003 she became director HR. Following a reorganization of HR in 2005 she became the assistant superintendent for human resources, and has been in that position since. She has been employed by the District nearly twenty-three years as of the date of her testimony.

Garcia holds a bachelor's degree and two master's degrees and has teaching certificates in elementary education, English as a second language, and bilingual education, and certification as a supervisor, a principal and a school administrator.

She testified that petitioner is the assistant superintendent for schools and was her supervisor when she became the supervisor of early childhood. When Garcia became the HR director, petitioner was in charge of HR. Garcia was named acting assistant superintendent for human resources in July 2005 until she received the appointment in November 2005. Dunn was the superintendent until May 2005 and Munoz became the acting superintendent that same month.

Garcia testified that Dunn's style as superintendent was different from that of Munoz, in that Dunn was not as focused on teaching and learning. Munoz made it clear that teaching and learning had to be the primary focus in the District. There was some overlap with Dunn serving out a sabbatical, and Munoz serving as acting superintendent.

As assistant superintendent for human resources Garcia handles hiring, benefits, labor relations, wrongdoing, DYFS incidents, increment withholdings, non-renewals, evaluations, recommendations and transfer requests, as well as other duties. In 2006–2007 there were approximately thirty schools in the District, some with one principal and no vice principals, some with one of each, and some with a principal and multiple vice principals based on the school size. The high school consists of houses, each with a house director and one or more assistant directors. There is one principal overseeing all of the houses, and that is the principal of the high school. In the 2006–2007 school year there were over 5,000 students at the Elizabeth High School. The principal reported to the assistant superintendent for schools, which was petitioner at the time. Garcia testified there were three prekindergarten centers, some elementary schools, some middle schools and some K–8 schools. Petitioner's role was to manage those principals. Cabinet meetings were held weekly at 3:00 p.m., and lasted until approximately 6:00 or 7:00 p.m. Student achievement was always emphasized at these meetings, as Munoz felt this was the administrators' job. At each meeting he emphasized the importance of teaching and learning, and it was made clear that their responsibility was to achieve the 90 percent goal by 2011, which would be five years since he took over as superintendent. He wanted to become the best district in New Jersey and ensure that the District was passing the State-mandated test.

Garcia defined adequate yearly progress as performance goals that have to be met pursuant to federal guidelines known as the "No Child Left Behind" law, enacted in 2003. The goal is 100 percent AYP. Under Dunn's administration there was no structure to ensure that schools reached AYP and no such focus. Since 2005, however, the emphasis has been on AYP, and a school that was not meeting it would be restructured. Garcia did not remember any school in the District making AYP under Dunn, but she does remember in the 2006–2007 school year celebrating AYP for some

schools. Less than half of the schools made AYP that year; however, the following year more met that goal. She testified that in the 2008–2009 school year the number of schools meeting AYP may have doubled from 2007–2008.

Garcia testified as to the standardized tests that are given to students. The High School Proficiency Assessment (HSPA) is given at the high-school level, and the New Jersey Assessment of Skills and Knowledge (NJ ASK) is administered at the grade-school level. The results of these tests determine AYP.

As to the process of increment withholding, Garcia testified that each year in August or September each administrator receives a timeline of evaluations for making recommendations for renewals or non-renewals of contracts and withholding of increments, which is based on performance, attendance, wrongdoing and the like. Each year everything is documented and submitted in March, and she receives the documentation as assistant superintendent for human resources, including the recommendations from the superintendent and other assistant superintendents. Backup documentation could include memos, evaluations and attendance records. Increment withholdings are based not just on a job description, but also on an individual's performance in his or her job. When Dunn was the superintendent there were few increment withholdings; however, now there are twenty, thirty or forty a year. Munoz has stressed the importance of properly evaluating others so that anyone not performing would be held accountable or the individual's supervisor would be held accountable. She did not recall receiving any recommendations from petitioner to withhold anyone's increment.

Garcia's office prepared the resolution indicating what increments were being withheld for the 2007–2008 school year (P-15). Increment withholdings are addressed in June of each year by the Board. Petitioner's name is listed, as are names of some principals and vice principals whose increments were withheld. These other increment withholdings were not based upon recommendations received from petitioner, but rather were made based upon decisions by the superintendent for performance or other reasons, where he felt the individual was not doing his or her job, whether it be his or

her own job or not evaluating others properly. She knows of at least two principals who were denied their increments because they had not properly evaluated staff.

With regard to the job description for assistant superintendent for schools (P-5), Garcia testified that Item 17 references the discipline of certified employees. If an employee is tenured, the recommendation can only be that an increment be withheld or that tenure charges be brought. If it is a non-tenured employee, there could be an increment withholding or a non-renewal. If an employee who is not tenured had performance issues and no improvement was observed by the assistant superintendent for schools (petitioner), a recommendation would be made to not renew that employee. Garcia does not recall any non-renewal recommendations having been made by petitioner. The statutory deadline is May 15 of each year to notify individuals of non-renewal for certified individuals. She stated that the superintendent can also make recommendations for renewal or non-renewal.

Garcia also testified that a Professional Improvement Plan is done each year and shared with the superintendent. The following year the plan is reviewed to see if the goals have been accomplished. Conferences are held to discuss the PIP and reminders issues. The superintendent spoke to each assistant superintendent responsible for properly evaluating principals to make sure they were producing results the District wanted.

Garcia referred to an annual employment contract employees receive in May if they are certified (see P-13). She also described a "Rice Letter" (P-14), which is a form letter notifying an individual that matters concerning the individual's employment may be discussed by the board of education. The individual can ask for the discussion to be made public.

A letter was eventually sent to petitioner indicating that her increment was being withheld, but that the Board would reconsider that decision when it had received the test scores for the District (P-16). Garcia was aware that the Board eventually awarded petitioner 52 percent of her increment and entered into a resolution restoring the 52

percent. Correspondence was also sent to petitioner (R-3) confirming that 52 percent of the increment was being restored.

Pablo Munoz

Pablo Munoz is the superintendent in Elizabeth. He began working in the District in 1991 as a social studies teacher at Elizabeth High School. In 1996 he was promoted to supervisor of social studies, which involved evaluating and supervising the teaching staff in that department and responsibility for the program in the District. In 1999 he became director of curriculum and instruction of early childhood through high school, and in 2002 he was appointed assistant superintendent for schools. From May 2005 until June 2006 he was acting superintendent, then on July 1, 2006, he became the superintendent, with a five-year contract.

Munoz testified that he graduated from Elizabeth High School and has a bachelor's degree in psychology from Yale University. He also has a master's in education and attended the Superintendents' Academy for a ten-month training program to become a chief executive in urban school districts. He is certified as a social studies teacher, a supervisor, a principal, a school administrator, and a teacher of elementary education. In 2005 he was nominated for admission to the Superintendents' Academy program and interviewed, which he describes as a lengthy process that went on through November 2005. High-caliber individuals who show promise to lead urban school districts are recruited from various fields. Once the entering class was selected, the course began in February 2006 and was a ten-month intensive program that involved traveling around the country, listening to speakers, doing case studies, and group projects, all to prepare for leading an urban school district. The course involves practical, hands-on training, designed to help transform public schools, for example, to convert from a culture of entitlement to a performance-based culture. In November 2006 he graduated from the program, which had only twelve people enrolled. There were no other New Jersey superintendents in the group that graduated with him. Munoz testified that the academy influenced how he operates in the District, and that changing a culture anywhere is difficult because it involves changing the mindset of employees.

When he became acting superintendent on May 12, 2005, his duties varied under then-superintendent Dunn, who had divided up the District among the assistant superintendents. Some had schools within their jurisdiction, and others had different divisions they oversaw. Eventually there were just two assistant superintendents, Munoz and petitioner, and they had responsibility for all the schools and divisions, although he does not recall how they were divided up at the time. Munoz testified that Dunn "shifted things around a lot," and offered no real guidance for evaluation of principals. Munoz stated that during Dunn's tenure "there was an outward appearance that everything was alright, but inside the District was rotting." The student performance was not good, and there was no guidance from Dunn provided as to evaluations or increment withholding. Munoz stated that when he was appointed acting superintendent he was given direction by the Board that made it clear that the Board wanted him to significantly transform the public schools. The Board adopted a policy with a mission and vision to become one of the best schools in New Jersey. The Board made it clear to him that he needed to change the performance of the schools and that the focus should be on academic learning and achievement.

Munoz testified that one of the first things he did in June 2005 was to put together a reorganization plan effective July 1, 2005, which largely focused on the high school administration central office. He created job descriptions for the three assistant superintendents, one for HR, one for overseeing the schools, and one for instructional services. He changed petitioner's assignment at the time from assistant superintendent for schools to assistant superintendent for instructional services and he promoted two other employees in the District to assistant superintendent positions. In June 2006 more changes were made and petitioner's job title was changed to assistant superintendent for teaching and learning. Munoz testified that at the time, he was being mentored by the superintendent of the Boston schools, who had won a prize for the best urban school district in the United States. That district used the term "teaching and learning," and he adopted it. Petitioner was thereafter made assistant superintendent for schools and Steve Liddawi was assistant superintendent for teaching and learning. He felt that Liddawi could make that part stronger, as he had been an excellent principal. As assistant superintendent for schools, petitioner was to be in the schools

100 percent of the time to evaluate core learning and what was happening in the classroom. Munoz wanted this to show up in the evaluations of principals, and indicated that the evaluation tools have checklists and categories. School are rated largely on their outputs and whether adequate yearly progress is made or a school is deemed in need of improvement, all as measured by the progress of students in standardized testing. The data from all schools is aggregated and the District gets a label of AYP or in need of improvement. The job descriptions, strategic plan and three-year action plan were all designed to improve student performance with five priorities: 1) excellence everywhere; 2) boost performance; 3) safe schools; 4) modernize; and 5) change the culture.

The assistant superintendents also got verbal direction from him, in that he made it clear that he wanted them "in the schools as close to 100 percent of the time as possible." Their job was to make sure the kids were learning, the teachers were teaching and the buildings were functioning as they were supposed to. Munoz felt the assistant superintendents were his eyes in the schools and it was their job to make sure the elements of the plans were actualized.

The State assessments measure student learning in language arts/literacy, math and science (fourth to eighth grade). Science is not used for AYP, but it is used by the State, and if students are not proficient there are sanctions imposed.

In January 2007 the State hired an outside firm to conduct the New Jersey Quality Single Accountability Continuum (NJ QSAC), which went into effect for 2006. Usually a district does its self-assessment and turns the results in to the State; however, since Elizabeth was in need of improvement the State had the evaluation done and a curriculum audit conducted. Liddawi was in charge of making sure all the documents were gathered; however, he passed away in March or April 2007 and Olga Hugelmeyer was eventually appointed an assistant superintendent to replace him. In 2006–2007 Munoz had a superintendent's "cabinet," consisting mostly of those who reported directly to him and two executive team individuals who reported to the Board. In February 2007 another assistant superintendent was appointed (for family and community outreach), for a total of five.

The business operations were headed by the business administrator/board secretary (Harold Kennedy). The two people who reported to him were part of the cabinet also, so there was no confusion in communication. The cabinet had two areas of focus: 1) operations and management (day-to-day items); and 2) instruction or teaching and learning. At cabinet meetings they also discussed articles with a view to leadership development, which was a third focus of the cabinet. The meetings were for two or three hours on Monday afternoons, but remained flexible, and attendance by assistant superintendents was required. The contents of the discussions were affected by the time of year; however, excellence in academics and athletics and boosting performance were almost always discussed. Also discussed towards the end of the year were renewals and non-renewals for non-tenured staff, and who was performing and who was not. Issues at individual schools were also discussed.

In 2006–2007 Elizabeth High School was the largest high school in the state and one of the largest in the country. The school got off to a bad start that year after parents and students filed a lawsuit. There were 5,300 students in the high school in multiple buildings, four which were grouped together and three of which were elsewhere. Other "houses" were later added, but it was all considered to be one school. Each house had its own director and assistant director; however, the reporting to the State was as one school and the reporting to the college board was also as one single school. Middle and elementary schools had between 300 and 1,200 students and had principals and vice principals. Petitioner dealt with high school principal evaluations that year, and Munoz also asked for reviews of vice principals and instructional coaches (experts in their field who worked with veteran and novice teachers with regard to issues such as classroom management and teaching). The instructional coaches reported to the principal and vice principal and to the supervisors of language arts literacy and math.

Munoz testified that he inherited a district in need of improvement, and it stayed that way. The first year the District met AYP was 2008–2009 based upon 2007–2008 test results. AYP is always based on the prior year's scores. Regarding evaluation of principals and house directors, he directed in the cabinet meetings that backup be provided for scores given, and an evaluation tool is used that includes information

regarding scores and references the possible withholding of an increment. An assistant superintendent had the ability to recommend action regarding principals and vice principals including tenure charges, withholding of increments and other sanctions.

Munoz testified that he developed the job description for assistant superintendent for schools (P-5), which was petitioner's job description for part of the 2006–2007 school year. As noted on the bottom of page 2, the job description was revised on February 15, 2007. Petitioner's responsibilities included evaluating the operations of schools and making recommendations to improve delivery of instruction to the students. Petitioner had latitude to make recommendations to improve anything at the schools, and her highest leverage was evaluation of principals to make sure they were doing their jobs well, because the principal is the person running the school. Petitioner's responsibilities also included overseeing the analysis of data and preparation of the State reports. Data collection was ongoing, and the primary data in the principal evaluations was student achievement. It was the responsibility of the assistant superintendent for human resources to prepare reports indicating who was current with their evaluations and who was not, and some principals did not keep up with the evaluation of individuals who reported to them. The assistant superintendent would then be told to write up any principal who was behind in that regard. Non-tenured staff were evaluated three times a year and tenured staff once a year. If a principal did not do the evaluations he or she was required to then there should have been a recommendation to withhold the principal's increment. If a vice principal did not do evaluations he or she was required to, then the principal should have recommended discipline of that vice principal, which could have been withholding an increment.

For the 2006–2007 school year the District was still in need of improvement. However for 2007–2008 the District met AYP. Munoz did not recall petitioner raising any issues regarding any principals in 2006–2007, but he did ask her questions about them. He believes that in 2006–2007 52 percent of the schools met AYP, and that some schools were ineligible for AYP, such as early childhood. Only the schools with grades in them that have the mandatory testing are eligible for AYP.

In evaluation conferences, Munoz spent time reviewing petitioner's evaluations and the quality of those evaluations, and he indicated that he was concerned about the evaluations she had done. Some principals were being given high marks, yet the District was in need of improvement. Some schools were very high performing (100 percent proficient), some were very low performing (for example, 15 percent proficient), and some were in the middle, yet most principals had good evaluations. Munoz made it very clear to petitioner that he was concerned about her evaluations. He put all of her data in a spreadsheet, and most of the people she evaluated had high scores.

Certificated staff, whether tenured or not, need to be acted upon before May 15 to determined whether they are going to be renewed, otherwise they are automatically renewed. Non-certificated staff needs to be addressed by June. Before June 30 recommendations need to be presented to the Board for increment withholding if there is to be one before the salary is awarded for the next year. The first thing addressed is the renewals or non-renewals of certificated tenured and non-tenured staff, then renewals of non-certificated staff, and then increment withholdings. Munoz testified that petitioner showed a lack of initiative in 2006–2007 in not recommending any non-renewals. In fact, he asked her for a non-renewal of a principal in one school, which she provided, and then the principal resigned. Munoz stated that he took other steps to evaluate petitioner's performance and built upon her performance report (P-10) using her job description, which is more specific, and "keys to excellence." He evaluated everyone who reported to him, and he used job descriptions and keys to excellence for everyone, except for two individuals who had not been there the entire year—Olga Hugelmeyer had been there one month and Jerome Dunn had been there approximately six months. Everyone else was evaluated exactly the same way as petitioner. The process he followed was to first review the individual's performance report, job description and strategic plan all together, and then look at the action plan for that individual. He looked at petitioner's, Kennedy's and Garcia's evaluations of others that they were responsible to evaluate, and spent a few hours on each, determining which areas were their strengths, which needed improvement and which needed future focus. He felt there was a thin line between needed improvement and future focus. Munoz made notes of things he wanted to discuss at the evaluation meeting with each,

and stated that those meetings took between two and four hours. After the meeting his practice is to prepare a written report of the evaluation meeting.

Munoz's memo to petitioner (P-11) was intended as a follow-up to the February 23, 2007, conference. He felt that future focus for petitioner could be making decisions and accepting responsibility and being firm. Her major weaknesses included that she needed to be more firm with principals and draw a line between friendships and responsibility to the school and its students. She was not direct enough about the ineffectiveness of some principals, and that ineffectiveness affects student performance because teachers take the lead from leaders, and if the leadership has high expectations, good teachers will be hired and renewed. He felt that if you do not hire good teachers and decline to renew bad ones it leads to low performance of students and discipline problems because students are bored, as they are not given a high level of teaching. Bad principals perpetuate mediocrity. Munoz discussed the comment "no surprises" that he had written under areas of future focus. He explained that he had heard something from a Board member or community member that should have been brought to his attention by petitioner and was not, and his comment was to let her know that such occurrences could not continue. Generally, Munoz felt that petitioner was not supervising the schools well enough and that she needed too much direction from him. She needed to be more proactive and her evaluations of principals were too high in scoring when measured against student performance. These concerns were addressed in general comments and questions. Most of petitioner's comments on the principals' evaluations were favorable, and this was troubling for Munoz based on what he had seen in the schools. He felt that her evaluations were ineffective and the words she used were "too soft." The tests scores affirmed that the principals were not doing a great job. He discussed the status of test scores and how the evaluation forms mentioned withholding of increments, yet increments were not in fact withheld. He indicated that they discussed student achievement and he asked her to reflect on the plans for student achievement, feeling that she needed to stay on top of the vision, mission, core beliefs, theory of action and priorities. He and petitioner discussed the need to pay attention to all of these and to eliminate the achievement gap. He does not remember any response or rebuttal to the memo from petitioner and does not recall her disputing what was being asked of her. Munoz emphasized that he made it clear to

petitioner that she was responsible for the performance of the schools, as was her predecessor in the assistant superintendent for schools position. Petitioner's performance did not change following the February 2007 evaluation; her approach stayed the same and her evaluations of principals stayed largely the same.

Petitioner's Professional Improvement Plan addressed moving forward in the next school year and how petitioner would improve her practices in areas of concern. Munoz stated that an individual is to reflect on his or her evaluation and then come back with the PIP, which he rejects if it is not complete, and signs once he is satisfied with the plan.

Petitioner's employment contract for July 2007 through June 2008 (P-13) is the standard contract used for all employees in the District, except for perhaps the business administrator. The recommendation he made to the Board to withhold her increment (P-14) is the standard Rice Letter that goes out to individuals being discussed at a board meeting. He sent it to petitioner pending receipt of student achievement scores to see if her increment should be withheld. He told petitioner in advance that he would be making that recommendation to the Board and indicated that the Board would revisit it when the test scores came in. If the Board did not take action to withhold the increment it would have been granted, and then they would not have been able to take it back. The test scores were expected in the fall of the following year, and once they were received he went to the Board and recommended that 52 percent of petitioner's increment be restored to her because 52 percent of the schools in the District made AYP, although the District did not make AYP. Munoz testified that the tests scores are the best indicators of school performance.

Munoz testified that Elizabeth is subject to complying with the "No Child Left Behind" Act. Not every school in the District made AYP over the 2002–2005 period. Munoz was not sure how many schools made AYP in the years 2002–2004, and believes that in 2005 eight or nine schools may have made it. AYP is tied to student achievement. The State uses an assessment system that has varied, but is largely language arts and math. The scores are generally calculated around grade spans, which he referred to as "bands": grades three to five, six to eight, and high

school groups. In addition, the data for the student population is broken down into boys and girls bands, socio-economic level and race bands, and there are mostly forty-one variables in a band. The federal government originally gave the states the ability to set benchmarks, and New Jersey gradually increased it to 100 percent. Each benchmark is set for three years, and so if a proficiency benchmark number was 50 percent it stayed that way for three years.

Munoz testified that there are two ways to make AYP: 1. proficient, which means clear the benchmark, and 2. safe harbor, which means at least a 10 percent reduction in the number of students who did not achieve proficiency. The federal government gives the states the choice. Two consecutive years of data are required to have AYP status, and if AYP is not achieved two years in a row then a school is classified as "in need of improvement."

The forty-one variables include measuring how each particular population performs. For example, the special education group in a school needs to either make the benchmark or safe harbor; however, some groups are exempt if they have less than a certain number of members. In Elizabeth there are different populations in different schools and some subgroups do not exist in some schools. The State assessment is once a year for elementary and middle school and multiple times a year for high school students. The high school exam is also a graduation requirement, so students have multiple opportunities to pass the test, which is taken for the first time in the spring of a student's junior year. If the student does not pass, the student can take the test in the fall of senior year and again in the spring of senior year if needed. If a student still does not pass, the student can take a special review or an alternative assessment just for graduation.

Munoz testified that petitioner's job includes the requirement that she motivate her staff to get 95 percent of the children into school. Every student is expected to be at school, and the Board hires people, including Barrett and him, to fulfill the responsibilities of the District. He testified that there are a number of issues in an urban area, including poverty, which results in lower performance (students in affluent communities perform better). There are also limited language proficiencies where

English is not spoken at home; however, there are special rules for those students. There are also social issues such as death, divorce, drugs, alcohol and dysfunction. Munoz testified that the special education students who are severely disabled take an alternative proficiency assessment and are exempt from the sit-down testing.

The Board resolved to restore 52 percent of petitioner's increment after the test scores were received (R-1), after 52 percent of schools achieved AYP based upon the prior year's scores. Petitioner's increment had been withheld based on her performance, and the test scores were used as a metric to restore some of it. Many other individuals had their increments withheld for performance as well. Petitioner was responsible for the schools, including the principals, vice principals and instructional staff. It was her job to use innovative and management techniques and/or discipline to motivate her staff. Munoz testified that he was not happy with her performance, including her evaluations of administrators, and that is why he withheld her increment. Once the test data came in, he used AYP as a metric to get her 52 percent of her increment back. He agreed that he did not use the "metric of AYP" to withhold any other assistant superintendent increments. However, other increments were withheld for various performance-based reasons. The resolution regarding individuals whose increments were withheld (P-15) includes six administrators and petitioner.

On redirect examination, Munoz testified that adequate yearly progress is a State requirement applied to all school districts, whether affluent, poor, Abbott, rural or urban.

Munoz testified that the salary guide (R-2) indicates salaries subject to annual review regarding "adjustments and/or improvements," which permits the Board to take a look at salaries for the upcoming year. Although the Elizabeth Education Association sets guidelines, with the superintendents they are direct contracts so the Board can address contract issues annually and adjust up or down.

Petitioner's job description at the time (P-5) sets forth in numbers 2, 9, 14 and 17 items related to review, evaluation, assessment, and recommendations to Munoz regarding principals and house directors and the like. He received no recommendations that petitioner initiated regarding any administrators. He directed her to look into

Ms. White, who eventually resigned, so he considered petitioner to be just following up on an issue he initially assigned to her. Ms. Leon was going to be shadowed. One of his concerns was the complete lack of recommendations from petitioner regarding principals, but he testified that the heart of the matter to him was that students were not getting educated to become proficient, and the leaders, including the principals and vice principals, were not being accurately evaluated if the kids were not learning. He stated that leaders need to get teachers to perform better, and that it was petitioner's job and obligation to get the principals, vice principals, house directors and assistant house directors to do their jobs. All of the administrators she supervised got good evaluations, but the kids were not learning; 52 percent is not good. It was petitioner's job to accurately evaluate people who were reporting to her directly. She gave high ratings, yet the narratives were soft and there were very limited references to the most important part of the evaluation, which is student performance. Student performance is the core of their job. Managing people who report to her, whether by written and formal or informal conversations is critical, and petitioner had an ineffectiveness there which was borne out by the student achievement numbers. Munoz opined that "the game has changed across the nation and across the world," and evaluations of administrators are at the heart of those changes.

LEGAL DISCUSSION AND CONCLUSION

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

> 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.

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 (1984). The statute was intended to vest local school boards "with the ability to withhold increments" from those who had "not performed well during the previous year." Probst v. Haddonfield Bd. of Educ., 127 N.J. 518, 526 (1992). 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 296–97.

In a matter such as this, the petitioner has the burden of showing that the denial of the salary increment was arbitrary or capricious. Id. at 288. The decision to withhold an increment does not require a showing of shortcomings sufficient to justify dismissal under the Tenure Act. Kopera v. West Orange Bd. of Educ., 1960–1961 S.L.D. 57, 62. The only question for the Commissioner is whether the district "had a reasonable basis for its factual conclusion." Kopera, supra, 60 N.J. Super. at 295. Indeed, it has been observed that a school district has no duty to

> prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-24.
>
> [Reilly v. Parsippany-Troy Hills Twp. Bd. of Educ., 1989 S.L.D. 1830, 1843 (citing Colavita v. Hillsborough Twp. Bd. of Educ., 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 Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n, 79 N.J. 311, 321 (1979)). An individual contesting a salary increment withholding has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. Kopera, supra, 60 N.J. Super. 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. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 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 Bd. of Educ., 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 Reg'l Bd. of Educ., EDU 5904-04, Initial Decision (Sept. 26, 2005), adopted, Comm'r (Dec. 23, 2005), aff'd, State Bd. (June 7, 2006) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

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

Munoz had numerous conversations with petitioner during the 2006–2007 school year about her performance wherein he conveyed to her that she was not supervising the schools well enough and continued to need too much direction from him. Petitioner was aware that Munoz felt her performance was deficient with respect to supervision and evaluation of principals and acknowledged having those conversations with him throughout the year. Indeed, she agreed that Munoz discussed with her whether she was "too soft" in those evaluations. While petitioner asserts she has a different "style"

from Superintendent Munoz, she nevertheless failed to present even a scintilla of evidence that the action of the Board in withholding her increment was arbitrary, capricious or unreasonable.

Assistant superintendent Aida Garcia testified credibly that Munoz's priorities were different than those of the former superintendent, and Munoz made it clear to all that teaching and learning had to be the primary focus in the District.[3] The notion that petitioner bore no responsibility for student achievement in the District and therefore had no accountability is patently ridiculous. The proclivity to assume that increments are automatic, and triggered in a vacuum without regard for the learning of children, is misplaced.

Based upon all of the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner has not met her 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.

Based upon all of the foregoing, I **CONCLUDE** that the respondent appropriately withheld petitioner's salary increment for school year 2007–2008.

ORDER

It is hereby **ORDERED** that the petition filed by petitioner 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

[3] It is difficult to imagine that a primary focus of academic achievement and learning constituted a change in focus and priorities for the District.

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 19, 2010

DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 7/19/10

Date Mailed to Parties: 7/19/10

dr

APPENDIX

Witnesses

For Petitioner:

Jennifer Barrett

For Respondent:

Michael F. DiPaola

Aida Garcia

Pablo Munoz

Exhibits

For Petitioner:

P-1 State Board of Examiners Certificate, Elementary School Teacher (June 1967)

P-2 State Board of Examiners Certificate, Principal/Supervisor (07/81)

P-3 State Board of Examiners Certificate, School Administrator (07/98)

P-4 Human Resources computer printout, administrative positions held by petitioner

P-5 Job Description: Assistant Superintendent for Schools (Feb. 15, 2007)

P-6 Administrative/Supervisory Observation Report (Position: Director) (4/2000)

P-7 Performance Report for Jennifer Barrett, 2002–2003 School Year (Position: Assistant Superintendent)

P-8 Performance report for Jennifer Barrett, 2005–2006 School Year (Position: Assistant Superintendent)

P-9 Administrative/Supervisory Professional Improvement Plan for Jennifer Barrett (May 11, 2006)

P-10 Performance Report for Jennifer Barrett, 2006–2007 School Year (Position: Assistant Superintendent)

P-11 Memorandum from Pablo Munoz, Superintendent, to Jennifer Barrett, Assistant Superintendent (March 15, 2007)

P-12 Administrative/Supervisory Professional Improvement Plan for Jennifer Barrett (April 30, 2007)

P-13 Employment Contract for Jennifer Barrett (May 16, 2007)

P-14 Letter to Jennifer Barrett from Pablo Munoz, Superintendent (June 26, 2007)

P-15 Resolution (2007–2008 Increment Withholding) (June 28, 2007)

P-16 Letter to Jennifer Barrett from Assistant Superintendent for Human Resources (July 2, 2007)

P-17 Employment Contract for Jennifer Barrett (Dated June 28, 2007)

P-18 Letter to Jennifer Barrett from Pablo Munoz, Superintendent (July 23, 2007)

P-19 Report of Michael F. DiPaola, Ed.D. (May 19, 2008)

P-20 Curriculum Vitae of Dr. DiPaola

P-21 Elizabeth Public Schools, Evaluation Policy No. 4116 (September 20, 2007)

P-22 Elizabeth Public Schools, Withholding Increment Policy No. 4117.51

P-23 Letter from Harold E. Kennedy, Jr., School Business Administrator/Board Secretary, to Andrew Babiak, Esq. (July 21, 2008)

P-24 Employment Contract between Elizabeth Board of Education and Superintendent of Schools (May 8, 2006)

P-25 Employee salary information for Pablo Munoz

P-26 Summary of Employment for Barrett, January 1, 2006–June 30, 2007

For Respondent:

R-1 Board of Education Resolution dated August 21, 2008

R-2 Resolution dated December 15, 2005

R-3 Letter from Aida C. Garcia, Assistant Superintendent for Human Resources, to Jennifer Barrett dated August 25, 2008

#443-10

A.T. and M.T., on behalf of minor child, M.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners alleged, *inter alia*, that respondent's representatives violated school policy, their minor son's rights, and their parental rights when – after a teacher observed a disturbing drawing at M.T.'s school desk – M.T. was sent by school staff to be evaluated at a hospital against the petitioners' wishes. Petitioners sought: discipline for respondent's staff members who decided to send M.T. to the hospital; letters of apology to the parents and the child; payment of $12,000 in hospital expenses; and payment of punitive damages. Respondent Board argued that petitioners failed to state a cause of action upon which relief may be granted, that the Board's actions were based upon good cause, and were not arbitrary, capricious or retaliatory.

The ALJ found, *inter alia,* that: the matter is ripe for summary decision as the record shows that there is no genuine issue as to any material fact; as a matter of law, the Commissioner does not have jurisdiction over this matter as it does not arise under the school laws; petitioners allege a violation of the district's internal regulations, but do not point to any alleged violations of any statutory school laws or related regulations that would fall under the Commissioner's purview; petitioners seek disciplinary action against district personnel, when only a board of education may forward disciplinary charges to the Commissioner for a hearing pursuant to *N.J.S.A.* 18A:6-11; and the petitioners' request for reimbursement of costs and punitive damages is likewise not within the Commissioner's authority. Accordingly, the ALJ concluded that the matter should be dismissed as a matter of law.

Upon a thorough review of the record and the Initial Decision of the OAL, the Commissioner concurred with the ALJ that she has no jurisdiction to adjudicate the substantive arguments made by the petitioners in this matter. Accordingly, the petition was dismissed.

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

October 21, 2010

OAL DKT. NO. EDU 07129-10
AGENCY DKT. NO. 129-6/10

A.T. and M.T., on behalf of minor child, M.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT 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 the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners. In their exceptions the petitioners maintain that since this was a serious incident that occurred in a public school that the Commissioner should automatically have jurisdiction over this matter. The petitioners also make other substantive arguments in their exceptions relating to the events that occurred at the school with M.T.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Commissioner does not have jurisdiction to adjudicate the substantive arguments made by the petitioners in this matter. Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/10
Date of Mailing: 10/22/10

* 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

CORRECTED
INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07129-10
AGENCY DKT. NO. 129-6/10

A.T. AND M.T., ON BEHALF OF MINOR CHILD M.T.,

Petitioners,

v.

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

Respondent.

A.T. and **M.T.,** petitioners, pro se

Mark T. Janeczko, Esq., for respondent

Record Closed: August 20, 2010 Decided: September 13, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners A.T. and M.T. on behalf of minor child M.T. have petitioned the Commissioner of Education, pursuant to N.J.A.C. 6A:3-1.1 et seq., for an order that the

Board of Education of the Borough of Carlstadt (District or Carlstadt) (1) discipline certain staff who decided to send the child to the hospital; (2) give letters of apology to the parents and the child; (3) absorb $12,000 in hospital expenses; and (4) pay punitive damages. The claims arise out of a decision by District representatives to send the child to Bergen Regional Medical Center (BRMC), allegedly against the wishes of the parents, after a teacher observed disturbing drawings at his school desk.

On June 23, 2010, petitioners filed a petition with the Commissioner. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on July 7, 2010, 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. In her transmittal, the Director indicated that the matter requires a threshold determination as to whether the requested relief is within the authority of the Commissioner to grant, and, if not, whether alternative reliefs are available and appropriate.

On July 22, 2010, I directed the parties to submit their positions in writing on the above threshold questions. I received their submissions by August 20, 2010.

FACTUAL DISCUSSION

The petition has attached to it an April 23, 2010, report by the Carlstadt Child Study Team, a written April 28, 2010, account by the child of the events of April 23, 2010, an April 23, 2010, report by the Carlstadt Police Department, and an April 28, 2010, memorandum from BRMC reflecting an admission date of April 23, 2010, for the child and a discharge date of April 28, 2010. From these documents and the petition, the facts appear to be as follows, and these facts are relied upon for the purpose of determining whether this matter should be subject to summary disposition.

On April 23, 2010, the child, age twelve, was referred to the Child Study Team for assessment when his teacher, Ms. Nagurka, found a drawing on his desk indicating suicidal ideation. In his interview by the Child Study Team, the child advised that he had drawn the picture in English class because he was concerned that a girl he liked did

not like him. He had seen similar pictures on the Internet. He also stated that his self-deprecating comments on the picture represented what he believed others thought of him. He reported that he did not actually intend to kill himself now, but said that he has considered it for other situations. He said that he feels depressed and that there is no point in trying anymore. The Child Study Team recommended that further evaluation of the child was necessary, as the child "presents as at-risk for suicide." The report further indicates that the child's mother, M.T., was called and asked to come to the school right away, and she agreed. The report states, "When she arrived, Ms. Simon, Mrs. Kiely and Mrs. Crapis described the above and showed her the picture that [the child] had drawn. We told her that [the child] needs to be further evaluated at Bergen Regional Medical Center's Emergency Room. She became upset and supportive counseling was provided to her." M.T. informed Mrs. Crapis that she and her husband had no intention of taking the child to the emergency room because they did not have insurance. The police and an ambulance were called. Mrs. Kiely spoke with A.T., the child's father, explained charity care, and advised him that the ambulance had arrived and that he could meet M.T. and his son at the hospital. He protested putting the child in the ambulance. (See Carlstadt Child Study Team report attached to the petition.) Officer Sanzari of the Carlstadt Police Department reported that he contacted Elizabeth Morley of Family Crisis, who directed that the child needed an evaluation at BRMC regardless of the parents' decision. Sanzari followed the ambulance carrying the child to BRMC as a safety precaution. (See Officer Sanzari report attached to the petition.)

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 52:14B-9 provides a party in a contested administrative case the opportunity for a hearing at which he or she may present evidence and argument on all issues involved. Such cases, however, may be subject to summary decision if the papers show that there is no genuine issue as to any material fact challenged and that a party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,

475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 533 (quoting Liberty Lobby, Inc., supra, 477 U.S. at 251–52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational 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."
>
> [Id. at 540 (quoting Liberty Lobby, Inc., supra, 477 U.S. at 251–52, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> . . . 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.

Petitioners do not materially dispute the above facts. They contend, however, that the District violated the rights of the parents and the child as set forth in Carlstadt School District Regulation R 5350, entitled "Pupil Suicide." (See regulation attached to petition). More particularly, they contend that: (1) Ms. Nagurka should have immediately contacted the school principal upon discovering the disturbing photo; (2) Crapis, Kiely and Simon interviewed the child without notifying his parents; (3) at the two-and-one-half-hour interview with the child, they violated his rights as a minor to have a parent to advocate on his behalf; (4) upon M.T.'s arrival at the school she was not allowed to see or speak with her son, but was informed that she was required to accompany her son in the ambulance; (5) District representatives refused M.T.'s request to take her son for an evaluation rather than have him transported by ambulance and refused to wait for A.T., instead calling the Division of Youth and Family Services and the police; and (6) despite the parents' recognition of the gravity of the situation and the need for their son to have a psychiatric intervention, the District disempowered them in violation of their rights as parents.

The Carlstadt regulation concerning pupil suicide requires that any indication of a potential suicide must be reported to the principal immediately. The principal shall immediately inform the Child Study Team, which shall investigate and evaluate. The principal will inform the pupil's parents of the suicidal signs and seek parental approval for an evaluation and notify the Division of Youth and Family Services if parental abuse or neglect is suspected. The regulation also provides that "in the event that the parent(s) or legal guardian(s) objects to the recommended evaluation or indicates an unwillingness to cooperate in the best interests of the pupil, the Child Study Team may contact the New Jersey Division of Youth and Family Services to request that agency's intervention on the pupil's behalf."

I **CONCLUDE** that, as a matter of law, the Commissioner does not have jurisdiction over this matter.

The Commissioner has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws. N.J.S.A. 18A:6-9; Bd. of Educ. of E. Brunswick, 48 N.J. 94 (1966). However, where the controversy does not

arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. E. Brunswick, supra, 48 N.J. at 102. Petitioners seek disciplinary action against District personnel. Although the school laws provide for disciplinary action against a school district's employees, only a board of education, rather than an individual citizen, may forward disciplinary charges to the Commissioner for a hearing. N.J.S.A. 18A:6-11, -16.

Although petitioners allege a violation of Carlstadt's internal regulation concerning pupil suicide, they do not point to any alleged violations of any statutory school laws or related regulations that would fall within the Commissioner's jurisdiction. In M.N. v. Board of Education of Dumont, EDU 11658-98, Final Decision (August 13, 1999) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the Commissioner, in accordance with East Brunswick, supra, 48 N.J. 94, held that a request for a determination as to whether a school counselor is allowed to keep from parents a potentially dangerous situation and a minor's state of mind calls for an analysis of duties in relation to a body of law which is not within his jurisdiction, since it is the Commissioner's primary responsibility to make certain that the terms and policies of the school laws are being faithfully effectuated. He reiterated that where the controversy does not arise under school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel, and notwithstanding that the board of education in M.N. adopted a policy contemplating that it may be necessary for a counselor to set aside confidentiality considerations when it is in the best interest of a student. The Carlstadt suicide policy similarly does not constitute a school law over which the Commissioner has jurisdiction.

As to petitioners' claim for money damages against the District, the Commissioner has consistently denied that the Commissioner is clothed with the authority to grant prayers for relief for punitive damages and reimbursement for costs and/or legal fees. Winter v. Bd. of Educ. of North Bergen, 1975 S.L.D. 236, 240; see also Bd. of Educ. of Tenafly, 1974 S.L.D. 420, aff'd, State Bd. of Educ. (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 Reg'l High Sch. Dist., 97 N.J.A.R.2d (EDU) 270. The payment of any other damages is not within the Commissioner's authority. Dunn v. Elizabeth Bd. of Educ., 96 N.J.A.R.2d (EDU) 279; see also B.G. v. Bd. of Educ. of E. Orange, EDU 03036-08, Initial Decision (April 25, 2008), adopted, Comm'r (May 20, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

Since all of petitioners' prayers for relief are outside of the jurisdiction of the Commissioner, I **CONCLUDE** that this matter should be **DISMISSED** as a matter of law. Such dismissal does not preclude petitioners from seeking certain relief in an appropriate forum.

ORDER

It is hereby **ORDERED** that the petition is **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, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 13, 2010
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 9/13/10

Date Mailed to Parties: SEP 13 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

449-10

TRACEE EDMONDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMER AND BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Pro-se petitioner challenged the 2010 agreement between the respondent Boards to expand their pre-existing sending-receiving relationship pursuant to *N.J.S.A.* 18A:38-8. Petitioner alleged that the actions of both school districts violated the law applicable to regionalization of school districts, since their agreement provides that all Elmer students be educated in Pittsgrove, rendering the Elmer district non-operating and creating a regional district without a referendum. Respondent Pittsgrove Board of Education filed a motion to dismiss the petition, and the Elmer Board of Education joined in the motion.

The ALJ found, *inter alia,* that: *N.J.S.A.* 18A:8-43 to 8-51 was enacted in an effort to merge and consolidate small non-operating school districts for operational efficiency and cost cutting; Elmer and Pittsgrove decided to expand their sending-receiving relationship to include all students from Elmer after the effective date of the legislation; this action was not a regionalization under *N.J.S.A.* 18A:13-34, but rather an exercise of managements' prerogative permitted by *N.J.S.A.* 18A:38-8; and there was no statute, regulation or applicable authority cited by petitioner prohibiting the two districts from broadening their sending-receiving agreement to include all students in Elmer. Accordingly, the ALJ concluded that the petition must be dismissed.

Upon independent review of the record and the Initial Decision of the OAL, the Acting Commissioner found that involuntary district mergers shall be effectuated by the Executive County Superintendent pursuant to *N.J.S.A.* 18A:8-44 *et seq.* As the Executive County Superintendent has taken no action, the petition against respondents cannot bring about the relief petitioner seeks. Accordingly, the Acting Commissioner dismissed the petition, and denied the petitioner's motions for emergent 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.

October 25, 2010

OAL DKT. NO. EDU 6992-10
AGENCY DKT. NO. 93-5/10

TRACEE EDMONDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMER AND BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	

Petitioner challenges the decision of respondent Elmer Board of Education to expand its sending-receiving relationship with respondent Pittsgrove Board of Education, alleging that the decision creates an unauthorized regionalization.

At the outset, the Acting Commissioner of Education (Acting Commissioner) is constrained to supplement the procedural history set forth in the Initial Decision. The record reveals that petitioner filed papers with the Commissioner of Education on or about May 11, 2010 and June 21, 2010. Respondent Elmer Board of Education filed its answer on June 14, 2010, and on June 21, 2010 respondent Pittsgrove Board of Education filed a motion to dismiss in lieu of answer to the petition.[1] The Bureau of Controversies and Disputes transmitted the pleadings to the Office of Administrative Law (OAL) on June 22, 2010 and the OAL's filing notation indicates that it received the pleadings on June 30, 2010.

[1] The Commissioner has reviewed all of the referenced pleadings.

As noted in the Initial Decision, petitioner did not respond to Pittsgrove's motion to dismiss but – taking into consideration petitioner's *pro se* status – the Administrative Law Judge (ALJ) declined to issue a default decision. Further, the petitioner filed with the Commissioner three motions for interim relief on August 24, 2010, which motions were transmitted to the OAL on August 26, 2010 and were ultimately considered by the ALJ after disposition of the threshold issues raised in Pittsgrove's motion to dismiss – which the Elmer Board joined.

There appears to be no factual dispute about the present posture of this matter. Respondents entered into an agreement to expand a preexisting sending-receiving relationship, as they are permitted to do under *N.J.S.A.* 18A:38-8. A consequence of the contemplated expansion was that – commencing at the beginning of the 2010-2011 school year – all Elmer primary and secondary school children would be educated in Pittsgrove-operated schools, including the one remaining school building in Elmer, which would be leased to Pittsgrove.[2]

Petitioner correctly points out that the practical result of respondents' agreement may be to render Elmer a non-operating district, pursuant to the definition in *N.J.S.A.* 18A:8-43.[3] However, she reasons that this signifies that regionalization pursuant to *N.J.S.A.* 18A:13-34 has occurred. This is a leap unsupported by the facts presented to the ALJ or the relevant law.

The recently enacted "Non-operating District" statute provides for executive county superintendents to eliminate non-operating districts and merge same with the districts which receive the non-operating district's students. *N.J.S.A.* 18A:8-44(a). There is no indication that the Salem County superintendent has made the determinations and taken the actions prescribed in *N.J.S.A.* 18A:8-44 to 8-49. Consequently, there is no relief which could be

[2] The lease proposal is currently under review by the Office of School Facilities of the Department of Education.

[3] The ALJ raises a question in the Initial Decision about the impact of the reference in *N.J.S.A.* 18A:8-43 to the date of June 30, 2009. Were the date not applied prospectively, it would defeat the legislative intent.

provided to petitioner by the respondents in this case. Further, none of the determinations or actions outlined in the regionalization statute, *N.J.S.A.* 18A:13-34, have been executed by respondents. Nor is there reason for the Acting Commissioner to order the initiation of such actions, since *N.J.S.A.* 18A:8-44 *et seq.* provides the means of effectuating involuntary district mergers.

Petitioner's September 15 exceptions to the Initial Decision appear to reiterate her position that respondents have carried out a *de facto* regionalization, and to suggest that Pittsgrove's rental and operation of the Elmer school building is an *ultra vires* action. The Acting Commissioner rejects the latter proposition as petitioner has failed to meet her burden to offer authority for same, and rejects the balance of petitioner's exceptions for the reasons set forth above.[4]

Finally, having found that the ALJ's dismissal of the petition was warranted by the facts and relevant law, the Acting Commissioner upholds the ALJ's denial of petitioner's motions for emergent relief.[5]

The petition is dismissed and petitioner's motions for emergent relief are denied.

IT IS SO ORDERED.[6]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|25|10

Date of Mailing: 10|26|10

[4] There is no provision under the OAL's procedural regulations for the second, third, fourth and fifth exceptions submitted by petitioner. They were consequently not considered.

[5] Attached to petitioner's exceptions were copies of the motions for emergent relief which were transmitted to the OAL, considered and rejected by the ALJ. Thus, the Acting Commissioner denies same.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 6992-10
AGENCY DKT. NO. 93-5/10

TRACÉE EDMONDSON,
Petitioner,
v.
BOROUGH OF ELMER BOARD OF EDUCATION AND TOWNSHIP OF PITTSGROVE BOARD OF EDUCATION,
Respondents.

Tracée Edmondson, petitioner, pro se

Jane B. Capasso, Esq., for respondent, Elmer Board of Education (Lipman, Antonelli, Batt, Gilson, Malestein, Rothman & Capasso, attorneys)

Kerri A. Wright, Esq., for respondent, Pittsgrove Township Board of Education (Porzio, Bromberg, & Newman, attorneys)

Record Closed: September 10, 2010 Decided: September 10, 2010

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

Petitioner challenges the 2010 decision of the Borough of Elmer Board of Education (Elmer or EBOE) and Township of Pittsgrove Board of Education (Pittsgrove or PBOE) to expand its send-receive agreement to include grades K-4. All students in Elmer will be educated in Pittsgrove upon implementation of this new agreement. Grades 5-12 were already attending the Pittsgrove district under preexisting agreements. Petitioner avers inter alia, that the 2010 agreement renders the EBOE as a non-operating district, resulting in a de facto regionalization of the district. Petitioner asserts that a referendum was required to implement this change.

Pittsgrove filed a motion to dismiss the petition and, for the reasons discussed below, that motion is **GRANTED.**

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was transmitted to the OAL on July 7, 2010, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The Commissioner transmitted Pittsgrove BOE's June 21, 2010, motion to dismiss the petition with the file. The matter was assigned to me on August 13, 2010.

On August 18, 2010, a conference call was arranged by me because no opposition to the motion to dismiss was received by this office. During the call, petitioner explained that she had recently filed a motion for emergent relief, stay, and expedited hearing [with the Commissioner] on or about August 6, 2010.

Indeed petitioner had not filed any opposition to Pittsgrove's June 21, 2010, motion to dismiss. Pittsgrove's motion could have been decided by me on the papers as unopposed on August 18, 2010. But since petitioner was pro se, the better course of action was to arrange a conference call in order to invite a response by petitioner; albeit out of time.

At the conclusion of the conference call it was determined that Pittsgrove's motion to dismiss would be considered prior to any other motions because Pittsgrove raised threshold challenges to the relief sought by petitioner. Moreover, Pittsgrove's motion to dismiss was pending for two months. And finally, petitioner's competing motions were not transmitted with the file nor filed with the OAL at the time of the call.

Petitioner's opposition to the motion to dismiss her petition was due August 30, 2010, and replies were due September 13, 2010. Elmer BOE joined in Pittsgrove's motion to dismiss. Pittsgrove's letter dated August 18, 2010, confirmed the discussions from the conference call.

On August 26, 2010, the Commissioner forwarded petitioner's motions for emergent relief, stay, and expedited hearing to me to be addressed as necessary.

STATEMENT OF FACTS

Elmer and Pittsgrove Boards of Education have a send-receive relationship that dates back to 1976. (Affidavit of Stephen Berkowitz, Superintendent annexed to EBOE Answer). In 1976, Elmer sent its students in grades 9-12 to Pittsgrove. In 2003, the send-receive relationship was amended to include students in grade 5 to 8. Finally, in 2010, the send-receive relationship was further amended to include students in K-4. Elmer pays Pittsgrove tuition per child for its students that attend Pittsgrove.

In 2010, the EBOE became a non-operating district as a result of sending its entire student body to Pittsgrove. N.J.S.A. 18A:8-43. The arrangement was consensual and developed exclusively between the respective boards. The County Superintendent and Department of Education were also informed of this decision. Pittsgrove distributed a flyer that noted "Pittsgrove and Elmer will be expanding their current grade 5-12 send-receive relationship to include grades K-4 next year." prior to the 2010-2011 budget. The flyer further stated that, while the details of the relationship are still in the planning stages, the result for both towns would be additional funds and shared expertise and resources.

On April 27, 2010, Pittsgrove circulated a letter written by the Pittsgrove and Elmer Superintendents. The letter advised that the "Elmer and Pittsgrove Boards of Education recently agreed to enter into a full send-receive relationship." and described the details of the arrangement.

Petitioner alleges that the actions of both districts violate the law applicable to regionalization of school districts. Citing, N.J.S.A. 18A:13-34. Petitioner contends that the impact of the decision to have all of Elmer's students educated in Pittsgrove was a de facto regionalization because it would render the Elmer district a non-operating district. N.J.S.A. 18A:8-43. And regionalization must be effectuated by a referendum rather than by a vote by the respective the boards of education. This, according to petitioner, creates a new district and therefore requires Commissioner and voter approval.

APPLICABLE LAW

School districts that have the necessary accommodations may receive, or may be required to receive, pupils from another district not having sufficient accommodations in exchange for tuition. N.J.S.A. 18A:38-8; English v. Bd. of Educ., 301 F.3d 69, (3d Cir. 2002). Send-receive relationships are subject to the supervision of the commissioner. Bd. of Ed. Merchantville v. Bd. of Ed. Township of Pennsauken, 204 N.J. Super. 508, 499 (App. Div. 1985). Elmer and Pittsgrove entered into a send-receive relationship in 1976. It was amended in 2003 and again in 2010. The 2010 amendment left the EBOE with no students within its district. All of the students are now sent to Pittsgrove.

The legislature promulgated N.J.S.A. 18A:8-43 to 51, in an effort to merge and consolidate small non-operating school districts for operational efficiency and cost cutting. The law became effective June 30, 2009, and if read literally, is only applicable to those small non-operating districts at the time of its passage. ("Non-operating district" means a school district **that is not operating schools on the effective date**

[June 30, 2009]). Under this new law any district that is "non-operating" on the effective date of the legislation will be eliminated.

The county superintendent is charged with enacting the law. N.J.S.A. 18A:8-44. The superintendent's duties include:

> The determination shall be based on the district that is able to accommodate the merger with the least disruption to its finances and educational operations. In making the determination the executive county superintendent shall examine, but need not be limited to, the following factors: current sending-receiving relationships; the quality and effectiveness of educational programming and district operations; proximity of school districts; transportation costs; school building capacity; and special education needs.

DISCUSSION

Here, Elmer and Pittsgrove had a preexisting send-receive agreement dating back to 1976. That agreement was lawful pursuant to N.J.S.A. 18A:38-8. Elmer and Pittsgrove decided to expand the existing send-receive relationship to include all students from Elmer, after the effective date (June 30, 2009) of the aforementioned legislation (N.J.S.A. 18A:8-43 et seq.). That action transformed the EBOE into a non-operating district as defined under N.J.S.A. 18A:8-43. Query whether the legislation was intended to eliminate only those small non-operating districts that existed prior to the passage of the law or was it intended to operate prospectively? Stated differently, could a district establish itself as a non-operating district after the passage of the legislation? It appears the statutory language was only directed to school districts that were "not operating schools **on the effective date** [June 30, 2009] of [N.J.S.A. 18A-43 et seq.]."

I **CONCLUDE** that Elmer and Pittsgrove BOEs were lawfully permitted to expand their send-receive relationship in 2010 to include grades K-4, resulting in Elmer now sending all of its students to Pittsgrove. N.J.S.A. 18A:38-8. This event was not a

regionalization under N.J.S.A. 18A:13-34. It was an exercise of managements' prerogative permitted in law. Therefore a referendum was not required. While I agree that Elmer is now a non-operating district because Pittsgrove receives all of Elmer's students, that action still does not equate to regionalization or de facto regionalization. The BOEs were lawfully permitted to proceed under N.J.S.A. 18A:38-8 (the send-receive statute) rather than the regionalization statute N.J.S.A. 18A:13-34.

It remains unclear whether the Elmer BOE will even be eliminated after 2010 because of the vague language in the statute. The present action post-dates the effective date of the statute. Moreover a send-receive relationship only requires a five year commitment. N.J.S.A 18A:38-13.1. Therefore the respective BOEs might return to their former send-receive relationship, in whole or in part, at some time in the future.

Even if N.J.S.A. 18A:8-43 et seq. applies to Elmer and Pittsgrove, it would not invalidate their decision to expand their send-receive relationship for all students. There was no statute, regulation, or applicable authority cited by petitioner prohibiting Elmer and Pittsgrove from broadening their send-receive agreement to include all students in Elmer. On the contrary, N.J.S.A. 18A:38-8 expressly permits such action.

The statute eliminating non-operating boards effective June 30, 2009, is silent on the topic of whether the receiving district will function as regional boards or as send-receive boards for other operational needs. The interworking of board membership, tuition calculations, tax assessments, lease arrangements, liquidation if necessary, as well as other necessary functions, either are not contested and/or are not properly before me at this time. These determinations are the next step in the process and must first be resolved by the local boards, county superintendent, or the Commissioner.

I further **CONCLUDE** that based upon my determinations set forth above, all other relief sought by petitioner is either moot or not ripe. Therefore, I **CONCLUDE** that the petition must be **DISMISSED**. This includes petitioner's motion for expedited hearing, stay and emergent relief.

ORDER

Based upon the foregoing, Pittsgrove's motion to dismiss the action filed by petitioner is **GRANTED**. It is **ORDERED** that the action filed by petitioner is **DISMISSED.**

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

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

9-10-10
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 9-10-10

Date Mailed to Parties: 9-10-10

/sd

DOCUMENTS CONSIDERED

Pittsgrove's Motion to Dismiss, June 21, 2010

Petitioner's Opposition, August 18, 2010

Petitioner's E-mail, August 18, 2010

Elmer's Letter joining Pittsgrove's Motion, August 27, 2010

Petitioner's E-mail, August 28, 2010

Pittsgrove's Reply, September 10, 2010

#450-10

OAL DKT. NO. EDU 7538-09
AGENCY DKT. NO. 116-6/09

LAW OFFICES OF ALAN L. ZEGAS AND WENDE L. GREENBERG,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Subsequent to the Agency's receipt of the recommended decision of the Office of Administrative Law (OAL) in this matter, by letter dated August 31, 2010, counsel for petitioners advised that petitioners and the respondent Board were in the process of reaching an understanding with respect to resolving this matter. Consequently, the Commissioner sought an extension of time within which to issue her decision in this matter in order to allow the parties to finalize their resolution efforts. By letter dated October 21, 2010, counsel for petitioners forwarded the parties' attached signed Stipulation of Dismissal of the Petition with Prejudice.

Accordingly, as there is no justiciable controversy in need of resolution in this matter, the recommended Initial Decision of the OAL is rejected as moot, and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/26/10
Date of Mailing: 10/26/10

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

LAW OFFICES OF ALAN L. ZEGAS
552 Main Street
Chatham, New Jersey 07928
(973) 701-7080
Attorneys for Petitioners

LAW OFFICES OF ALAN L. ZEGAS and WENDE L. GREENBERG, an individual, Petitioners, v. **RIDGEWOOD SCHOOL DISTRICT BOARD OF EDUCATION,** Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF AMINISTRATIVE LAW OAL DKT. NO.: EDUOR 07538-2009N AGENCY DKT. NO. 116-6/09 **STIPULATION OF DISMISSAL OF THE PETITION WITH PREJUDICE**

Petitioners the Law Offices of Alan L. Zegas (the "Zegas Firm"), Wende L. Greenberg ("Dr. Greenberg") and Respondent the Board of Education of the Ridgewood School District (the "Board") (collectively, the "Parties"), having reached an amicable settlement of the above-captioned matter, hereby stipulate as follows:

The Petition submitted by the Zegas Firm and Dr. Greenberg in this matter is hereby voluntarily withdrawn with prejudice and without costs to any party.

STIPULATED AND AGREED UPON BY:

LAW OFFICES OF ALAN L. ZEGAS

Dated: By: _____
ALAN L. ZEGAS, ESQ.
552 Main Street
Chatham, New Jersey

WENDE L. GREENBERG

Dated: 10/22/10 BY: Wende Green
WENDE L. GREENBERG, pro se

LINDABURY, MCCORMICK, ESTABROOK AND COOPER

Dated: BY: _____

JEFFREY MERLINO, ESQ.
53 Cardinal Drive
Westfield, New Jersey 07091-2369
Attorneys For The Board Of Education
Of The Ridgewood School District

WENDE L. GREENBERG

Dated: BY:_____
WENDE L. GREENBERG, pro se

LINDABURY, MCCORMICK, ESTABROOK AND COOPER

Dated: 10/15/10 BY: _____
JEFFREY MERLINO, ESQ.
53 Cardinal Drive
Westfield, New Jersey 07091-2369
Attorneys For The Board Of Education
Of The Ridgewood School District

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07538-09
AGENCY DKT. NO. 116-6/09

LAW OFFICES OF ALAN L. ZEGAS
AND WENDE L. GREENBERG,
Petitioners,
v.
RIDGEWOOD BOARD OF EDUCATION,
BERGEN COUNTY,
Respondent.

Judson L. Hand, Esq., for petitioner (Law Offices of Alan L. Zegas, attorneys)

Jeffrey R. Merlino, Esq., for respondent (Lindabury, McCormick, Estabrook and Cooper, attorneys)

Record Closed: June 17, 2010 Decided: July 30, 2010

BEFORE **JOANN LASALA CANDIDO**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner, Dr. Wende L. Greenberg, (Dr. Greenberg) seeks indemnification of attorney's fees pursuant to N.J.S.A. 18A:16-6.1 for defense of criminal charges of which

she was acquitted. The Law Offices of Alan L. Zegas (Zegas Firm) seeks fees and costs incurred in defending Dr. Greenberg. The matter was transmitted to the Office of Administrative Law (OAL) on November 6, 2009, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. The hearing was scheduled for March 15 and March 16, 2010. The matter was converted to a telephone status conference on March 15, 2010, and the parties agreed to file motions and cross-motions for summary decisions. Petitioner filed a motion for summary decision on May 28, 2010. Respondent opposed the motion and filed a response and cross-motion for summary decision on June 3, 2010. Replies were received by June 17, 2010.

The issue presented is whether petitioners are entitled to reimbursement of legal fees and expenses pursuant to N.J.S.A. 18A:16-6.

STATEMENT OF FACTS

I have considered the pleadings and several exhibits submitted by the parties and **FIND** the following uncontroverted **FACTS**:

1. Petitioner Dr. Wende L. Greenberg is a tenured teacher at Ridgewood High School in the employ of the respondent.

2. The New Jersey Education Association (NJEA) and the Ridgewood Education Association (REA) are labor organizations representing the interests of various public school employees of the Ridgewood School District, including Dr. Greenberg.

3. Respondent Ridgewood School District Board of Education is a body corporate and politic having statutory responsibilities for the management and administration of the Ridgewood School District.

4. On July 24, 2007, a Complaint/Summons was issued to Dr. Greenberg in the Ridgewood Municipal Court, charging her under N.J.S.A. 2C:30-3(a) with fourth-degree theft of a cell phone belonging to Christopher Metzger, an employee at

Ridgewood High School. The charge was later downgraded to a disorderly person's offense.

5. The alleged theft took place at Ridgewood High School on July 5, 2007, at a time when Dr. Greenberg was there on school business to collect student papers from her classroom.

6. According to the police report, the cell phone was taken from a table in the hallway outside of the Little Theater in Ridgewood High School on the afternoon of July 5, 2007, and was returned by a student, A.V.-Z., who Metzger claimed had found the phone outside the Little Theater doors.

7. Dr. Greenberg initially retained the law firm of Friedrich & Friedrich located in Ridgewood, New Jersey to represent her. She paid the sum of $2,849.55 to that firm for legal services.

8. Dr. Greenberg subsequently retained legal counsel through the NJEA's and REA's Legal Services Program. Under this program, the NJEA assigns the defense of school-related offenses to outside counsel at no cost to Dr. Greenberg.

9. The NJEA and REA through their Legal Services Program assigned Dr. Greenberg's defense to the Law Offices of Alan L. Zegas.

10. On August 22, 2008, the Honorable Richard J. Donohue, J.S.C., of the Superior Court of New Jersey, Law Division, Bergen County, granted Dr. Greenberg's motion to dismiss the charge on de minimis grounds pursuant to N.J.S.A. 2C:2-11.

11. In defending the charge against Dr. Greenberg, the Zegas Firm provided legal services that, at the firm's standard rates, would have been billed at $68,413.96.

12. However, the Zegas Firm charged the NJEA reduced rates. Therefore, the total amount actually paid to the Zegas Firm by the NJEA in this matter was $20,796.46.

13. By letter dated September 15, 2008, to Merlino, attorney for the Ridgewood Board, the Zegas Firm requested reimbursement of the legal fees incurred on behalf of Dr. Greenberg in defending against the charge.

14. Merlino, by letter dated September 18, 2008, first advised that the Board was refusing to pay. The Ridgewood Board subsequently referred the matter to an insurance carrier for an investigation that was never completed.

15. During the next eight months, the Zegas Firm and the NJEA repeatedly attempted, without success, to negotiate an amicable settlement of the dispute with the Ridgewood Board.

16. By letter to Merlino dated February 9, 2009, the Zegas Firm advised the Ridgewood Board that, as attempts to reach a good faith settlement had failed, petitioners had no choice but to pursue a remedy with the Commissioner of Education.

17. Dr. Greenberg subsequently filed a petition with the Commissioner of Education, which was received on June 10, 2009, seeking indemnification for the attorney's fees expended in defense of the charge against her which was subsequently dismissed.

LEGAL ANALYSIS AND CONCLUSION

The rules governing motions for Summary Decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), the motion for 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." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the

moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one sided that [the moving party] must prevail as a matter of law." Id. at 536. 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). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539.

Petitioners aver that attorney fees were incurred in the defense of the criminal charge against Dr. Greenberg that arose out of the course of her employment and subsequently dismissed, thereby entitling the Zegas Firm to be reimbursed for costs and fees incurred on Dr. Greenberg's behalf.

Indemnity of officers and employees in certain criminal and quasi-criminal actions is governed by N.J.S.A. 18A:16-6.1. The statute provides, in relevant part, that:

> 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.
>
> [N.J.S.A. 18A:16-6.1.]

N.J.S.A. 18A:16-6.1 was interpreted by the New Jersey Supreme Court in Bower v. Board of Education of the City of East Orange (Bower I), 149 N.J. 419 (1997). The Bower court adopted a two-part standard, which dictates that board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges if they meet the following two requirements:

> 1. any act or omission on which the criminal charges are based must "arise out of and in the course of performance of the duties" of the position held by the employee, and
>
> 2. the charges must either be dismissed or result in a final disposition favorable to the employee.
>
> [Id. at 423.]

In Bower I, a teacher was charged with the sexual assault of three kindergarten students in a school bathroom during school hours. Id. at 419. Although the indictment was dismissed, the board of education that employed the teacher refused to indemnify him for his legal fees which resulted from defending the charges. After hearing the teacher's appeal, the State Board of Education remanded the case to an administrative law judge to determine whether the teacher had established "a nexus between the alleged conduct forming the basis of the charges and the performance of his duties in the district so as to support a finding that the criminal actions against him involved alleged acts or omissions arising out of and in the course of the performance of his duties" and a favorable disposition of the criminal charges. Id. at 421. The State Board sought to impose, as an additional requirement for indemnification that "specific testimony be presented by the claimant that rebuts the charges or explains their specific relationship to the claimant's performance of his assigned duties." Id. at 432. The Supreme Court rejected this contention and reasoned that the statute "requires mere proof by a preponderance of the evidence that the act on which the charges are predicated arose out of and in the course of performance of the duties of employment." Id. at 434. The Court illustrated that the State Board's supplemental requirement that specific testimony be presented by the claimant "is absent from the statute and has not been imposed by an administrative regulation adopted to supplement or clarify the statutory requirement for indemnification." Id. at 420-22.

Here, as was the case in Bower I, Dr. Greenberg has been charged with a crime committed during school hours on school premises. Dr. Greenberg is charged with the theft of a cellular telephone that was left unattended on a table in the main corridor of the hallway in which her classroom is located. The risk of a teacher being charged with the theft of an item left unattended in the school, which she would otherwise be expected to collect and report as lost, is of such a nature that the risk would be

contemplated by a reasonable person when becoming a teacher. Similarly, the fact that Dr. Greenberg was on school grounds, during school hours, to collect student papers from her classroom directly lends itself to the conclusion that this risk is at least incidental, if not directly related to Dr. Greenberg's employment as a teacher.

I therefore **CONCLUDE** that the criminal charge against Dr. Greenberg arose out of and in the course of the performance of her position as a teacher in the Ridgewood School District.

The first requirement for reimbursement of attorney's fees for the purpose of N.J.S.A. 18A:16-6.1 is that the charge arises out of the course of the teacher's employment. The Appellate Division in Bower, whose decision was subsequently affirmed by the New Jersey Supreme Court, explained that:

> the criminal charges, in order to arise "out of" the employment, must be of such nature the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a teacher has to do in fulfilling his contract of service.
>
> [Bower v. Bd. of Educ. of the City of E. Orange (Bower II), 287 N.J. Super. 15 (App. Div. 1996), aff'd, 149 N.J. 419 (1997).]

The Bower II court makes clear that Dr. Greenberg need not prove that her presence at the school was directly related to her employment in order to satisfy the requirement. The charge against her is at least incidental to her employment such that a reasonable teacher would expect to risk being charged with theft for performing the function of attempting to return a lost item. The charge against Dr. Greenberg arose out of her employment in the Ridgewood School District, thus satisfying the first requirement of the two-part test.

The second requirement for reimbursement of attorney's fees for the purpose of N.J.S.A. 18A:16-6.1 is that the charge must either be dismissed or result in a final disposition favorable to that employee. The Appellate Division in Bower II articulated

that dismissal of the indictment "constituted a favorable disposition." Bower II, supra, 287 N.J. Super. at 20. However, it is important to note that N.J.S.A. 18A:16-6.1 exists in the disjunctive, requiring *either* dismissal of the charge *or* a final disposition favorable to the employee, and does not require both to exist in the conjunctive in order to satisfy the statute.

N.J.S.A. 18A:16-6.1 does not require dismissal *and* a favorable disposition; it requires one or the other. The word "or" must be given meaning in a proper construction of the statute. As our Supreme Court has previously explained in determining the meaning of a statute, "'construction that will render any part of the statute inoperative, superfluous or meaningless, is to be avoided.'" Abbotts Dairies v. Armstrong, 14 N.J. 319, 328 (1954) (quoting Hoffman v. Hock, 8 N.J. 397, 406 (1952)). To construe "or," as it appears in the statute, to mean "and," would render the word "or" meaningless an inoperative. Therefore, all that is required of Dr. Greenberg is that she demonstrates the mere dismissal of the charge.

Notwithstanding the aforementioned, the Appellate Division in Bower II determined that in the context of N.J.S.A. 18A:16-6.1, dismissal does indeed constitute a favorable disposition. Bower II, supra, 287 N.J. Super. at 20. Therefore, indemnification seems appropriate not only because the charge was dismissed, but also because the charge was disposed of in a final disposition favorable to Dr. Greenberg. Accordingly, I **CONCLUDE** that both standards of the disjunctive test have been satisfied: the charge was dismissed, and the result was a final disposition favorable to the employee.

Respondent claims that petitioner Zegas lacks standing to recover attorney's fees because the firm does not represent Dr. Greenberg in the fee-recovery matter. Rather, the Zegas Firm was retained by the NJEA at no cost to Greenberg.

N.J.S.A. 18A:16-6.1 provides for the indemnity of officers and employees of boards of education for the expenses incurred by that employee in defending against charges which are dismissed or result in a favorable disposition. In relevant part, the statute states that "the board of education shall reimburse [her] for the cost of defending

such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals." N.J.S.A. 18A:16-6.1. In light of the fact that petitioner Zegas Firm, and not Dr. Greenberg, brought this suit for payment under the statute, the within matter must be summarily dismissed as the statute only provides for the reimbursement of fees expended by the employee [herself]. The facts and circumstances of this case do not seem to fall within the purview of the statute.

The language of the statute appears to contemplate reimbursing only those costs actually borne by the employee. This conclusion is echoed by a case that seems to be dispositive to the issue before the court, Meisenbacher v. Board of Education of the City of Newark, 1 N.J.A.R. 162 (1980). In Meisenbacher, the attorney-at-law petitioner sought reimbursement from the respondent board of education for legal fees in relation to the representation of Ray James, a teacher and employee of the defendant. Analogous to the case at bar, the respondent in Meisenbacher refused payment because the "petitioner lacked standing under N.J.S.A. 18A:16-6, in that only Ray James, the teacher, and not his attorney, may seek payment." Meisenbacher, supra, 1 N.J.A.R. at 163.

In examining N.J.S.A. 18A:16-6, which the court stated "must be read in conjunction with the remainder of the statute" the court held that it is clear that "the statute intends to repay officers and employees for legal expenses incurred in defending a civil action." Meisenbacher, supra, 1 N.J.A.R. at 164-165 (emphasis added). The court subsequently held that "the statute does not intend that a board of education shall directly pay counsel fees to an attorney." Id. at 165 (emphasis added). The court further articulated that if "the statute intended that attorneys, themselves, could apply to a board of education for payment of legal fees for services rendered, it would have said so." Ibid. Therefore, the court found that the petitioner law firm had no standing under the statute to bring suit for reimbursement of attorney's fees, and that "only Ray James, the teacher-employee, has such standing." Ibid.

In the within matter, the Zegas Firm, and not the teacher-employee Dr. Greenberg instituted this action for payment of legal fees under N.J.S.A. 18A:16-6.1. The Zegas firm is the only petitioner in this matter seeking to recover fees as evidenced

by the fact that in his Answers to Interrogatories. Zegas writes that "this office does not represent Dr. Greenberg in this matter."[1] In their petition of appeal, the Zegas Firm states that in defending the charge which underlies this matter, Dr. Greenberg paid the law firm of Friedrich & Friedrich a sum of $2,849.55.[2] This is the only reference to Dr. Greenberg's expenditure of any of her own funds in defending the underlying complaint. Thereafter, Dr. Greenberg subsequently retained legal counsel through the NJEA's Legal Services Program who assigned her to the Zegas firm. The firm provided legal services and incurred expenses valued at $68,413.96 based on the firm's standard rates. However, the Zegas Firm charged the NJEA reduced rates, so the total amount actually paid to the firm by the NJEA in this matter was $20,796.46. It has been admitted by the petitioner that Dr. Greenberg only expended the sum of $2,849.55 to her initial law firm of Friedrich & Friedrich, and has yet to incur any out-of-pocket expenses as a result of the work of the Zegas Firm.

For the aforementioned reasons, I **CONCLUDE** that the Zegas Firm does not have standing to request fees under N.J.S.A. 18A:16-6.1. Analogous to the decision by the Meisenbacher court, only the employee of the board of education, and not the law firm who represented the employee, has standing to receive reimbursement for costs incurred in defending an action. Similarly, as a result of the fact that Dr. Greenberg has yet to incur any costs subsequent to those expended on the Friedrich firm, I further **CONCLUDE** that she is not entitled to reimbursement.

Based on the briefs, exhibits and certifications submitted, the undisputed facts illustrate that the petitioners are not entitled to indemnification pursuant to N.J.S.A. 18A:16-6.1, notwithstanding the fact that the attorney's fees incurred in defense of the criminal charge brought against Dr. Greenberg (1) arose out of and in the course of performance of the duties of her employment, and (2) that charge was indeed subsequently dismissed and resulted in a final determination favorable to her. See Bower I, supra, 149 N.J. 419. The petitioners do not have standing within the plain meaning of N.J.S.A. 18A:16-6.1 to recover attorney's fees that have already been paid to the firm by the NJEA.

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[1] (See Exhibit B of resp't's br.: pet'r's Answers to Interrogs.)
[2] (See Exhibit A of resp't's br.: Pet. of Appeal.)

DISPOSITION AND ORDER

Based on the foregoing findings of fact and legal authority, I grant respondent's cross-motion for summary decision and deny petitioners' motion for summary decision and **ORDER** the petitioner's Verified 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 29, 2010
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: July 29, 2010

Date Mailed to Parties: JUL 30 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

#451-10

DENZEL D. RANKINS	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY and JAMES RIEHMAN, STATE-APPOINTED MONITOR OR SUCH OTHER MONITOR CURRENTLY ASSIGNED TO THE PLEASANTVILLE SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a long-time non-tenured security guard in respondent's district, who was non-renewed for the 2009-2010 school year – challenged the State-appointed monitor's rejection of the decision of the Pleasantville Board of Education to rehire petitioner following a *Donaldson* hearing. Petitioner alleged that the State-appointed monitor (Monitor) acted unlawfully in rejecting the Board's decision to rehire him, and seeks reinstatement to his position as of the beginning of the 2009-2010 school year and compensation for lost salary and emoluments.

The ALJ found that: the School District Fiscal Accountability Act, *N.J.S.A.* 18A:7A-54 *et seq.*, authorizes the Commissioner to appoint a state monitor whose scope of powers is delineated in Section (b) of the statute; the Monitor's actions are bound by the education laws; this case involves the non-renewal of a non-tenured staff member – ie: day-to-day operations involving personnel matters – and arises out of alleged inappropriate conduct that is wholly unrelated to the fiscal oversight duties of the Monitor; and neither the Monitor's contract or statute empowered him to overturn Rankin's reinstatement by the Board that was exercised at a *Donaldson* hearing, the right to which is granted under education law. The ALJ reversed the action of the Monitor in overruling the Board of Education, and ordered that petitioner be reinstated to his position effective August 11, 2009 and reimbursed for back pay, less mitigation.

Upon comprehensive review of the entire record in this matter, the Commissioner concluded that the Monitor did not exceed his statutory authority when he overturned the Board's decision to reinstate the petitioner, finding that the Monitor's decision was related to the fiscal management of school funds because it was based in part on concern that the Board would expose itself to potential legal liability if it knowingly reinstated a non-tenured employee who had evidenced inappropriate behavior in the past. Accordingly, the Commissioner rejected the Initial Decision of the OAL and affirmed the decision of the Monitor not to renew petitioner's 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.

October 26, 2010

OAL DKT. NO. EDU 6918-09
AGENCY DKT NO. 276-10/09

DENZEL D. RANKINS	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY and JAMES RIEHMAN, STATE-APPOINTED MONITOR OR SUCH OTHER MONITOR CURRENTLY ASSIGNED TO THE PLEASANTVILLE SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by James Riehman, State-Appointed Monitor ("Monitor"), and the respective replies thereto filed by the petitioner and the Pleasantville Board of Education (Board).

The Monitor submitted exceptions to support his contention that the Administrative Law Judge (ALJ) erroneously concluded that the Monitor did not have the authority to overturn the Board's decision to reinstate the petitioner, a non-tenured security guard, after his *Donaldson* hearing. The Monitor initially takes exception to several factual findings made by the ALJ, arguing that the ALJ generally failed to make findings of fact that encompassed the totality of the evidence presented during the hearing. The Monitor specifically contends that the ALJ erred in finding that: the petitioner has a good relationship with the remaining students; the ALJ's factual analysis of the Monitor's rationale for overturning the Board's vote fails to reflect the testimony; and the ALJ failed to consider the testimony of

assistant principal Hyman-Medley. In his exceptions, the Monitor states that he acted within his authority to override the Board based upon his concern that petitioner has engaged in inappropriate conduct and that his continued employment was not in the interest of the district or the students.

In addition to the factual exceptions, the Monitor also takes exceptions to the legal conclusions reached by the ALJ. The Monitor argues that: the ALJ erred in finding that the Monitor acted outside the scope of his contract; the failure of the Monitor to be involved in the Superintendent's decision not to renew petitioner's employment contract is irrelevant to whether the Monitor exceeded his powers; the ALJ erred in finding that the Monitor does not have the authority to make personnel decisions after a non-renewed employee exercises his rights to a *Donaldson* hearing before the Board; the ALJ incorrectly found that the Monitor did not consider any fiscal factors in overturning the Board's decision; the Judge improperly substituted his judgment for that of the Monitor; and the ALJ's legal conclusion misinterprets the governing law and frustrates the purpose of the School District Fiscal Accountability Act, *N.J.S.A.* 18A:7A-54 *et seq.* ("Fiscal Accountability Act"). In his exceptions, the Monitor generally maintains that – given the petitioner's non-tenured status – he had broad authority to overturn the Board's decision because the Fiscal Accountability Act explicitly grants the Monitor authority over staffing matters, including the ability to hire, promote and terminate employees. Finally, the Monitor argues that the adoption of the Initial Decision would significant weaken the role of the state monitor.

The Board and the petitioner both submitted reply exceptions that contained similar arguments in response to the Monitor's exceptions. In their replies, the Board and the petitioner urged the adoption of the Initial Decision, and cite testimony from the hearing

transcripts to support the factual findings made by the ALJ. The Board and the petitioner further maintain that the statutory power given to the Monitor under *N.J.S.A.* 18A:7A-55 relating to the ability to make staffing and personnel decisions is subject to the education laws and regulations. The Board and the petitioner also emphasize that the Monitor acted beyond the scope of his authority because his decision to overturn the Board was not fiscally motivated. Finally, the Board and the petitioner argue that it was not the intent of the legislature to grant the Monitor the unfettered power to make decisions on issues that do not involve fiscal duties or responsibilities.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the two hearing dates conducted at the OAL on May 11 and June 11, 2010, the Commissioner finds that the Monitor did not exceed his statutory authority under *N.J.S.A.* 18A:7A-55 when he overturned the Board's decision to reinstate the petitioner. Pursuant to the Fiscal Accountability Act, the Commissioner is authorized to appoint a state monitor to oversee the fiscal management and expenditures of school district funds when an independent audit reveals the existence of certain financial shortfalls that are delineated in the Act. *N.J.S.A.* 18A:7A-55(a) and (b). Additionally, there is no doubt that the state monitors have the power to make personnel decisions for non-tenured staff members, when those decisions are necessary to solve the district's fiscal or audit deficiencies. *N.J.S.A.* 18A:7A-55. Further, in order to achieve fiscal stability, state monitors have the authority to override a vote of the board of education. *N.J.S.A.* 18A:7A-55(b)(5).

In this case, the petitioner's employment was initially not renewed based on the fact that he made inappropriate comments toward female students. The Monitor testified that one of the reasons why he overrode the Board's decision to reinstate the petitioner was related to potential liability for the Board in connection with the reinstatement of the petitioner.

(1T114:17-115:4, 1T116:2-13). The Monitor was concerned that there would be similar issues with the students in the future, and that the Board would then be at risk for legal liability for reinstating petitioner knowing that there was evidence of inapprop riate behavior in the past. (*Id.*). Certainly, the exposure to potential legal liability for a school district that is plagued with financial shortcomings is a valid fiscal rationale for making a personnel decision regarding a non-tenured staff member. Therefore, the Commissioner finds that the Monitor's decision was related to the fiscal management of school funds, and thus falls within the statutory authority of a state monitor.

It is important to recognize that the Commissioner's decision in this case does not afford the state monitors more power than is statutorily provided by the Fiscal Accountability Act. State monitors do not have unfettered power to make decisions for the district that are not grounded in fiscal accountability; rather, the state monitors must continue to have fiscal or financial concerns or motivations in order to appropriately overturn a Board's decision.

Accordingly, the Initial Decision of the OAL is rejected; and the Monitor's decision not to renew the petitioner's employment is hereby affirmed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/26/10

Date of Mailing: 10/26/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6918-09
AGENCY DKT. NO. 276-10/09

DENZEL D. RANKINS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY AND JAMES RIEHMAN, STATE-APPOINTED MONITOR OR SUCH OTHER MONITOR CURRENTLY ASSIGNED TO THE PLEASANTVILLE SCHOOL DISTRICT,
Respondents.

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, attorneys)

Kyana Woolridge, Esq., for respondent, Board of Education of the City of Pleasantville (Hunt, Hamlin & Ridley, attorneys)

Sidney A. Sayovitz, Esq., for respondent, James Riehman, State-Appointed Monitor (Schenck, Price, Smith & King, attorneys)

Record Closed: July 23, 2010 Decided: August 3, 2010

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

Denzel Rankins (Rankins or petitioner), a non-tenured security officer with the Pleasantville Board of Education (District or Board), was non-renewed for the 2009-2010 school. Rankins had been employed with the District for over ten years. Rankins requested a Donaldson hearing and prevailed upon the Board to reinstate him. The monitor overturned the Board's decision to reinstate Rankins for reasons unrelated to correction of fiscal or financial deficiencies. For the reasons set forth below, I **CONCLUDE** that the monitor exceeded his authority as outlined in the statute establishing the monitor's powers and further established in education law.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was received by the OAL on November 12, 2009, 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 heard on May 11, 2010. The hearing proceeded on that date and the record closed on July 23, 2010, after receipt of post-hearing briefs.

JOINT STIPULATION OF FACTS

1. The Pleasantville Board of Education is a body corporate and politic of the State of New Jersey empowered by law to administer the Pleasantville School District.

2. James Riehman held the position of State Monitor for the Pleasantville School District from July 1, 2009, through September 30, 2009. He currently holds that position, having assigned to it from March 23, 2010, through March 30, 2011. James Riehman was/is assigned by the Commissioner of Education to that position under the School District Financial Accountability Act, N.J.S.A. 18A:7A-54, et seq.

3. Petitioner was a security officer employed by the Board during the 2008-2009 school year. He had been a security officer employed by the Board of approximately 10 years. Prior to that, he was employed in other positions for the Board.

4. In or about January/February 2009, allegations of abuse were made against petitioner by two students in connection with two separate incidents. Petitioner was suspended with pay while the allegations were pending. It was alleged that petitioner made inappropriate comments of a sexual nature to the students. Petitioner denied the allegations.

5. The Institutional Abuse Investigation Unit from the Department of Children and Families was contacted and conducted an investigation of the matter. (JT-1;JT-2)

6. After investigating the matter, the Institutional Abuse Investigation Unit, on March 12, 2009, issued communications to petitioner and the Superintendent of Schools. Those communications are attached hereto and speak for themselves (JT1 and 2). It is agreed that those communications be deemed confidential and are submitted herewith with the understanding that they are to be placed under seal and thereby closed to the public pursuant to N.J.S.A. 9:6-8.10a and N.J.A.C. 1:1-14.1.

7. The Board conducted its own investigation. The letter dated June 2, 2009, addressed to petitioner, a copy of which is annexed hereto, speaks for itself (JT3).

8. The petitioner responded by letter dated June 2009. The letter is annexed and speaks for itself (JT4).

9. On or about July 14, 2009, petitioner with counsel appeared before the Board in closed session. State-Appointed Monitor James Riehman was present during that meeting. The Board meeting minutes for that date are annexed (JT5).

10. On or about July 28, 2009, the Board voted with regard to petitioner's reinstatement. State-Appointed Monitor James Riehman was present during that meeting. The Board meeting minutes for that date are annexed (JT6).

11. On August 11, 2009, the Pleasantville Board of Education again met and, at that time, took a formal vote with regard to reinstating petitioner. The motion was brought by Board member McClellan and seconded by Board member Sanchez. The vote was six in favor of rehiring him and three against rehiring him. The motion carried. State-Appointed Monitor James Riehman was present during that meeting. The Board meeting minutes for that date are annexed (JT7).

12. On August 25, 2009, the Pleasantville Board of Education met at which time State-Appointed Monitor James Riehman was present. Mr. Riehman stated that he was officially overriding the Pleasantville Board of Education's decision to reinstate petitioner. The Board meeting minutes for that date are annexed (JT8).

SUMMARY OF OTHER TESTIMONY AND STATEMENTS

Monitor James Riehman

James Riehman held the position of State Monitor for the Pleasantville School District from July 1, 2009, through September 30, 2009. On August 25, 2009, Riehman voted to overturn the Board's decision to reinstate Rankins. The foundation for Riehman's decision to override the Board was explained as follows:

> Q. And what did he do in terms of repeated harassment of this middle school female student?
>
> A. To my knowledge, he referred to various body parts or he indicated sexual innuendo. I don't have the specific language, so I can't answer that. I wasn't a witness to that.
>
> Q. Well, when you say, "body parts," I mean, we're adults here. What body parts?

A. I don't – okay. Let's put it this way. I got information second hand basically from the Donaldson hearing. If you have the minutes of the Donaldson hearing, then that's really where it came from.

Q. Well, I'm asking you what information you got from the Donaldson hearing. What do you recall about the information that you got? What did Mr. Rankins do?

A. He essentially sexually harassed this individual student or students.

THE COURT: He's asking for specificity.

THE WITNESS: I don't have specificity. I don't have the notes. I don't have the information, so I can't do that.

* * *

Q. Okay. And the basis for what you're reporting to the Commissioner of Education is that he repeatedly harassed a middle school female student, correct?

A. Right.

Q. That was all the information that you had.

A. That's all the information I can testify to. The other witnesses may testify otherwise.

1T58-60

Riehman reported to the Commissioner's office once per week as required. In an August 24, 2008, e-mail to Joan Saylor, Assistant Commissioner of Education Riehman indicates, "This employee should have been charged with sexual harassment or sexual misconduct. He repeatedly harassed a middle school female student." (P-11). This comment formed the basis of Riehman's decision to overturn the Board's decision made during the Donaldson hearing.

Security Officer Quana Barnes

Quana Barnes is a security officer at the Pleasantville High School. On January 14, 2009, she was at the front desk. Barnes overheard comments between Rankins and A.V. During her testimony it became apparent that Barnes heard only portions of the conversation. While she was seated at the front desk, she observed and heard Rankins come up from behind A.V. and say "Are you scared of a real man?" and "You want a boy, you're scared of a real challenge". Barnes was not aware that just prior to those comments A.V. was showing Rankins pictures of her boyfriend. A.V. is a twelfth grader and her boyfriend was an eleventh grader. In the context of the conversation, Rankins was referring to A.V. dating a younger man.

Barnes also was not aware of A.V.'s statement wherein A.V. indicated that she and Rankins were acting in a playful manner and she was not offended by the conversation (R-4b).

Barnes provided the school administration with a statement of what she believed was harassment of a student. Her statement provides:

> While at the front desk on Jan. 14 at around 1:10 pm, I witness Officer Rankins approach [A.V.] from behind, saying to her you scared of a real man you want a boy, you scared of a real challenge yea you don't want a man. As I looked up I asked her to be sure of what I heard what did he say after confirming she stated that he has been saying things to her and what should she do I told her that she needed to speak with her administrator as so she did. The next day I went and spoke to Miss Medley about the situation also.

Barnes performed no investigation, made no inquiry of the student or the declarant. Barnes assumed that Rankins was "making a pass" at the student when she heard him make statement such as you're "scared of a real man you want a boy, you scared of a real challenge, yea you don't want a man." As she explained during the hearing she may have misunderstood the context of the conversation.

Q. Again, why not talk to Mr. Rankins? I'm just curious of he's a co-worker and you have a good relationship with him, why not talk to him?

A. Because I was shocked that he would say something like that. Honestly, I was shocked.

Q. Even if it was in a joking sense?

A. Everything in a joke is not always good –

Q. I understand.

A. -- when dealing with children, so I was shocked.

Q. And you didn't know he'd seen a picture of her boyfriend?

A. No.

Q. That precipitated that? Did you know he was talking about her boyfriend?

A. I just know that he said it was scared of a real man. "You scared of a challenge." So, no, I didn't know she was – no.

Q. **He was – but you didn't know he was referring to a 12th grader dating an 11th grader when he said that?**

A. No.

Q. Okay. Does that make a difference to you?

A. **It would make a heck of a difference, but that's not how it approached. That's not how it came to me. That's not how –**

2T77-78

Statement of A.V.

A.V. did not testify at any of the hearings involved. She did provide two written statements that state:

> He asked to see my phone and said who's that and I said that's my boo and said what grade is he in and I said he a baby he's only in the 11th and then he said oh he a baby so you aint ready for no man you can't handle a challenge. I said watch your mouth that's still my boo and he was like yea yea I know you scared of a challenge.
>
> Statement of A.V., 1/15/09
>
> (R-4C)
>
> When Mr. Rankins approached me and made certain comments **I took it in a playful manner. All of us students joke around with the security guards so when this incident happen I didn't get in a offensive mood because I didn't think nothing of it.** Ms. Barnes who was standing close by influenced me to tell Mrs. Medley because she said if I don't tell she would tell.
>
> Statement of A.V., 1/15/09
>
> (R-4B)

Another student, T.J., accused Rankins of inappropriate statements in December 2008.

Statement of T.J.

> I, [ ], have experienced many problems with Mr. Rankins. He has been giving me nasty comments and looks lately, well forever but now its just getting seriously bad. Not so long ago, he came towards me when I was waiting outside the café, and said "what happened to you..in 8th grade prom picture you had a better body then you do now. Another example if I was walking in the hall he would stare at me until I said anything. Also yesterday 12/11/08 I was in Mrs. Delaney classroom during first period and he came in by the door while Mrs. Delaney was holding it for someone. I felt him staring at me and I was right. I looked up and seen him eyeing me. I tried to ignore it but he wouldn't stop so I asked him "what are you looking at. He didn't say nothing but smile and wink at me. So this time I yelled it at him. He answered "I wasn't looking at you. I was looking at Ms. Aalyah [ ]. I was like [unreadable]. Said what you mad because she looks better and have a better body. I started to [unreadable] him really feel so uncomfortable around him.

> He makes me scared to walk through the halls by myself thinking he's going to pop out of nowhere.
>
> (R-6B).

Denzel Rankins

Rankins admitted making the statement to A.V. that "he's just a baby" after looking at a cell phone picture of her boyfriend. On cross-examination, Rankins denies making any other statement to A.V. that would be considered inappropriate. 1T 215-217.

With regard to T.J., Rankins testified he barely ever saw this student. T.J. was in eleventh or twelfth grade. Rankins recalled a prior occasion when his cell phone was either stolen or misplaced on a bus ride home. The next day Rankins' cell phone was thrown out the window of the bus from where T.J. was sitting, while Rankins exited the bus. 1T161. He was not sure who actually took his cell phone or who threw it out the bus window. On December 9, 2008, Rankins was in the high school hallway and T.J. said "go suck some dick." 1T164. Rankins told T.J,. she had a very nasty mouth. Id. Rankins denied any further contact with T.J.

The T.J. matter was resolved on December 22, 2008, with a written warning. (R-6a). Rankins and Stephen Townsend had a meeting. Townsend concluded Rankins made inappropriate statements. Townsend did not testify.

Character Witnesses

Derrick Carrington, Athletic Director, Irvin Doris, Security Officer, and Jean Hovey, union representative all testified as to Rankins' good character. They all recalled specific instances where petitioner helped students as well as other staff members. Rankins is known to go the extra-yard for students in need. He has been seen chastising males student grabbing the buttocks of female students in the hallway,

giving students lunch money out of his own pocket, cleaning up after food fights, breaking up fights and coaxing students to cool off before fighting.

FINDING OF FACTS

1. Rankins made some form of inappropriate statements to either T.J. or A.V.

2. Rankins was a non-turned staff member who was non-renewed for the 2009-2010 school year because of his inappropriate contact with T.J. and A.V.

3. Rankins was employed with the District for over ten years, has a good employment record, is well liked by other teaching staff members, and has a good relationship with the remaining students.

4. Rankins explained the nature, extent and context of his conduct to the Board at his Donaldson hearing.

5. On August 11, 2009, the Board exercised its statutory authority under education law at a Donaldson hearing and reinstated Rankins.

6. On August 25, 2009, the monitor overturned the Board's decision to reinstate Rankins for reasons that were not connected to solving the district's fiscal or audit deficiencies. The monitor did not want Rankins reinstated for reasons exclusively related to Rankins' alleged conduct.

LEGAL ANALYSIS

The School District Fiscal Accountability Act authorizes the Commissioner of Education to appoint a state monitor when an independent audit concludes that two of the following circumstances have occurred:

1. The district ends the fiscal year with a deficit balance.

2. The district receives a qualified opinion by its independent auditor.

3. The district receives an adverse, disclaimer, or qualified opinion by its independent auditor.

4. Findings by its independent auditor identified as material weaknesses in internal controls.

5. The district fails to develop and implement a plan acceptable to the commissioner or his designee to address a potential or actual deficit balance.

6. The district fails to implement a plan making the appropriate corrections as delineated in the prior year's audit.

7. The district is required to return federal funds that were not disburse in accordance with a grant.

8. The district submits the annual audit after the submission date.

N.J.S.A. 18A:7A-55(a).

Section (b) of the statute delineates the scope of the monitor's powers. It provides:

> The State monitor shall:
>
> (1) oversee the fiscal management and expenditures of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and payment of bills and claims;
>
> (2) oversee the operation and fiscal management of school district facilities, including the development and

> implementation of recommendations for redistricting and restructuring of schools;
>
> (3) ensure development and implementation of an acceptable plan to address the circumstances set forth in subsection a. of this section which resulted in the appointment of the State monitor. The plan shall include measurable benchmarks and specific activities to address the deficiencies of the school district;
>
> (4) oversee all district staffing, including the ability to hire, promote, and terminate employees;
>
> (5) have authority to override a chief school administrator's action and a vote by the board of education on any of the matters set forth in this subsection, except that all actions of the **State monitor shall be subject to the education, labor, and employment laws and regulations, including the "New Jersey Employer-Employee Relations Act," P.L.1941, c.100 (C.34:13A-1 et seq.), and collective bargaining agreements entered into by the school district**;
>
> (6) attend all meetings of the board of education, including closed sessions; and
>
> (7) meet with the board of education on at least a quarterly basis to discuss with the members of the board the past actions of the board which led to the appointment of the State monitor and to provide board members with education and training that address the deficiencies identified in board actions.

Riehman's contract contains a provision related to termination of non-tenured staff members. Paragraph 6 states:

> 6. Oversee all district staffing with the ability to hire, promote and terminate the employment of employees. This includes recommendation and oversight of any **sick-leave buyout** or other **retirement incentive program** presented to the board, and any **reduction-in-force** of tenured personnel or issuance of **termination notices for non-tenured teaching staff in response to the school redistricting and restructuring plan**;

Id.

The issue here is whether the monitor exceeded his authority by overruling a Board decision made at a Donaldson hearing. Donaldson v. Board of Educ. of North Wildwood, 65 N.J. 236, 240-41 (1974). The monitor's actions are bound or limited by education laws. N.J.S.A. 18A:7A-55(b)(5). A Donaldson hearing arises when a non-tenured staff member is non-renewed for the following contract year. The staff member's right to a Donaldson hearing is codified at N.J.S.A. 18A:27-4.1. This statute states in part:

> 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**.

Rankins was employed by the District as a security officer for about ten years. He held other titles before he became a security officer. The superintendent determined to non-renew Rankins for the 2009-2010 school year, due to alleged conduct violations. On June 2, 2009, Superintendent Alston confirmed that it was Rankins' alleged conduct that formed the basis of his decision to non-renew him. (JT-3). Thus, the monitor was not involved in the initial decision to let Rankins go. The decision was exclusively a Board matter at this juncture.

On June __, 2009 Rankins responded to Superintendent Alston. Rankins disputed the Superintendent's conclusions. (JT-4). Indeed Rankins requested a [Donaldson] hearing before the Board to address matters that were entirely unrelated to fiscal or audit matters. School law permits Rankins to make a presentation before the Board, "**to convince the members of the board to offer reemployment.**" Id.

On August 11, 2009, Rankins appeared before the Board for his Donaldson hearing. Riehman and Alston were present. After a presentation, the Board voted to

reinstate Rankins (6 in favor and 3 against). Rankins exercised his rights under education law and the Board performed it statutory duty. N.J.S.A. 18A:27-4.1.

Riehman was adamantly against Rankins being rehired, as indicated in his email to Joan Saylor, supra. Riehman believed Rankins repeatedly harassment or sexual harassment a middle school student. (P-11). But Riehman's grasp of the facts were vague and limited. 1T58-58. Riehman did not interview any of the students. He had no firsthand information. He incorrectly concluded one of the students was in middle school. Middle school students are substantially younger. The student(s) were in high school. Riehman had no details to support the allegation of repeated harassment. Indeed, none of the victims testified at the Donaldson hearing or at any other hearing. And the initial statement of security officer Quana Barnes was predicated upon a misunderstanding, as came out during her testimony in this proceeding. Barnes only heard a small part of the conversation between Rankins and A.V. And Barnes made mistaken conclusions about their conversation. 2T78. Consequently Riehman's understanding of events may have been unduly influenced by Barnes' written statements. Once these statements were challenged as part of an adversarial proceeding, the nature and context changed significantly.

Cross-examination is a vital tool in extracting the untold story. Neither A.V. nor T.J was subject to any examination. Their statements were entirely hearsay. And Rankins denies the allegations contained therein. This does not mean Rankins' statements were appropriate or proper. But they were not as pervasive, were not made to middle school children, and had a different context once more facts were closely examined.

More importantly, none of Riehman's reasons relate to fiscal, audit, or similar matters contained in his contract or found in the monitor statute. For example, Riehman's reasons were not related to redistricting or restructuring non-tenured staff, reduction in force, sick-leave, retirement incentives or other fiscal related areas.

There is no clear line between the powers granted to the monitor or those retained by the Board when a monitor has been appointed. Obviously the monitor holds greater authority in matters that are fiscal in nature. Indeed it was a poor audit that trigged the appointment of the monitor. N.J.S.A. 18A:7A-55(a) and (b). And the criteria to invoke the monitor's statute and the criteria embodied within the powers granted to the monitor are almost universally geared towards correcting the (fiscal) problems identified in the annual audit of the district. In other words, the scope of the monitor's power is directly linked to the audit. And his chief responsibility is to correct the deficiencies identified in the audit.

This is an isolated case involving the non-renewal of a non-tenured staff member which does not fall within the audit. This case concerns day-to-day operations involving personnel matters. A non-renewal arising out of alleged improper behavior is not a fiscal matter envisioned under the monitor powers as proscribed in his contract or statute. Here Rankins was being non-renewed for alleged inappropriate conduct on the job. The monitor's **contractual power** to impact a **non-tenured** staff member's contractual employment is limited to redistricting or restructuring plan, reductions in force, and other similar actions that address the overall financial integrity of the district. (See, monitor's contract P-1, ¶ 6). I **CONCLUDE** that neither the monitor's contract or statute empowered him to overturn Rankins' reinstatement by the Board that was exercised at a Donaldson hearing.

Finally a non-tenured staff member has a statutory right under **education law** to appear before the Board in an attempt to regain his position, when non-renewed. N.J.S.A. 18A:27-4.1. The monitor's powers are expressly subject to education law. N.J.S.A. 18A:7A-55(b)(5). It follows then that the monitor's powers are restrained by education law that are outside fiscal matters. Therefore, when Rankins appeared before the Board at his Donaldson hearing, Rankins was properly exercising his educational rights, granted by statute, which cannot be disturbed by the monitor. Once the Board reinstated Rankins, the Monitor had no authority to overturn the Board's determination. Otherwise the monitor's actions contravene the very statute authorizing his appointment that expressly limits his authority, when education law is involved.

N.J.S.A. 18A:7A-55(b)(5). And the monitor's contract expressly limits his authority in regard to non-tenured staff members. (P-1, ¶ 6). I **CONCLUDE** that Rankins and the Board properly exercised their rights and responsibilities under education law, and as such, the monitor lacks authority to overturn such action.

The monitor is not totally powerless notwithstanding the Donaldson process codified under education law. A Donaldson hearing is not a basis to circumvent the powers of the monitor when the monitor initiates and pursues fiscal action. If the monitor restructured or RIF'd non-tenured staff for fiscal reasons, a Donaldson hearing would not be a means for a staff member's reinstatement, regardless of the Board's decision at a Donaldson hearing. Pleasantville Board of Educ. and the Pleasantville Educ. Ass'n v. State Dep't of Educ., et al. No. A-2123-08T3 (App. Div. August 25, 2009) (where the court held that a RIF imposed by the monitor could not be rejected by the Board).

The circumstances here are legally and factually distinguishable from Pleasantville Board of Educ. and the Pleasantville Educ. Ass'n v. State Dep't of Educ., supra. Rankins' case was not initiated by the monitor. The monitor was not acting under his contract or statute. Rankins was essentially being fired by the superintendent. It was ordinary school board business from outset. The monitor merely intervened in the process for non-fiscal reasons. The monitor's understanding of the events, by his own admission, was vague and unclear. 1T57-60. Security officer Barnes, the primary witness and reporter of the A.V. incident, admittedly misunderstood parts of the A.V. event. 2T78.

ORDER

Based upon the foregoing, I **ORDER** that the action of the monitor overruling the Board of Education is **REVERSED** and that petitioner Rankins shall be reinstated to his position as a security officer, effective August 11, 2009. Petitioner shall be entitled to back pay from August 11, 2009, to the date of his reinstatement. The amount of back pay shall be reduced and mitigated to the extent of any income earned or that could have been earned by petitioner during this period. Proof of income shall be submitted

by or on behalf of petitioner to the Board of Education within thirty (30) days of issuance of this decision. The parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the petitioner's reinstatement be delayed pending resolution of any potential back pay.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 3, 2010
DATE

W. Todd Miller
W. TODD MILLER, ALJ

Date Received at Agency: 8-3-10

Date Mailed to Parties: 8-3-10

sd

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Professional Services Contract (06/08/09)

P-2 Professional Services Contract (03/17/10)

P-3 Letter from Michael Damm, Esquire to James Reichman, 09/03/09

P-4 Letter from Michael Damm, Esquire to James Reichman, 09/24/09

- P-4(a) Jean Barksdale Letter, 9/9/09
- P-4(b) Andrea Atkins Turner Letter, 8/28/09
- P-4(c) Leni Benjamin Letter, 8/29/09
- P-4(d) William J. Martin Letter, 9/3/09
- P-4(e) Elder Antonio Gandy Letter (undated)
- P-4(f) Irene Cruz Letter, 9/1/09
- P-4(g) Linda G. Richards Letter, 8/27/09
- P-4(h) Ina Cowherd Letter, 9/21/09

P-5 Denzel Rankins Employment Evaluations, 4/13/00, 4/26/01, 2/27/02, 2/6/02, 1/30/04, 3/4/05, 4/4/07, 10/31/07 and 11/21/08)

P-6 Letter from Michael Damm, Esq. to Dr. Clarence Alston, Superintendent, 3/23/09

P-7 Letter from Michael Damm, Esq. to Dr. Clarence Alston, Superintendent, 4/8/09

P-8 Denzel Rankins Statement, 1/20/09

P-9 Bruce Ingram Statement (undated)

P-10 Memo Regarding Pants Incident, 12/22/92

P-11 James Riehman Letter to Joan Saylor, 8/24/09

P-12 James Riehman Letter to Pleasantville Board of Education, 8/24/09

P-13 Interrogatories, #8 and #9

P-14 Townsend Memo, 1/20/09

For respondent:

R-1 Letter from Michael Damm, Esq. to James Riehman
R-2 Joint Exhibits (excluding contracts)
R-2A Board Meeting Minutes, 7/14/09
R-2B Board Meeting Minutes, 7/28/09
R-2C Board Meeting Minutes, 8/11/09
R-2D Board Meeting Minutes, 8/25/09
R-2E Letter from Dr. Alston to Rankins, 6/2/09
R-2F Letter from Rankins to Dr. Alston, June 2009
R-3A Riehman e-mail, 8/24/09
R-3B Riehman Letter to Board, 8/24/09
R-4A Report of Felicia Hyman, Assistant Principal
R-4B Statement of A.V., 1/15/09
R-4C Second Statement of A.V., 1/15/09
R-5 Incident Report Completed by Quana Barnes
R-6A Memo from Stephen L. Townsend, 12/22/08
R-6B Student Statement, December 2008
R-6C Memo from Rankins to Townsend, 1/20/09
R-6D Memo from Townsend to Superintendent Alston, 1/22/09

Joint:

JT-1 Letter from Department of Children and Families, Institutional Abuse and Investigation Unit to Denzel Rankins, March 12, 2009 **(record sealed)**
JT-2 Letter from Department of Children and Families, Institutional Abuse and Investigation Unit to Dr. Clarence Alston, Superintendent of Pleasantville Public Schools, March 12, 2009 **(record sealed)**
JT-3 Letter from Dr. Clarence Alston, Superintendent to Denzel Rankins, June 2, 2009
JT-4 Letter from Denzel Rankins to Dr. Clarence Alston, Superintendent, June, 2009

JT-5 Pleasantville Board of Education Meeting Minutes, June 14, 2009

JT-6 Pleasantville Board of Education Meeting Minutes, July 28, 2009

JT-7 Pleasantville Board of Education Meeting Minutes, August 11, 2009

JT-8 Pleasantville Board of Education Meeting Minutes, August 25, 2009

WITNESSES

For Petitioner:

James L. Riehman

Denzel Rankins

Derrick Carrington

Irvin Dorris

Jean Hovey

For Respondent:

Filicia Hyman-Medley

Quanna Barnes

452-10

OAL DKT. NO. EDU 3192-10
AGENCY DKT. NO. 41-3/10

IN THE MATTER OF THE TENURE HEARING OF ENRICA MERCORELLI, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.	COMMISSIONER OF EDUCATION DECISION

Tenure charges were brought against respondent Mercorelli, a tenured health teacher, in the wake of her decision to instruct her class about the demeaning effect of certain language used by students in the district's schools. In the course of instruction, she specifically articulated the offending words, disconcerting several students and their parents.

The Acting Commissioner agrees with the Administrative Law Judge (ALJ) that respondent's behavior was a breach of professionalism which, however, does not warrant termination and loss of tenure. Similarly, the Acting Commissioner concurs with the penalty which the ALJ recommended be imposed upon respondent. Accordingly, respondent will forfeit 120 calendar days of pay pursuant to *N.J.S.A.* 18A:6-14, forego an increment for the 2010-2011 school year and successfully complete pedagogical coursework – before the end of 2011 – that addresses classroom demeanor and the proper boundaries between school instruction and parental guidance. Such coursework shall be subject to reasonable review and approval by the petitioning Board of Education.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/10
Date of Mailing: 10/27/10

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

IN THE MATTER OF THE TENURE HEARING OF ENRICA MERCORELLI, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioning Board filed tenure charges of conduct unbecoming, insubordination and other just cause against respondent Enrica Mercorelli – a tenured health teacher – alleging that her conduct in the presence of students on November 19, 2009 failed to comport with the reasonable expectations of behavior for a tenured employee. The charges stem from a spontaneous lecture delivered by respondent to her middle school health class which aimed to teach students that the use of inappropriate and obscene words was demeaning to the user as well as the recipient, and that the use of such words was disrespectful to both parties. In the course of this lesson, respondent allegedly used words that were unacceptable for a teacher to say in a classroom, in the presence of students. The petitioning Board sought revocation of respondent's tenure and termination of her employment.

The ALJ found, *inter alia*, that: on November 19, 2009, respondent – in the context of an unplanned lecture prompted by the rudeness of some of her students – recited a list of words that have no place in the classroom; respondent had no proper basis to advocate against the use of four-letter words, anatomical words, and slang references to same by actually stating each word or phrase to her students; though her goal may have been worthwhile, respondent's behavior clearly went beyond the boundaries of her professional responsibilities and constitutes unbecoming conduct. The ALJ concluded that, while her conduct was certainly unprofessional, it did not rise to a level that would justify terminating her tenure and career. Accordingly, the ALJ ordered that respondent forfeit 120 days of pay and one year's salary increment, and that she complete coursework in pedagogy that addresses the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control, as well as professional classroom demeanor.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter.

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

October 27, 2010

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03192-10

AGENCY DKT. NO. 41-3/10

IN THE MATTER OF THE TENURE HEARING OF ENRICA MERCORELLI, BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY.

Mark A. Tabakin, Esq., for petitioner; **Sarah A. Makuck**, Esq., on the brief (Weiner Lesniak, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: August 9, 2010 Decided: September 13, 2010

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

Enrica Mercorelli is a tenured teacher employed by the Linden Board of Education. The Board filed tenure charges against her with the Commissioner of the Department of Education, alleging that her conduct in the presence of students on November 19, 2009, failed to comport with the reasonable expectations that adhere to the status of tenured employee and that as a result, her tenure should be removed. The Board certified the charges on January 19, 2010, but the charges were not forwarded to the Commissioner until March 5, 2010. Mercorelli filed an Answer to the charges on March 8 and on March 18, 2010, the Commissioner transmitted the contested case to the Office of Administrative Law for hearing. On June 2, 2010, the parties and their counsel appeared before this judge in Newark and advised that they intended to reach a stipulation on the facts of the matter and submit the same to me, supplementing the stipulation with briefs. The Stipulation of Facts was received on July

8, 2010. The briefs were received on July 29 and 30; reply briefs were received on August 9, 2010, on which date the record closed.

PRELIMINARY COMMENTS AND FINDINGS

The essential issue of this case is whether Ms. Mercorelli's acknowledged use of a particular set of words in her sixth grade classroom on November 19, 2009, was so inappropriate in nature and context as to rise to the level of a violation of professional standards and expectations, such as to amount to misconduct, incompetence and/or insubordination, as charged by the Board, and whether, if the actions do rise to such level, the proper outcome is the removal of tenure, as urged by the Board, or some lesser disciplinary sanction, as Mercorelli believes to be the more appropriate outcome. While in their briefs the parties dispute the meaning of some of the actions that occurred, in the end these disputes do not affect the conclusion that, given the stipulated facts, there is no doubt whatsoever that Ms. Mercorelli acted in a manner inconsistent with her professional responsibilities and engaged in professional misconduct. However, unless any act of professional misconduct be deemed as necessarily establishing incompetence, I do not find her action to be indicative of that level of abysmal professional standing. Finally, I find no evidence of insubordination, as there is no evidence of her refusal to obey any command, directive or request, other than the more generalized demands of her status as a professional educator. In view of these findings, after listing the Stipulations, this decision will address the sanctions issue, including the parties' contentions as to the impact of the circumstances in which the misconduct occurred.

The Stipulation of Fact, which is adopted as a set of **FINDINGS OF FACT**, reads as follows:

> 1. The Linden Board of Education (hereinafter referred to as the "Board") is a public employer within the meaning of N.J.S.A. 34: 13A-I, et seq.
>
> 2. Enrica Mercorelli (hereinafter referred to as "Respondent") is employed by the Board as a tenured teaching staff member.

3. For the 2009/2010 school year, Respondent was assigned to work at McManus Middle School as a health teacher for grades six, seven and eight.

4. November 19, 2009 was the first day of the second marking period.

5. On November, 19. 2009, during Respondent's eleventh period Health class, Respondent began class by explaining classroom procedures. A student asked whether they would have homework, to which another student responded effectively saying "shut up, what are you stupid?" or "shut up and we will find out."

6. In response to the student's comment, Respondent began lecturing the entire class about self-respect.

7. Prior to instructing her students on the "words" that should never be used by people who had self-respect, Respondent asked the students whether or not they had cell phones.

8. When the students responded by a show of hands, Respondent instructed the students to turn off their phones and place the cell phones on their desks.

9. Respondent also advised the students that, as a teacher, she was not permitted to curse, so she removed her identification badge prior to delivering her explicit lecture on words that she did not want to hear in the class room.

10. Only after Respondent ensured that all of the cellular telephones were turned off and she had removed her badge did she begin to deliver her lecture on "self-respect".

11. During the afternoon of November 19. 2009, the parent of L.A., one of the students in Respondent's eleventh period Health Class, reported that her child had revealed to her the contents of Respondent's lesson that day and that she was troubled by such comments.

12. After receiving the report from L.A.'s mother, Principal John S. Kolibas questioned L.A. regarding what had happened during Respondent's class.

13. L.A. reported that Respondent had set forth an explicit and vulgar list of words that she believed self-respecting individual do not use, such as "God damn, asshole and other words relating to sex such as tits and balls".

14. Following L.A.'s report, a second student J.J. was questioned about the events that transpired during the eleventh period Health Class on November 19, 2009.

15. J.J. corroborated L,A.'s report of Respondent's lecture, adding that Respondent specifically used the words "shit", "hell", "damn", 'titties" and "dick".

16. Both L.A. and J.J. indicated that they were extremely uncomfortable about what had transpired in class.

17. Based upon the statements of L.A. and J.J., Respondent, in the presence of her union representative, Respondent was questioned by Mr. Kolibas regarding the events occurring in her eleventh period class on November 19, 2009.

18. Respondent confirmed that in response to a student saying "shut up," she lectured the class on words that should never be said by the students if they respected themselves.

19. On November 20, 2009, Respondent provided Mr. Kolibas with a written statement, memorializing what had transpired in her class on the previous day. See Exhibit A.

20. In her statement, when asked to write down the words that she used, Respondent reported that she had said the following words: "fuck, suck, tits, ass, balls, dick, cunt, shit, pussy, dam (sic), asshole. God-dam (sic), fuck you," to the 12 and 13 year old students of her eleventh period class that same day. See Exhibit A.

21. As a result of her conduct. Respondent was immediately suspended, with pay, pending a further investigation. See Exhibit B.

22. Respondent subsequently sent an electronic mail message to Mi. Kolibas and Jennifer Smith, the School's Vice Principal, apologizing for her "lapse in discretion". See Exhibit C.

23. Based upon the facts set forth in Paragraphs 7 through 10, Respondent was questioned for the second time on November 23, 2009, in the presence of her Union Representative.

24. Respondent admitted that the allegations as set forth in Paragraphs 7 through 10 were true and explained that she

had her students turn off their cell phones because, admittedly, she did not want her words recorded and played out of context at a later date.

25. Respondent provided Mr. Kolibas with a second written statement confirming that she had her students turn off their cell phones because she was "worried" that her lesson on "improper disrespectful words would be recorded". See Exhibit D.

26. in an effort to explain her conduct, Respondent's attorney, Michael T. Barrett, Esq., forwarded counsel for the Board a letter, attempting to explain Respondent's lecture, explaining:

> ...Having taught for many years. having walked the halls in schools in Linden and elsewhere, having hears these words used by students multiple times on a daily basis, having found many of these words scratched onto books discarded in the classroom and written surreptitiously on class work hanging in the classroom, Ms. Mercorelli determined that the subject area was an appropriate topic for instruction. This Period 11 is to cover, as part of the curriculum, character education, basic anatomy and. physiology including units on puberty and disease. Concerned upon what she continually heard, saw and read, she wanted to make certain, the class understood her expectations on self-respect, respect for others and general decorum as the semester continued.
>
> This is the context in which the lesson was taught .....

See Exhibit E.

27. Respondent's lesson plan reflects that she did not have an. anatomy lesson planned for the day. Although she planned to instruct her students on the rules of the classroom and respect, she planned to do so through the distribution of a contract entitled "respect and responsibility contract". See Exhibit F.

28. Between December 15 and December 16, 2009, written statements were obtained from every student in Respondent's eleventh period class. Those statements are contained in the Sworn Statement of Evidence. More

particularly, true and accurate copies of the Statements provided by A.Z., I.G., and I.R. are attached hereto as Exhibits G, H, and I, respectively.

29, The students' statements confirmed Respondent's admissions that she used obscene and vulgar words as part of her "lesson" to her eleventh period Health class on November 19, 2009.

30. The students' statements established that Respondent used the following words on November 19, 2009: "bullshit", "ass", "asshole", "balls", "ballsack", "bitch", "dick", "fuck", "fuck you", "pussy", "shit', "vagina", "penis" and "tits".

31. A student described Respondent and her lesson as shocking.

32. In addition, two parents forwarded letters of complaint to the school's administration, voicing their outrage over Respondent's behavior and how such misconduct shocked and embarrassed their children. See Exhibits J and K.

APPLICABLE 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).

"Unbecoming conduct" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "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 Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). 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.

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).

DISCUSSION

Based upon this Stipulation and the statements received from students that were also presented as exhibits, I **FIND** that on November 19, 2009, at the start of the 11th period Health class, something prompted Ms. Mercorelli to explain to her students certain rules of her classroom. One of the students reports that there was a reference to a student saying "shut up" to someone, although in that statement it is unclear whether the student actually heard this remark or whether the student is merely reporting what Mercorelli said happened. Nevertheless, Mercorelli reported in her November 20, 2009, statement that a student had made such a comment, and it seems

most probable that the action or event that prompted the discussion about rules and conduct did begin after she heard such a statement. Whether this involved a "commotion", as characterized by Mercorelli's brief, or not, is largely immaterial. It is sufficient to conclude that the most likely scenario is that something happened that prompted Mercorelli to act, and that she did not simply decide to discuss these words in a vacuum, nor as a pre-planned "lesson" for the day. That said, it is then abundantly clear that Mercorelli proceeded to recite a rather comprehensive list of words that clearly have no place whatsoever in a classroom. And while she was a health teacher, it is not claimed by her that these words were utilized as a part of a discussion of health as such. Instead, she intended that the message to students be that the use of such words and phrases was demeaning to the user as well as the recipient, and that their use was therefore disrespectful to both parties. Presented in the proper manner, with a generic suggestion as to nature of the words and phrases, but without the specificity here employed, such a message about the corrosive impact of language could surely be a message worth delivering to all students, and it may be fair to say that in this day and age, if indeed not in earlier times, the reality is that the use of some of these words, if not indeed all, is not unknown to at least a portion of the student population of middle school children in most, if not all, school districts. One cannot be too unrealistic when dealing with such matters. But be that as it may, I **FIND** that there is no question that Ms. Mercorelli had no charge, or any proper basis whatsoever, to carry the message of respect to the students with such particularized, vivid and direct force. The words related to the students, even if known by many of them, are not words that any teacher should say in a classroom in the presence of any students, under any circumstances. And it must be noted that even to the extent that it might be entirely professional to tell a student not to tell someone to "shut up," there is a world of difference between addressing this sort of disrespectful language and conduct and expanding the "lesson" (to view it from Mercorelli's stated viewpoint) to advocating against the use of four-letter words, anatomical words and slang references to such by actually stating each word or phrase to the students. In doing so, I **CONCLUDE** that this teacher clearly "crossed the limits," and went beyond the boundaries of her professional responsibilities, forgetting exactly what it is that she is supposed to represent to her students. And in so doing she acted in an unprofessional manner that properly is deemed misconduct. Indeed, while her counsel argues strenuously against her loss of tenure, it does not appear that he, or

she, seriously disputes the impropriety of her actions. While they attempt to place it in a context and demonstrate that this was not a case of her attempting to use language to insult or coerce a student, or to demean a student for a characteristic such as race, religion, or other insidious reason, they do not suggest that even with the intent of teaching a lesson, her manner of doing so was proper and professional.

In arguing both for a finding of guilt and for removal of tenure as the appropriate sanction, the Board appears to argue that Ms. Mercorelli has not accepted the impropriety of her action. It states that while she first acknowledged the "lapse of judgment" (which this event surely involved), she later "recanted her apology" and tried to defend her use of the offending language. But I do not see this as a proper understanding of her position. In her November 20, 2009, statement, she referred to the student saying "shut up" and her use of that instance "as a teachable moment" to address respect for one's self. In her e-mail of that day, she apologized for her "lapse of discretion" and promised that she would never allow such a thing to happen again and would "exercise more prudence so as to not put myself, the school or the administration in any kind of jeopardy in the future." In her November 23, note, she added the detail about the cell phones that will be discussed shortly, and then, in her attorney's letter of December 4, 2009, Mr. Barrett proffered that the use of the words had to be understood in a context and that it was in the context of hearing the student say "shut up" and her having heard inappropriate language in the hallways over many years that she determined the subject area [use of language] was an appropriate topic for instruction in a class that had as a part of its curriculum "character education" and in which she wanted the students to understand "her expectations on self-respect, respect for others and general decorum . . . ." While the Board may see Mr. Barrett's expanded comments on the context that led to Mercorelli's actions on November 19 as some sort of attempt to deny any wrongdoing, I **FIND** that Mercorelli's consistent position has been that, prompted by the comment she heard, she found it proper to address her students on the use of certain words the use of which was disrespectful and demeaning. Unfortunately, while her goal may have been laudable, for the use of these words by students is surely to be discouraged, Ms. Mercorelli, as she and her counsel understand, utilized a flawed and troubling approach to try to teach a lesson to her students. Her attempts to explain why she acted and to offer that she thought that she

was addressing a legitimate concern cannot reasonably be understood as a denial of the impropriety of the method utilized to achieve that end.

The Board is also concerned that the evidence be understood to demonstrate the calculated manner in which this teacher went about speaking to her students about something that, as the Board views the situation, she obviously knew ahead of time was not a fit subject for discussion. That she first decided to talk about these words and then directed that all cell phones be placed on the desks in a shut off mode is seen as betraying any attempt to minimize either the seriousness of the offense or to dispel any notion that she acted in a spontaneous manner. Surely, she did make a conscious decision that she should talk to her students about these words. And to that extent, there is no doubt as to the deliberate nature of her misconduct. It did not involve a spontaneous outburst, and she does not seek to portray it as such. As for the cell phones, she explains that she did not want her comments recorded. The Board suggests that this action betrayed a consciousness of guilt, a knowledge that what she was about to do was wrong, so much so that she wanted to make sure there was no recording evidencing what she was about to say. I understand that the Board may see it this way, but in a world in which it is common knowledge that practically anything can be recorded or photographed and almost instantaneously be posted on the Internet, YouTube and the like, for all the world to see, in whatever context or lack of context the poster chooses, it is understandable that Ms. Mercorelli, who in this regard is nowhere accused of or said to have told the students that the discussion was a secret or that they should not mention it to their parents, may have simply wanted to avoid having what she felt was an appropriate talk (even though her belief was incorrect) used in an inappropriate, and exceedingly public, fashion. Indeed, the very problem of Internet posting of in-school activity, whether the activity be wholly proper or not, was a significant element in the recent case of In the Matter of Desly Getty, Board of Education of the City of Asbury Park, Monmouth County, Initial Decision, (June 4, 2009), adopted, Comm'r. (July 17, 2009) <http://lawlibrary.rutgers.edu/oal/search.html>, where a student used a cell phone to visually record students dancing in a classroom while the teacher sat right behind them, inappropriately talking on a cell phone. The student then posted an edited version of the video on YouTube, to the great embarrassment of both the Board and teacher. The impropriety of Ms. Getty's conduct

that day, while existing regardless of the posting, was certainly made a cause célèbre by its electronic exposure, and it may not be too much to say that the intensity of the Board of Education's reaction to the misconduct and its insistence that removal of this long-time teacher was the only proper outcome was affected by the embarrassingly public nature that this in-classroom incident assumed due to the posting.[1] Here, even if what Mercorelli was about to do had been a legitimate lesson on improper language (which it was not), it is certainly the case that a recording of such could have been utilized in a wholly improper manner. Additionally, the removal of her badge and her comment that as a teacher she was not permitted to curse was merely a "dramatic" element of the "lesson," and is not any indication of an understanding of the impropriety of the "lesson." Instead, it can be seen as an affirmation of the idea that such language is not a proper element of the schoolhouse, the very concept that Mercorelli's unfortunate "lesson" was supposed to teach.

In summary, I **CONCLUDE** that Ms. Mercorelli's conduct on November 19 was unprofessional and a violation of the high standards expected of teachers. She is certainly guilty of misconduct. What is the appropriate sanction for such an impropriety?

In the recent case of Tenure Hearing of Kimberly Geurds, East Windsor Regional School District, EDU 08965-08, Initial Decision, (April 9 , 2010), *adopted,* Comm'r. (August 27, 2010) <http://lawlibrary.rutgers.edu/oal/search.html> a fifth grade teacher reacted to the use of vulgar terms used by students and to student complaints about "messy" bathroom conditions by both recalling certain demonstrations of "proper" bathroom "technique" given to some of the students in her class who were in her kindergarten class some years earlier and by repeating a form of that demonstration and by attempting to clarify both the meaning, and the demeaning nature, of certain specific bodily and/or sexually oriented words and phrases, terms which she stated in class. Like Ms. Mercorelli, her conduct was found to have crossed the bounds of propriety and of professional limits, but to have been motivated by a "misguided" attempt at a "teachable moment," with no hint of any lurid or prurient intent. Id. at 7.

[1] The Board sought removal of tenure, but the Commissioner adopted this judge's determination that Getty's misconduct and insubordination should be sanctioned by the imposition of a reprimand and forfeiture of 120 days pay.

The Commissioner agreed with this judge that Geurds had acted improperly and that her actions constituted misconduct, but he also agreed that the proper sanction was not removal, but instead a forfeiture of 120 days of pay and one year's increment, adding that Geurds be required to complete coursework, before the end of 2011, in "pedagogy that addresses: . . . the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control, and . . . professional classroom demeanor."[2] That coursework was to be subject to reasonable review and approval by the District, which could, if it believed that Geurds failed to comply with the terms of the sanction, apply to the Commissioner for relief. Given the very similar elements between Ms. Mercorelli's case and that of Ms. Geurd's, I see no reason not to impose upon Mercorelli the same sanctions as the Commissioner did upon Geurds. In Geurds, I found that the teacher was in no sense "a lost cause" and that is also true of Mercorelli. Each made the mistake of crossing boundaries, but did so motivated by a misguided sense of the proper means of addressing certainly inappropriate student behavior, behavior, which was at least of a sensitive nature not properly addressed in the classroom setting by a classroom teacher. Given the context in which these violations of proper professional conduct occurred, and keeping in mind the principles of In re Fulcomer, 93 N.J. Super. 404, 420-22 (App. Div. 1967) and its progeny, it can be said that, as with Geurds, there is every reason to believe that Ms. Mercorelli can continue to be an effective educator and that this experience will assure that she never again repeat the mistakes that have led to this unfortunate proceeding. There is no warrant for a result that involves the loss of tenure and the significant career damage that such an outcome would entail.

It is hereby **ORDERED** that Ms. Mercorelli shall forfeit 120 days pay and one year's increment, and that she shall successfully complete coursework, before the end of 2011, in pedagogy that addresses the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control, and. professional classroom demeanor. The coursework shall be subject to reasonable

[2] A third requirement regarding the differences in social and psychological needs of children of different age and grade levels appears to have been imposed to address Ms. Geurd's expressed concerns about the transition from her former work as a kindergarten teacher to that of a fifth grade teacher. Such is not directly an issue in the current matter.

review and approval by the Board of Education, which may apply to the Commissioner if respondent fails to comply with the articulated terms.

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

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

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.

9/13/10
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: Sept. 14, 2010

Date Mailed to Parties: Sept. 14, 2010

mjm

WITNESS LIST

FOR THE PETITIONER:

None.

FOR THE RESPONDENT:

None.

EXHIBIT LIST

JOINT EXHIBITS

J-1 Stipulation of Facts, with attached Exhibits A through K, as described in the Stipulation

#453-10R

ARCHWAY PROGRAMS, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	PARTIAL DECISION ON REMAND
RESPONDENT.	:	

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 five audits conducted by the respondent Department on Archway's accounts for the school years from 1994-1995 through 1998-1999, 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. In September 2008, the ALJ issued an Initial Decision recommending resolution of legal issues concerning methodologies and allowable costs in connection with the five contested audits, and further recommended that the Commissioner compute and present final mathematical calculations as to disallowances based upon these resolutions. In a final decision dated December 5, 2008, the Commissioner adopted the ALJ's recommendations regarding resolution of legal issues, but rejected the proposal regarding computation and presentation of final mathematical calculations. The Commissioner remanded the matter to the OAL for such further proceedings as were necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

On remand, the ALJ found that it was appropriate to initially resolve only the audit for the 1994-1995 school year – and to reserve recommendation on the remaining years – as resolution of this particular audit will have a carryover effect on the remaining later audits, and ordered that DOE prepare a new audit of the 1994-1995 school year. Based on that audit, and the fact that Archway indicated no objections to the mathematical calculations contained therein, the ALJ determined that the revised DOE audit dated June 25, 2010 (Exhibit B) includes the amount that petitioner is obligated to return to the sending districts, and ordered Archway to reimburse these districts the amount of their overpayments for the 1994-1995 school year.

Upon a thorough and independent review of the record, the Commissioner adopted the Partial Initial Decision of the OAL as the final decision as to the 1994-1995 school year, and ordered Archway to return – within 60 days of this decision – a total of $2,315,855.51 to the districts which sent students to its PSH during the 1994-1995 school year. The matter was returned to the OAL for further action deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years.

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

October 28, 2010

OAL DKT. NO. EDU 10474-08
(OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, and EDU 4607-03, ON REMAND)
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, and 392-12/02

(CONSOLIDATED)

ARCHWAY PROGRAMS, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	PARTIAL DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Archway Programs, Inc. (hereinafter "Archway") filed exceptions in accordance with the provisions of *N.J.A.C.* 1:1-18.4. The New Jersey Department of Education (hereinafter "Department") sought and received an extension of time within which to submit reply exceptions, which were filed in accordance with the extended timeline. Both submissions were fully considered by the Commissioner in reaching her determination herein.

By way of background, the essence of the underlying controversy in this matter 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.

On September 2, 2008, the Administrative Law Judge (ALJ) issued an Initial Decision recommending resolution of a myriad of legal issues concerning methodologies and allowable costs vis-à-vis particular account schedules in connection with the five contested audits. Such decision further recommended that the Commissioner, in her final 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. By decision dated December 5, 2008,[1] the Commissioner adopted the ALJ's recommended determinations with respect to the various disputed issues relating to non-allowable costs, but rejected her recommendation that the Commissioner's final decision in this matter was the appropriate vehicle for the necessary recalculations, along with presentation of the specific amounts of money that Archway was required to return to its sending districts. Rather, the Commissioner found that the equitable resolution of this matter and the interests of the parties and the sending districts would be 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 made in this decision.[2] Therefore, the Commissioner remanded this matter to

[1] *Archway Programs, Inc. v. New Jersey State Department of Education and Board of Education of the Township of Pemberton, Burlington County v. Archway Programs, Inc. and Archway Programs, Inc. v. Board of Education of the Township of Ewing, Mercer County*, Commissioner's Decision No. 470-08.

[2] The Commissioner also found that – given the nature of the petitions of appeal in this matter – such computations by the OAL were compelled by a provision of the Administrative Procedure Act (*N.J.S.A.* 52:14B-10(c)).

the OAL for such further proceedings as were necessary to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

On remand, the ALJ determined it was appropriate to initially resolve only the audit for the 1994-95 school year – and to reserve recommendation on the remaining years – as resolution of this particular audit will have a carryover effect on the remaining later audits. Consequently, this partial decision on remand solely resolves the amount of money due and owing its sending districts by Archway as a consequence of the Department's 1994-95 audit.

Archway's exceptions here state that "within the context of [the ALJ's] interlocutory rulings since remand," it concedes "that the actual dollar calculations in the [Partial Initial Decision] before the Commissioner are correct." However, it argues, it is the correctness of these interlocutory decisions which Archway disputes. Specifically, Archway contests the ALJ's interlocutory determination 1) to allow the Department to submit new evidence to the record; 2) her refusal to allow such new evidence to come in by hearing rather than by written submissions; and 3) her rejection of Archway's interpretation of *N.J.A.C.* 6:20-4.1. (Archway's Exceptions at 3) With respect to its first and second objections here, Archway argues that the Commissioner's December 5, 2008 remand to the OAL directed that the ALJ calculate the amounts due by Archway. On remand, the ALJ directed the Department to submit a recalculation of the five audits to determine the exact amounts Archway had to return to the sending districts. By so doing, it argues, the ALJ impermissibly allowed the Department to do her job by reopening the record to present new evidence through revised calculations. It further contends that only the Commissioner has the authority to reopen the record, and points out that the Commissioner's remand decision did not so direct. Moreover, accepting *arguendo*, that new evidence could be submitted to the record, Archway maintains that it should have been allowed to contest such evidence by way of a hearing.

(*Id.* at 2) Finally, Archway charges that in her May 6, 2010 Order rejecting Archway's interpretation of *N.J.A.C.* 6:20-4.1(d), the ALJ merely reviewed the arguments of the parties and then – with no analysis – simply concluded that Archway failed to show its interpretation of this regulation was correct. (*Id.* at 3-4)

In reply, the Department proffers that Archway's exceptions are meritless and fail to recognize the purpose of the Commissioner's December 5, 2008 remand. In that remand decision, the Department points out, the Commissioner returned the matter to the OAL for "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. Commissioner's Decision (December 5, 2008) at 21." Archway's argument now that the record could not be opened for new calculations but, rather, had to utilize the calculations of its expert below "directly contradicts the Commissioner's finding that 'the ALJ properly rejected utilizing the calculations submitted by Archway's expert. *Id.* at 17" (Department's Reply Exceptions at 2) Most importantly, however, it argues that adopting Archway's advocated position that the remand proceedings should solely utilize the calculations already in the initial record would lead to unfair results. The calculations advanced during the initial hearing do not reflect the findings and conclusions of the Commissioner in her December 5, 2008 decision and, therefore, there is no question that these must be recalculated. (*Ibid.*) Furthermore, the Department contends, Archway's charge that the ALJ has abrogated her responsibility to make recommended mathematical calculations or to resolve legal disputes in the instant matter is wholly disingenuous. At no time, it advances, has the ALJ delegated such authority to either party. Rather, it maintains, she has provided each party with an opportunity to present its arguments at each stage of the recalculation process. Finally, in this connection, the Department contends there is no requirement that the recalculations had to be based

on live testimony. Such a process, the Department avers, is merely Archways preference and would only serve to prolong final resolution of this matter. (*Id.* at 2-3)

As to the ALJ's May 6, 2010 Order finding the Department's interpretation of *N.J.A.C.* 6:20-4.1(d) to be correct, despite Archway's assertion to the contrary, the Department argues, such order clearly stated the basis for the ALJ's determination in this regard. Specifically, "the ALJ explained that the 'rule of deference [to the agency] is followed unless it is shown that the agency's interpretation is plainly unreasonable. (ALJ's May 6, 2010 Order at 7). In support of her conclusion, the ALJ found that Archway 'failed to show that a reasonable interpretation of *N.J.A.C* 6:20-4.1(d)2 included the latitude to create different methods of the calculations of the schedules in issue.' *Ibid.*" (*Id.* at 3)

The Commissioner has conducted an independent review of the full record here, including the two interim orders of the ALJ – that of March 17, 2009 and that of May 6, 2010 – which form the sole basis of the exceptions advanced in this matter. Upon such review, the Commissioner finds Archway's exception arguments with respect to these interlocutory orders without merit. Initially, the Commissioner concurs with the ALJ's March 17, 2009 Order denying Archway's motion to preclude the re-opening of the record, which motion was subsequently `renewed and again denied by the ALJ's May 6, 2010 Order, along with Archway's request for a hearing. In light of the Commissioner's determination in her December 8, 2008 decision with respect to allowable and disallowable charges – which rejected portions of the Department's audits as well as portions of the changes advanced by Archway's expert – there was an inherent recognition that, consequently, the calculations in the record at that time would need to be re-worked.[3] As such, whether or not reopening of the record was specifically directed by the

[3] Additionally, the body of the Commissioner's decision stated "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 decision, it was obvious that such reopening would be required. As to the ALJ's denial of Archway's request for a hearing, it is noted that the record reflects that early-on in the remand proceedings the ALJ reserved the right to decide if, in her judgment, a hearing was necessary. Upon her determination that there were no factual disputes and that she could make a determination based upon the parties' legal arguments in their briefs, the Commissioner concludes that her denial of Archway's request was entirely appropriate. Finally, for the reasons presented on pages 5-8 of her May 6, 2010 Order, the Commissioner determines that the ALJ's rejection of Archway's interpretation of *N.J.A.C.* 6:20-4.1(d) was correct. The Commissioner, therefore, adopts the ALJ's two interlocutory orders and attaches and incorporates them into this decision.

Accordingly, the recommended Partial Initial Decision of the OAL is adopted as the final decision as to the 1994-95 school year audit. Archway is hereby directed – within 60-days of this decision – to return a total of $2,315,855.51 to the districts which sent students to its PSH during the 1994-95 school year as detailed in Exhibit B. This matter is being returned to the OAL for further action deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/10

Date of Mailing: 10/28/10

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 findings here." *Archway Programs, Inc. v. New Jersey State Department of Education and Board of Education of the Township of Pemberton, Burlington County v. Archway Programs, Inc. and Archway Programs, Inc. v. Board of Education of the Township of Ewing, Mercer County*, Commissioner's Decision No. 470-08, decided December 8, 2008 at 17-18.

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

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BEATRICE S. TYLUTKI
ADMINISTRATIVE LAW JUDGE t/a

March 19, 2009

Steven D. Weinstein, Esq.
Blank Rome LLP
210 Lake Drive East, Suite 210
Cherry Hill, New Jersey 08002

Joyce D. Atkins
Deputy Attorney General
Division of Law
P.O. Box 112
Trenton, New Jersey 08625-0112

RE: *ARCHWAY PROGRAMS, INC. v. NEW JERSEY STATE DEPARTMENT OF EDUCATION*
OAL DKT.NO. EDU 10474-08
AGENCY DKT. NO. 271-7/11, 381-10/00, etc.

Dear Counsel:

Enclosed please find a copy of the Order issued in the above captioned matter.

Sincerely,

Beatrice S. Tylutki

Beatrice S. Tylutki
Administrative Law Judge t/a

BST/cad
Enclosure:

Cc: Sandra Hlatky, Deputy Clerk, OAL-T

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 10474-08
AGENCY DKT. NO. 271-7/00,
381-10/00, etc.

ARCHWAY PROGRAMS, INC.,
Petitioner,
v.
NEW JERSEY STATE
DEPARTMENT OF EDUCATION,
Respondent.

Steven D. Weinstein, Esq., for petitioner (Blank Rome, attorneys)

Joyce D. Atkins, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

On December 4, 2008, the Commissioner of Education (Commissioner) remanded to the Office of Administrative Law (OAL) that portion of the consolidated case (OAL Dkt. Nos. 6956-00, 8646-00, 4834-01, 4607-03, 4608-03 and 427-06), which deals with the audits by the New Jersey State Department of Education (DOE) of the records of Archway Programs, Inc. (Archway) for its private school for the handicapped (PSH) for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years.

In the decision/remand, the Commissioner adopted the conclusions in my initial decision as to the various schedules contained in the five audits, but rejected my recommendation that the Commissioner calculate the final amounts that Archway must return to the sending school districts for the five school years.

I had a conference with the parties on January 7, 2009 regarding the remand. During the conference, I established a schedule whereby the DOE was to submit a recalculation of the five audits to determine the exact amounts that Archway had to return to the sending school districts. Archway would have the opportunity to review these recalculations and submit its own recalculations. Based on the filings by the parties, I would then decide if a hearing was necessary or that I could make a determination as to the amounts that Archway had to return to the sending school districts based on the written submissions. At that time, Steven D. Weinstein, Esq., on behalf of Archway, argued that to allow the DOE to submit the recalculations was to reopen the record in the consolidated case and he moved to preclude the reopening of the record. Deputy Attorney General Sookie Bae, on behalf of the DOE, opposed the motion. I requested that the parties submit briefs as to the motion. I received Archway's brief on January 25, 2009; the DOE's response on February 9, 2009 and Archway's reply on February 18, 2009.

In his brief, Weinstein noted that during the hearing in the consolidated case, the DOE admitted that its calculations as to certain schedules in all five audits were incorrect. The DOE did not submit revised amounts for these schedules and a revision as to the amounts the DOE claimed that Archway had to return to the sending school districts.

Weinstein argued that to now allow the DOE to submit revised calculations would be in violation of the governing law. He argued that only the Commissioner has the authority to reopen the record and cited In re Trantino, 89 N.J. 347, 364 (1982); Skulski v. Nolan, 68 N.J. 179, 195 (1975); N.J.A.C. 1:18-5(b); Lefelt, 37 New Jersey Practice, Administrative Law and Practice §6.32 (2d ed. 2008). He argued that the Commissioner's decision to remand this matter to OAL did not authorize the reopening

of the record in the consolidated matter and that the Commissioner only directed the administrative law judge to calculate Archway's liability.

Weinstein argued that to allow DOE to submit the revised calculations would be unfair to Archway since it would have to have its expert review these calculations and, depending on the results, prepare a rebuttal report. He noted that there might even be a need for a hearing as to the calculations. I recognized the additional costs to Archway; however, the recalculations are necessary since the recommendations in my initial decision, which were adopted by the Commissioner, rejected parts of the DOE's initial audits as well as parts of the changes suggested by Archway's expert during the hearing.

In her brief, Deputy Attorney General Joyce D. Atkins argued that Archway's interpretation of the Commissioner's decision as to the remand is narrow, without legal support, as well as illogical. She noted that the Commissioner concluded:

> 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. [Comm'r. Decision p. 21]

She argued that even though the Commissioner did not specifically authorize the reopening of the record in the consolidated case, a reasonable interpretation of the language used by the Commissioner, specifically "for such further proceedings as are necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculation . . .", allows the ALJ to request the DOE to recalculate the amount Archway has to reimburse the sending school districts based on the findings in my initial decision which were adopted by the Commissioner. Archway would thereafter have the

opportunity to review these calculations and if it had any objections, to submit its own calculations.

Atkins argued that Archway's attempt to foreclose the submission of recalculations by the DOE is intended to force the ALJ to accept the calculation of Archway's expert even though the Commissioner agreed with my rejection of these calculations. Comm'r. Decision at p. 17.

Atkins argued that the Commissioner did not place any limitation on how the calculations are to be presented to me and that it is a reasonable interpretation of the Commissioner's decision that I ask for the recalculations by both DOE and Archway, and that such an interpretation is consistent with procedural due process.

Having reviewed the arguments of the parties, I agree with DOE's argument that I allow recalculations by both the DOE and Archway. I do not disagree with Archway's argument that DOE's reliance on the decision in the case of In the Matter of William J. Kallen, 92 N.J. 14 (1992) is misplaced since in that case the final agency decision required the administrative law judge to reopen the hearing.

The Commissioner adopted the recommendations in my initial decision as to what were allowable expenses to be included in the five audits. I rejected some of the arguments of both parties in arriving at my recommendations as to the allowable costs. I recognized that in her final decision the Commissioner could have modified my findings and that any such modification would have a carryover effect on other schedules and as to the schedules in subsequent school years, and I recommend that there be one recalculation of the amounts to be repaid by Archway to the sending school districts as part of the final decision by the Commissioner.

The Commissioner remanded this matter so that I would do the recalculations for two reasons. The first is her position that I have the responsibility to decide the entire case which includes the recalculation of the monetary consequences pursuant to

N.J.S.A. 52:14B-10(c). This regulation requires that an initial decision be "in such form that it may be adopted as the decision in the case."

The second reason given by the Commissioner is that the concepts of fundamental fairness require that I give the parties an opportunity to be heard on the recalculations before rendering an initial decision. Comm'r. Decision at p. 17-8.

Therefore, I **CONCLUDE** that the Commissioner's remand allows me to accept and consider recalculations by both DOE and Archway. I **ORDER** that the motion of Archway to preclude the opening of the record be **DENIED**.

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.

March 17, 2009
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

/cad

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BEATRICE S. TUYLUTKI
ADMINISTRATIVE LAW JUDGE t/a

May 5, 2010

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RE: *ARCHWAY PROGRAMS INC. v. NEW JERSEY STATE DEPARTMENT OF EDUCATION*
OAL DKT. NO. EDU 10474-08
AGENCY DKT. NO. 271-7/00, 381-10/00 etc.
(ON REMAND)

Dear Counsel:

Enclosed please find a copy of the Order issued in regard to the above captioned matter.

Very truly yours,

Beatrice S. Tylutki
Administrative Law Judge t/a

/cad
Cc: Sandra Hlatky, Deputy Clerk, OAL-Trenton

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 10474-08
AGENCY DKT. NO. 271-7/00,
381-10/00, etc.

ARCHWAY PROGRAMS, INC.,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Steven D. Weinstein, Esq., for petitioner (Blank Rome, attorneys)

Joyce D. Atkins, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

On December 5, 2008, the Commissioner of Education (Commissioner) remanded to the Office of Administrative Law (OAL) that portion of the consolidated case (OAL Dkt. Nos. 6956-00, 8646-00, 4834-01, 4607-03, 4608-03 and 427-06), which deals with the audits by the New Jersey State Department of Education (DOE) of the records of Archway Programs, Inc. (Archway) for its private school for the handicapped (PSH) for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years (audits in issue).

Archway is a non-profit human services organization that provides various educational, social, psychological and residential services for developmentally disabled and mentally and physically challenged adults and children. It has both PSH programs and non-PSH programs. The PSH programs provide special education services to public school children, ages 3 to 21, with special needs. The number of school districts and the number of students sent to Archway varies from year to year. Archway's PSH programs are subject to state audits.

Archway's PSH programs are operated at two locations, a campus in Atco, Camden County and another campus in Washington Township, Gloucester County.

It was agreed at the hearing in the consolidated case that the former regulations that determined tuition rates for PSHs, that were in effect during the years covered by the audits in issue, were applicable in the consolidated case. These regulations were previously codified at N.J.A.C. 6:20-4.1 et seq. and were introduced into evidence at the consolidated case as J-1 and R-8. These regulations are also applicable in this matter.

In the final decision as to the consolidated case, the Commissioner adopted the conclusions in my September 2, 2008 initial decision as to the various schedules contained in the five audits in issue, but rejected my recommendation that the Commissioner calculate the final amounts that Archway must return to the sending school districts for the five school years. The Commissioner required that there be a procedure in the OAL to compute the revised audits for the five school years consistent with my initial decision and the Commissioner's final decision.

The remanded matter was transmitted to the OAL on December 5, 2008 for disposition pursuant to N.J.S.A. 52:14B-1 to -15. I was assigned to the case,

I had a conference with the parties on January 7, 2009 regarding the remand. During the conference, I established a schedule whereby the DOE was to submit a recalculation of the 5 audits to determine the exact amounts that Archway had to return

to the sending school districts. Archway would have the opportunity to review these recalculations and submit its objections, if any. Based on the filings by the parties, I would then decide if a hearing was necessary or that I could make a determination as to the amounts that Archway had to return to the sending school districts based on the written submissions.

At that time, Steven D. Weinstein, Esq., on behalf of Archway, argued that to allow the DOE to submit the recalculations was to reopen the record in the consolidated case and he moved to preclude the reopening of the record. Deputy Attorney General Sookie Bae, who at that time represented the DOE, opposed the motion. I requested that the parties submit briefs as to the motion. I received Archway's brief on January 25, 2009; the DOE's response on February 9, 2009 and Archway's reply on February 18, 2009. After reviewing the arguments of the parties, I issued an order on March 17, 2009, in which I decided that the Commissioner's remand allows me to accept and consider recalculations of the five audits by both DOE and Archway, and I denied Archway's motion. Archway thereafter in its November 19, 2009 brief renewed this motion. For the same reasons stated in my March 17, 2009 order, I again deny Archway's motion.

I received the DOE's revised audits on January 23, 2009. Archway filed a response dated April 23, 2009 and listed 21 objections to the DOE's revised audits (Attachment 1). I had a telephone conference with the parties on May 7, 2009, and I gave the DOE the opportunity to file a response as to the objections, which I received on June 24, 2009. Also, I gave Archway the opportunity to file a reply, which it did on August 7, 2009.

I held a settlement conference with the parties on October 6, 2009, and we were able to resolve 10 of the objections raised by Archway (Attachment 2). After Archway had further time to review the unresolved objections, I had a telephone conference with the parties on October 23, 2009. At that conference we were able to resolve seven of the remaining objections. The objections still in issue were 6, 7, 8 and 19 as set forth in Attachment 1. Thereafter, the parties were able to resolve objections 6 and 8.

By letter dated September 1, 2009, I told the parties that I wanted them to submit briefs as to Archway's objections applicable only to the 1994-95 school year audit and that initially I wanted only to resolve this audit. It is not disputed that the resolution of the 1994-95 school year audit will have a carryover effect on the later audits.

As a result of the negotiations of the parties, there is only one unresolved objection regarding the 1994-95 school year audit – namely objection 7 as set forth in Attachment 1. The other unresolved objection refers to a later school years.

Objection 7 concerns Schedules D (Petting Zoo/Janitorial/Pool), E (Pupil Transportation), F (Construction Labor Costs); G (Landscaping/Maintenance/Security) and H (Depreciation). The parties agreed that the applicable regulation as to these schedules is N.J.A.C. 6:20-4.1(d) (J-1, R-8), which provides:

> (d) Whenever a facility used by an approved private school for the handicapped is also used for unrelated activities and/or enterprises by related or unrelated parties, all costs, direct or indirect, associated with such facilities and operations shall be charged accordingly to the associated activities and/or enterprises which they benefit. Indirect cost pools may be established as appropriate for allocation between common or joint purposes at the end of the fiscal year. Indirect costs shall be distributed in accordance with an equitable allocation plan approved by the Commissioner or as follows:
>
> 1. For joint activities and enterprises which have a common purpose of educating pupils, the indirect costs shall be allocated consistent with the methods contained in (c) above.
> 2. For joint activities and enterprises which do not have a common purpose of educating pupils, indirect costs for the approved private school for the handicapped shall be based on the ratio of the revenues for the approved private school to the total of all revenues for all purposes.

Pursuant to this regulation, the costs in the 5 schedules in issue are to be allocated to the PSH and non-PSH programs using the revenue allocation method. At the hearing in the consolidated case, DOE stipulated that its auditor had used a wrong allocation method in his calculations as to Schedules D, E, F, G and H, and that

Archway had correctly argued that the revenue allocation method should have been used (October 18, 2006 transcript, pp.45-52, 60-63, 96-98; November 3, 2006 transcript, pp. 18, 34, 36-7, 56, 59-61; November 13, 2006 transcript pp. 21-8, 34-47). It is DOE's position that this stipulation was only that the revenue allocation method in N.J.A.C. 6:20-4.1(d) should be used and does not include the mathematical calculations done by Archway's consultant. Archway did not disagree with DOE.

Although both parties agree that the revenue allocation method is applicable to Schedules D, E, F, G and H, there is a disagreement between the parties as to the mathematical calculations for all the schedules using the revenue allocation method.

In his November 19, 2009 brief, Weinstein argued that this issue should be resolved after a hearing and not on briefs. As previously stated, I reserved the right to decide if a hearing was necessary in this matter. After reviewing the briefs of the parties as to objection 7, I **FIND** that there are no factual disputes and that I can make a determination based on the legal arguments in the briefs. Therefore, I deny Archway's request for a hearing as contained in its November 19, 2009 brief.

Archway argued that in DOE's recalculation of the 1994-95 audit, DOE incorrectly used a global revenue allocation percentage of 39.73%, for all schedules based on the total revenue of Archway for that school year, including both its PSH and non-PSH programs. Weinstein stated that DOE relied solely on the provisions in N.J.A.C. 6:20-4.1(d)(2) and did not take into consideration the introductory language in N.J.A.C. 6:20-4.1(d) which states that both direct and indirect costs associated with PSHs "shall be charged accordingly to the associated activities and/or enterprises which they benefit."

Archway argued that the use of the global revenue allocation percentage was improper and resulted in overstatements of disallowed costs in Schedules D, E, F, G, and that Archway's application of the regulation results in the following:

Schedule D – a $107,769 reduction in disallowed expenses
Schedule E – a $2,045 reduction in disallowed expenses

Schedule F – a $45,032 reduction in disallowed expenses
Schedule G – a $7,205 reduction in disallowed expenses
Schedule H – a $201,525 reduction in disallowed expenses

Archway stated that the changes as to these schedules will also have an impact on other schedules in the 1994-95 audit, namely fringe benefits, organization overheard and working capital.

In her briefs of November 20, 2009 and December 9, 2009, Deputy Attorney General Joyce Atkins, who now represents DOE, argued that since Archway did not have an equitable allocation plan approved by the Commissioner, DEP correctly applied N.J.A.C. 6:20-4.1(d)2 to establish an equation for calculating the revenue allocation (called a global revenue allocation percentage in Archway's briefs) as follows:

$$RAP^{1} = \frac{\text{Total Revenue Of The PSH}}{\text{Total Of All Revenues For All Purposes}} \times 100$$

Atkins argued that applying this equation the DOE determined that the RAP for all the schedules in issue is 39.73% based on:

$$RAP = \frac{\$6,935,765}{\$17,456,988} \times 100 = 39.73\%$$

Atkins argued that the use of this percentage is based on the clear and plain language of the regulation. She argued that it has been established that when both statutes and regulations are clear on their face, the plain language must be strictly followed. Bd. of Educ. of the Vocational Sch. of the County of Passaic v. Bd. of Educ. of the Manchester Regional High Sch. Dist., OAL No. EDU 5964-04, I.D. (May 17, 2007), aff'd Comm'r., F.D. (June 27, 2005).

Atkins argued that Archway improperly used the regulation to created different RAPs for the various schedules and that its calculations are self-serving and not consistent with the clear and plain meaning of the regulation. Atkins argued that if

[1] RAP is the revenue allocation percentage.

Archway did not believe that the method provided in the regulation accurately represented the costs for its PSH, it should have developed an equitable allocation plan for the Commissioner's approval.

In its briefs of November 19, 2009 and December 11, 2009, Archway makes an argument that using a global revenue allocation percentage does not reflect the differences as to usage for the PSH program for the schedules in issue. I am incorporating herein Archway's argument in its November 19, 2009 brief (Attachment 3).

In his letter dated April 30, 2010, Weinstein sent me a copy of the Appellate Division's decision in Catholic Family and Community Services (Friendship Corner I and Friendship Corner II) v. State-Operated School District of the City of Peterson, et al, Dkt. No. A-0438-08T1, decided March 31, 2010, approved for publication March 31, 2010. In this case, the Appellate Division reversed the Commissioner's decision on the basis that the Commissioner had ignored DOE's own budget guidelines and used a combination of prior guidelines and other unarticulated policies of DOE. The Appellate Division held that the Commissioner's action was arbitrary and capricious. Weinstein argued that DOE's position in this case is also arbitrary and capricious since DOE relied entirely on the language in N.J.A.C. 6:20-4.1(d)2 without taking into consideration the first sentence of N.J.A.C. 6:20-4.1(d).

Having reviewed the arguments of the parties I **CONCLUDE** that Archway has failed to show that a reasonable interpretation of N.J.A.C. 6:20-4.1(d)2 includes the latitude to create different methods for the calculations of the schedules in issue.

It has been well established that courts will give deference to the agency's interpretation of the statutes and regulations it is charged with implementing. Dept. of Env. Protection v. Stavola, 103 N.J. 425 (1986); In re Election Law Enforcement Comm. Advisory Opinion No. 01-2008, 201 N.J. 254 (2010). This rule of deference is followed unless it is shown that the agency's interpretation is plainly unreasonable. Reilly v. AAA Mid-Atlantic Ins. Co. of N.J., 194 N.J. 474, 485 (2008). In this matter, I **CONCLUDE**

that Archway has not shown that DOE's interpretation of N.J.A.C. 6:20-4.1(d) is unreasonable.

Therefore, I **CONCLDUE** that DOE's calculation methodology should be used for Schedules D, E, F, G and H. I **ORDER** that DOE prepare a new audit for the 1994-95 school year using this order and the settlements as to the other objections in Attachment 1 which relate to this audit .

The revised audit is to be submitted to me and to Archway. Archway will have 30 days from receipt to submit a response as to the mathematical calculations only. Once this is resolved, I will issue a partial initial decision as to the 1994-95 audit.

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 6, 2010
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

/cad

ATTACHMENTS

1. Summary of Errors Chart which is Exhibit C in Archway's April 23, 2009 brief

2. Summary of Errors Chart with notations as to the objections resolved which is Exhibit A in Archway's November 19, 2009 brief.

3. Pages 4-9 of Archway's November 19, 2009 brief.

Attachment 1

Archway Programs, Inc.

Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
1	All years	Missing Information	Exhibit 1 as referred to by the Department of Education ("DOE") in the narrative to their recalculation report is missing from the DOE's production of documents for all five years. The DOE purports that Exhibit 1 summarizes their calculation of the revised disallowed amounts for each year in accordance with the OAL decision. See DOE 1 and DOE 9 for reference to this schedule.	The DOE's failure to include all schedules, especially summary schedules, within their revised report severely restricts the ability to review their recalculation for accuracy and for adherence to the OAL's decision and casts doubt on the integrity of their report.
2	1995	Missing Information	Schedule T - Working Capital Adjustment is missing from the production. This schedule should appear after DOE 56, however, DOE 57 is the cover page for the next year (1996).	Same as above.

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Archway Programs, Inc.
Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
3	1998	Out of sequence	Schedule C from 1998 has been provided out of sequence. This schedule was located within the DOE's calculation of the revised disallowed amounts for 1999.	Due to the size and complexity of this report, the act of providing the report "out of sequence" causes inefficiencies and makes it unnecessarily burdensome to review as additional time must be spent searching for, what are believed at the time to be, missing documents and then rearranging the production in an organized manner. Again, the sloppy production of this report (i.e. missing schedules and "out-of-sequence" schedules) casts doubt on its integrity.
4	1998/1999	Out of sequence	Schedule D, Schedule E, and Schedule F between the years 1998 and 1999 have been provided out of sequence.	Same as above.
5	1998/1999	Out of sequence	Schedule K between the years 1998 and 1999 has been provided out of sequence.	Same as above.

Archway Programs, Inc.
Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
6	1997	Mathematical Error	Schedule A - Teacher's Salaries (DOE 81) does not add up correctly - the total overstates the disallowed amount by $39,694. The DOE calculated the disallowed amount to be $430,994 while the correct amount should have been $391,300. As a result of this math error, the DOE also overstated the related disallowed fringe benefits and disallowed overhead and working capital amounts.	$39,694 +	The error overstates the disallowed salary amount by $39,694 as well as the related disallowed fringe benefit, disallowed overhead, and working capital amounts in this year. It also impacts the working capital amounts in subsequent years.
7	1995	Improper application of the revenue method used	Per DOE regulations, these costs should be allocated only to those programs (PSH and non-PSH) who receive the benefit of those costs based on the revenue percentages of those participating programs. The DOE used a global revenue allocation percentage based upon the total revenues of PSH and the total revenues of Archway of approximately 39.75%. This error occurred on Schedules D, E, F, G, and H which calculate the disallowed amount of maintenance, transportation, and depreciation expenses.	$428,250 +	This error overstates the disallowed amount by $428,250 as well as overstates the related disallowed fringe benefits, disallowed overhead, and working capital amounts in this year. It also impacts the calculation of the working capital amounts in subsequent years.

Archway Programs, Inc.
Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
8	1995	Unknown reclassification	The DOE has reclassified expenses from Schedule C1 (DOE 26) to other schedules without providing a reason for such change including transferring $225 to Schedule D1, $1,170 to Schedule D2, and $2,337 to Schedule G. These transfers reduce the disallowed amount on this schedule and increased the disallowed amount on the other referenced schedules. None of these changes were directed by the OAL decision and it appears that the DOE has changed the results of their original audit without instruction by the court.	These changes impact the disallowed amounts on this schedule and the other referenced schedules, as well as, the disallowed overhead and working capital amounts. It also impacts the calculation of the working capital amount in subsequent years.
9	1995	Unknown reclassification	The DOE has reclassified expenses to Schedule D (DOE 28) from other schedules without providing a reason for such change including transferring $7,774 from Schedule G. None of these changes were directed by the OAL decision and it appears that the DOE has changed the results of their original audit without instruction by the court.	Same as above.

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
10	1995	Unknown reclassification	The DOE has reclassified expenses from Schedule O2 (DOE 44) to other schedules without providing a reason for such change including transferring $2,150 to Schedule R3. None of these changes were directed by the OAL decision and it appears that the DOE has changed the results of their original audit without instruction by the court.	Same as above.
11	1995	Inconsistent internal reference	Due to the reclassified expenses disclosed earlier, the total amount of Schedule R2 - Meals and Schedule (DOE 52) and R3 - Contributions (DOE 54) changed, however, these adjusted amounts were not updated within the calculation of Organizational Overhead on Schedule R (DOE 48). However, this error caused no impact on the calculation of the disallowed amounts as the transferred costs were above the maximum allocation amount.	The failure to update the schedule did not have any impact on the recalculation of the disallowed amount but casts doubt on the integrity of the DOE's report.

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
12	1996	Incorrect number used for calculation	In determining the non-allowable fringe benefit amount on Schedule I (DOE 68), the DOE incorrectly deducted the wrong amount of "Salary Separately Allocated" of $286,632 rather that the correct amount of $316,478 as found on Schedule J1 (DOE 72). We can not determine if the DOE unintentionally applied the wrong number in their calculation or intentionally disregarded the OAL Decision with regard to maximum salaries.	This error decreased the disallowed overhead amount and the working capital amount. It also impacts the working capital calculation in subsequent years.
13	1999	Incorrect number used for calculation	In determining the non-allowable fringe benefit amount on Schedule I (DOE 132), the DOE incorrectly deducted the wrong amount of "Salary Separately Allocated" of $441,663 rather that the correct amount of $596,234 as found on Schedule J1 (DOE 136). We can not determine if the DOE unintentionally applied the wrong number in their calculation or intentionally disregarded the OAL Decision with regard to maximum salaries.	Same as above.

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
14	1997	Failure to update amount	The DOE failed to update on Schedule J (DOE 92) the adjusted amount of Direct Costs from DOE 93 and therefore failed to use an updated Allocation Percentage in determining allowable organizational overhead.	This error results in an overstatement of the disallowed overhead amount and the working capital amount. It also impacts the working capital calculation in subsequent years.
15	1998	Incorrect number used for overhead allocation percentage calculation	In recalculating the Allocation Percentage on Schedule J (DOE 115), the DOE updated the direct costs of Atco, Challenge, Camden, and Gloucester without providing the details to support these changes, therefore, we can not determine the appropriateness of the allocation percentage used to calculate organizational overhead.	Without any details to support these changes, we can not determine the accuracy of the recalculation or the DOE's adherence to the OAL decision.
16	1999	Incorrect number used for overhead allocation percentage calculation	In recalculating the Allocation Percentage on Schedule J (DOE 134), the DOE updated the direct costs of Challenge and Camden without providing the details to support these changes, therefore we can not determine the appropriateness of the allocation percentages used to calculate organizational overhead.	Same as above.

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
17	1998	Incorrect number used for working capital calculation	The DOE improperly lists the Working Capital balance to be increased by $15,373 on Schedule L, however, this number should be a reduction of $15,373. See DOE 120 for details. As we do not have the yearly summary from the DOE (presumably Exhibit 1), we can not determine the impact or how or if this error was resolved.	As the summary schedule (Exhibit 1) was not provided, we can not determine how this error was used in their calculation and the accuracy of the DOE's recalculation.
18	1999	Incorrect number used for working capital calculation	The DOE improperly lists the Working Capital balance to be a reduction of $75,575 on Schedule L, however, this number should be a increased by $75,575. See DOE 140 for details. As we do not have the yearly summary from the DOE (presumably Exhibit 1), we can not determine the impact or how or if this error was resolved.	Same as above.

Archway Programs, Inc.

Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
19	1999	Incorrect number used for calculation	Inconsistent with other years, the DOE calculated a fringe benefit rate on Schedule F (DOE 109) based on the total salaries of Archway and not on the PSH related salaries. The rate the DOE used was lower thus reducing the amount of allowable fringe benefits.	$44,139 +	This error overstated the disallowed fringe benefit amounts by $44,139 as well as overstated the related overhead and working capital amounts in this year. As this error occurred during 1999, the last audit, it did not impact the working capital calculation in subsequent years.
20	1995	Correction of original report	The DOE included the disallowed tuition waiver amount they calculated (DOE 55) but did not include (apparently an error) in their original report. As such, the DOE has increased the disallowed amount of tuition waivers by $43,384 in their recalculation. As a result, the DOE's recalculated report exceeds the amount of tuition waivers affirmed by the OAL by $43,384.	$43,384	This error overstates the tuition waiver amount affirmed by the OAL decision by $43,384 in this year.

Archway Programs, Inc.

Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
21	1997, 1999	Inconsistent treatment of disallowed expense	The DOE inconsistently included disallowed tuition waivers during the years 1997, 1998, and 1999. During the recalculation, they have attempted to treat this area using a consistent method for disallowed costs, however they have increased the amount of disallowed tuition waiver amounts in 1997 and 1999. However, they have not adjusted 1998 and therefore it is inconsistent with the other years. In addition, they have changed Schedule L to reflect new information which was not on their original calculation which they have described in a footnote for the years 1997, 1998, 1999. The result of DOE's inconsistencies and new changes resulted in an additional $15,605 in disallowed cost more that was affirmed by the OAL judge. This error and error #20 has resulted in $58,989 of disallowed costs in excess of that affirmed by the OAL judge.	$15,605	This error results in an overstatement of the disallowed tuition costs in excess of the amounts affirmed by the OAL Decision by $15,605 for these years.

Attachment 2

Archway Programs, Inc.

Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
1	All years	**Information Provided**		No impact
2	1995	**Information Provided**	Schedule T - Working Capital Adjustment is missing from the production. This schedule should appear after DOE 56, however, DOE 57 is the cover page for the next year (1996).	**While Schedule T was provided within the Revised Report, there is no explanation as to the increase of working capital from $261,039 in the DOE's 2008 report to $301,151 in the DOE's 2009 revised report.**

Archway Programs, Inc.

Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
3	1998	Information Provided		No impact	
4	1998/1999	Information Provided		No impact	
5	1998/1999	Information Provided		No impact	
6	1997	Mathematical Error - Corrected	Schedule A - Teacher's Salaries (DOE 81) does not add up correctly - the total overstates the disallowed amount by $39,694. The DOE calculated the disallowed amount to be $430,994 while the correct amount should have been $391,300. As a result of this math error, the DOE also overstated the related disallowed fringe benefits and disallowed overhead and working capital amounts.	$39,694 +	The revised 1997 amount refundable was decreased by approximately $70,000.

Archway Programs, Inc.

Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
7	1995	Improper application of the revenue method used - **Still in dispute**	Per DOE regulations, these costs should be allocated only to those programs (PSH and non-PSH) who receive the benefit of those costs based on the revenue percentages of those participating programs. The DOE used a global revenue allocation percentage based upon the total revenues of PSH and the total revenues of Archway of approximately 39.75%. This error occurred on Schedules D, E, F, G, and H which calculate the disallowed amount of maintenance, transportation, and depreciation expenses. **Organizational overhead and working capital increases because of the reduced percentage calculated by DOE.**	$428,250 +	This error overstates the disallowed amount by $428,250 as well as overstates the related disallowed fringe benefits, disallowed overhead, and working capital amounts in this year. It also impacts the calculation of the working capital amounts in subsequent years.

Archway Programs, Inc.

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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
8	1995	Unknown reclassification - **Amount was corrected**	The DOE has reclassified expenses from Schedule C1 (DOE 26) to other schedules without providing a reason for such change including transferring $225 to Schedule D1, $1,170 to Schedule D2, and $2,337 to Schedule G. These transfers reduce the disallowed amount on this schedule and increased the disallowed amount on the other referenced schedules. None of these changes were directed by the OAL decision and it appears that the DOE has changed the results of their original audit without instruction by the court.	These changes impact the disallowed amounts on this schedule and the other referenced schedules, as well as, the disallowed overhead and working capital amounts. It also impacts the calculation of the working capital amount in subsequent years. **The adjustment decreases the amount Archway owes by approximately $4,600.**
9	1995	Unknown reclassification	The DOE has reclassified expenses to Schedule D (DOE 28) from other schedules without providing a reason for such change including transferring $7,774 from Schedule G. None of these changes were directed by the OAL decision and it appears that the DOE has changed the results of their original audit without instruction by the court.	**Without seeing the original stipulation, it appears that they are correct and that this was part of the DAG stipulation.**

Archway Programs, Inc.
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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
10	1995	Unknown reclassification	The DOE has reclassified expenses from Schedule O2 (DOE 44) to other schedules without providing a reason for such change including transferring $2,150 to Schedule R3. None of these changes were directed by the OAL decision and it appears that the DOE has changed the results of their original audit without instruction by the court.	**Without seeing the original stipulation, it appears that they are correct and that this was part of the DAG stipulation.**
11	1995	Inconsistent internal reference - **Corrected**	Due to the reclassified expenses disclosed earlier, the total amount of Schedule R2 - Meals and Schedule (DOE 52) and R3 - Contributions (DOE 54) changed, however, these adjusted amounts were not updated within the calculation of Organizational Overhead on Schedule R (DOE 48). However, this error caused no impact on the calculation of the disallowed amounts as the transferred costs were above the maximum allocation amount.	The failure to update the schedule did not have any impact on the recalculation of the disallowed amount but casts doubt on the integrity of the DOE's report. **DOE corrected schedules - no financial Impact.**

Archway Programs, Inc.

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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
12	1996	Incorrect number used for calculation - **DOE corrected**	In determining the non-allowable fringe benefit amount on Schedule I (DOE 68), the DOE incorrectly deducted the wrong amount of "Salary Separately Allocated" of $286,632 rather that the correct amount of $316,478 as found on Schedule J1 (DOE 72). We can not determine if the DOE unintentionally applied the wrong number in their calculation or intentionally disregarded the OAL Decision with regard to maximum salaries.	This error decreased the disallowed overhead amount and the working capital amount. It also impacts the working capital calculation in subsequent years. **DOE corrected error. Correction reduces the amount Archway owes by approximately $2,750.**
13	1999	Incorrect number used for calculation - **DOE corrected**	In determining the non-allowable fringe benefit amount on Schedule I (DOE 132), the DOE incorrectly deducted the wrong amount of "Salary Separately Allocated" of $441,663 rather that the correct amount of $596,234 as found on Schedule J1 (DOE 136). We can not determine if the DOE unintentionally applied the wrong number in their calculation or intentionally disregarded the OAL Decision with regard to maximum salaries.	This error decreased the disallowed overhead amount and the working capital amount. It also impacts the working capital calculation in subsequent years. **DOE corrected error. Correction reduces the amount Archway owes by approximately $13,800.**

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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
14	1997	Failure to update amount - **DOE corrected**	The DOE failed to update on Schedule J (DOE 92) the adjusted amount of Direct Costs from DOE 93 and therefore failed to use an updated Allocation Percentage in determining allowable organizational overhead.	This error results in an overstatement of the disallowed overhead amount and the working capital amount. It also impacts the working capital calculation in subsequent years. **Which was corrected and shown in number 6 above, not in number 7 as stated in thier report.**
15	1998	Incorrect number used for overhead allocation percentage calculation - **DOE provided details**	In recalculating the Allocation Percentage on Schedule J (DOE 115), the DOE updated the direct costs of Atco, Challenge, Camden, and Gloucester without providing the details to support these changes, therefore, we can not determine the appropriateness of the allocation percentage used to calculate organizational overhead.	Without any details to support these changes, we can not determine the accuracy of the recalculation or the DOE's adherence to the OAL decision. **No financial impact.**
16	1999	Incorrect number used for overhead allocation percentage calculation - **DOE provided details**	In recalculating the Allocation Percentage on Schedule J (DOE 134), the DOE updated the direct costs of Challenge and Camden without providing the details to support these changes, therefore we can not determine the appropriateness of the allocation percentages used to calculate organizational overhead.	Without any details to support these changes, we can not determine the accuracy of the recalculation or the DOE's adherence to the OAL decision. **No financial impact.**

Archway Programs, Inc.
Revised Refund Amount Based on Administrative Law Judge's Decision dated September 2, 2008

Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision
17	1998	Incorrect number used for working capital calculation - **DOE corrected error**	The DOE improperly lists the Working Capital balance to be increased by $15,373 on Schedule L, however, this number should be a reduction of $15,373. See DOE 120 for details. As we do not have the yearly summary from the DOE (presumably Exhibit 1), we can not determine the impact or how or if this error was resolved.	As the summary schedule (Exhibit 1) was not provided, we can not determine how this error was used in their calculation and the accuracy of the DOE's recalculation. **The cumulative impact from prior years through 1998 reduces the amount Archway owes to the sending districts by approximately $4,850.**
18	1999	Incorrect number used for working capital calculation - **DOE corrected error**	The DOE improperly lists the Working Capital balance to be a reduction of $75,575 on Schedule L, however, this number should be a increased by $75,575. See DOE 140 for details. As we do not have the yearly summary from the DOE (presumably Exhibit 1), we can not determine the impact or how or if this error was resolved.	As the summary schedule (Exhibit 1) was not provided, we can not determine how this error was used in their calculation and the accuracy of the DOE's recalculation. **The cumulative impact from prior years through 1999 increased the amount Archway owes to the sending districts by approximately $19.**

Archway Programs, Inc.

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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
19	1999	Incorrect number used for calculation - **Still in dispute**	Inconsistent with other years, the DOE calculated a fringe benefit rate on Schedule F (DOE 109) based on the total salaries of Archway and not on the PSH related salaries. The rate the DOE used was lower thus reducing the amount of allowable fringe benefits.	$44,139 +	This error overstated the disallowed fringe benefit amounts by $44,139 as well as overstated the related overhead and working capital amounts in this year. As this error occurred during 1999, the last audit, it did not impact the working capital calculation in subsequent years. **DOE could have used the salaries allowed by ALJ ($51,812 - as discussed on page 81 of the ALJ decision) to recalculate at least in part the fringe benefits allowable. This would change working capital and overhead for 1999.**

Archway Programs, Inc.
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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
20	1995	Correction of original report - **DOE revised**	The DOE included the disallowed tuition waiver amount they calculated (DOE 55) but did not include (apparently an error) in their original report. As such, the DOE has increased the disallowed amount of tuition waivers by $43,384 in their recalculation. As a result, the DOE's recalculated report exceeds the amount of tuition waivers affirmed by the OAL by $43,384.	$43,384	This error overstates the tuition waiver amount affirmed by the OAL decision by $43,384 in this year. **The new report was revised to show $0 in tuition waivers.**

Archway Programs, Inc.
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Summary of Errors by the Department of Education ("DOE")

No.	Year	Type	Description	Impact of Error on OAL Decision	
21	1997, 1999	Inconsistent treatment of disallowed expense	The DOE inconsistently included disallowed tuition waivers during the years 1997, 1998, and 1999. During the recalculation, they have attempted to treat this area using a consistent method for disallowed costs, however they have increased the amount of disallowed tuition waiver amounts in 1997 and 1999. However, they have not adjusted 1998 and therefore it is inconsistent with the other years. In addition, they have changed Schedule L to reflect new information which was not on their original calculation which they have described in a footnote for the years 1997, 1998, 1999. The result of DOE's inconsistencies and new changes resulted in an additional $15,605 in disallowed cost more that was affirmed by the OAL judge. This error and error #20 has resulted in $58,989 of disallowed costs in excess of that affirmed by the OAL judge.	$15,605	This error results in an overstatement of the disallowed tuition costs in excess of the amounts affirmed by the OAL Decision by $15,605 for these years.

Attachment 3

BLANK ROME LLP
COUNSELORS AT LAW

APPLICATION OF NJAC 6:20-4.1(d)

Subject to the aforementioned objections and the request for live testimony, Archway now submits the information on the disputed 94-95 items as directed. Since the initial DOE Recalculation, we have all been working from the "Summary of Errors" chart Archway submitted (later updated to reflect the DOE's Revised Recalculation and Archway's response (submitted as Exhibit C to Archway's August 5, 2009 filing), herewith attached as **Exhibit A** to this letter. We agreed in our telephone call of October 23rd, that of the 21 error categories on Ex. A, only items 6,7,8, and 19 remained in dispute. Of those items, following our call, I confirmed with Mr. Kleckner that Item 8 was resolved, leaving numbers 6,7 and 19 in dispute. Further, number 6 refers to the 96-97 year and number 19 refers to the 98-99 year.

Thus, the focus of this submission will be on error number 7 which covers the application of NJAC 6:20-4.1(d)(2) to Schedules D, E, F, G and H of the 94-95 Audit. In addition, it was understood that the outcome on these schedules would also impact the Organizational Overhead and Working Capital amounts for 94-94 before a final determination can be made for 94-95.

Schedules D (Petting Zoo/Janitorial/Pool); E (Pupil Transportation); F (Construction Labor Costs); G (Landscaping/Maintenance/Security) and H (Depreciation) are all related to the allocation made pursuant to NJAC 6:20-4.1(d)(2). All involve indirect costs. This is the specific regulation to which DOE stipulated it used the wrong methodology in its original audit. Since that time, it continues to fail in its application of this regulation by insisting a global allocation method is appropriate – a position which ignores the actual words or the context of the Regulation.

Subchapter 4 of N.J.A.C. 6:20 provides for the tuition calculation of a PSH. Attached as **Exhibit B** is NJAC 6:20-4.1 as it then existed. The basic goal of the tuition calculation is to determine "actual cost per pupil," N.J.A.C. 6:20-4.1(a). N.J.A.C. 6:20-4.1(b) covers those costs which are "direct costs." The costs in issue here are all indirect costs. Subsections (c) and (d) address "indirect costs." Subsection (c) – not applicable here – addresses indirect costs "incurred for a common or joint purpose."

Subsection (d) comes into play:

> Whenever a facility used by a [PSH] is also used for unrelated activity and/or enterprises by related or unrelated parties, all costs, direct or indirect, associated with such facilities and operations shall be charged according to the associated activities or enterprises which they benefit.

(Emphasis added).

For indirect costs that fall within §4.1(d), two sub-categories exist:

> (1) those activities/enterprises which have a common purpose of educating pupils are directed to the 4.1(c) allocation methods. THIS CATEGORY IS NOT APPLICABLE TO THE CURRENT DISPUTE.
>
> (2) joint activities/enterprises which do not have a common purpose of educating pupils for which the ratio of revenues for the PSH to the total of all revenues for all purposes applies.

In applying §4.1(d)(2), DOE ignored the introductory paragraph of §4.1(d):

> a facility used for unrelated activities is directed to charge the costs to the activity which is benefited.

Subsection (d) applies to specific joint activities without a common purpose of educating pupils. Expenses falling within this category are by definition indirect expenses which creates the necessity for an allocation. The clear intent is to split these costs between the PSH and non-PSH uses relating to that facility or operation.

The application of (d) requires two things: (1) an understanding of Archway's multiple programs (PSH and non-PSH) and overlapping use of facilities; and (2) a revenue analysis that allows the apportionment as appropriate to each category of expense involved.

Attached as **Exhibit C** hereto is the revenue allocation for 94-95 broken down by both PSH and non-PSH activities and by location, adjusted to account for expenses already disallowed and not in dispute. These numbers will be used in the allocation formulas to follow.

Schedule D

Schedule D (**Exhibit D**) covers the Petting Zoo, janitorial and pool expenses. DOE's original ratio was 44.1%, now admitted to be wrong. Archway's Hearing ratio was 97.07%. Reflecting the ALJ's hearing decisions, Archway's adjusted ratio for this category is now 96.92%. Incredibly, DOE comes to 39.73%, over 4% points **less** than what it already stipulated was wrong.. The difference results from DOE's refusal to recognize the expenses being allocated.

The **Petting Zoo** and **Pool** are located at Archway's **Atco** campus and are available for use by the **Atco** PSH, the Challenge Program PSH (located exclusively at **Atco**) and the Summer Camp located at **Atco**. The Washington Township PSH does not use the Petting Zoo or the Pool; thus, the revenues associated with the Washington Township PSH are not part of the Schedule D ratio calculation. The Summer Camp, a non-PSH facility/activity (which does "not have a common purpose educating pupils") does use these facilities and brings its expenses within subsection (d)(2).[1]

As reflected on Ex. D, Archway calculated the revenue ratio by comparing the revenue for PSH-Atco and PSH-Challenge to the total revenue (including summer camp) of the activities participating in the expense category. The total adjusted revenue relevant to this specific use was $6,041,876 (PSH-Atco, PSH-Challenge and Summer Camp). Comparing the non-PSH revenue (Summer Camp - $186,349) to the total produces a PSH Revenue Ratio of 96.92%.

The DOE, however, calculated the ratio by including in the calculation all Archway Program revenue, including the PSH at Washington Township, all Camden City programs, all public school based after care programs, all other non-PSH social service programs at other remote locations – none of which participate in any way with the Atco campus pool or petting zoo. Thus, the DOE's calculation increased the total revenue denominator to over $19 million versus the applicable total revenue for the users of this specific cost center of about $6 million, resulting in a ratio of 39.73%. In so doing, the Department ignored the direction in the first sentence of §4.1(d) that when a facility is used by a PSH and is also used for unrelated activities "all costs . . . associated with such facilities and operations shall be charged accordingly to the associated activities and/or enterprises which they benefit." (emphasis added). The only users of the petting zoo and pool are located at Atco. Only those specific revenues are pertinent to establishing the PSH to non-PSH revenue ratio which is then applied to total expenses related to those facilities.

The bottom portion of Ex. D shows the impact of the ratio calculation. The two rectangular boxed numbers reflect DOE's and Archway's (KFAG – Phil Kleckner, Archway's expert) computations. DOE, applying its revenue ratio of 39.73%, disallowed $105,807 whereas Archway, applying its revenue ratio of 96.92% disallowed $5530. Archway's calculation reflects that the overwhelming users of the pool and petting zoo were PSH activities and is consistent with §4.1(d).

[1] This information for all schedules discussed herein is in the Hearing Record.

Schedule E

Schedule E (**Exhibit E**) (Pupil Transportation Costs) is a good contrast that reflects the proper handling of the indirect costs under §4.1(d)(2). The "facilities" covered in this expense category are all bus and transportation costs. This activity is more system-wide than the narrower use of the Atco Petting Zoo and Pool. It is appropriate in determining the (d)(2) ratio allocation to include (1) on the PSH side all PSH activities including Washington Township and (2) on the non-PSH side all transportation costs for all other Archway programs where busing is involved. Total revenue sources relevant to Pupil Transportation amount to $17,948,689; the PSH portion of that total is $7,427,466 resulting in a 41.38% ratio, much lower than the Schedule D ratio (96.92%). This is due to the fact that in the Pupil Transportation category the non-PSH programs are a much larger component.

Schedule F

Schedule F (**Exhibit F**)(Construction Labor Costs) is much like the Schedule D analysis. Again, DOE used its global revenue ratio (39.73%) without analyzing the "pot" of facilities and operations covered by the category of expense involved. Washington Township is a rented facility and all the construction labor costs occurred only at Atco (encompassing the Atco PSH, the Challenge PSH and the summer camp). Thus, Archway's revenue ratio for this category of expense is 96.92% – the same as with Schedule D. The DOE disallowed an additional $45,032. See Ex. A, p. 1,5.

Schedule G

Schedule G (**Exhibit G**) covers landscaping, maintenance, and security expenses. Since these activities are spread over all the activities, the analysis is similar to Schedule E and the Revenue Ratio is 41.38%.

Schedule H

Finally, Schedule H (**Exhibit H**) on depreciation requires a similar focus. As indicated, the Washington Township PSH and all other non-PSH programs are in rented facilities, to which, by definition, depreciation does not apply. Thus, Archway again calculates the revenue ratio at 96.92% versus the DOE's global 39.73% resulting in a $201,525 difference between the two.

Impact on other schedules

The differences reflected in the §4.1(d)(2) analysis are not limited to just these schedules. Because these analyses result in less disallowed costs than the DOE calculation, they also impact the percentage applied to organizational overhead ($29,737 difference), and working capital ($59,490 difference) for 94-95.

SUMMARY

For just 1994-95, the DOE calculations overstate disallowed costs by $491,701. **See, Ex. I.** The point of departure that results in almost $500,000 in differences for 94-95 is DOE's failure to apply its own regulation as written. Essentially, DOE focuses only on the final phrase of NJAC 6:20-4.1(d)(2) (". . . for which the ratio of revenues for the PSH to the total of all revenues for all purposes applies.") to the exclusion of rest of the words in the regulation. More disappointing, DOE ignores the entire concept embodied in the regulation, whose purpose is to determine a PSH's tuition costs by establishing "actual cost per pupil." NJAC 6:20-4.1(a). First comes "direct costs," Id. at §4.1(b). Next is the identification of "indirect costs incurred for a common or joint purpose" of education, Id. at §4.1(c). Finally, the category at issue here is costs relating to facilities used by both PSH and non-PSH facilities without a common purpose of educating pupils. The regulation logically requires that "all costs, direct or indirect, associated with such facilities and operations shall be charged according to the associated activities or enterprises which they benefit." Id. at §4.1(d) (introductory paragraph).

Query why the regulation would have multiple sub parts to deal with various categories of indirect and direct costs if a simple, one size fits all revenue ratio was to be applied. The intent – finding the actual cost per pupil – is best determined in the instance of multi-program enterprises sharing facilities and services by separately identifying the specific uses applicable to each cost center and applying a revenue ratio relevant to those uses. Using a global ratio based on total PSH revenue to total revenue of all programs does not even come close to determining "actual cost per (PSH) pupil" because it ignores that with some activities and cost centers the PSH may be the primary user and in others the PSH may be a minor beneficiary of the activity.

In summary, the correct application of the Regulation results in the following:

Schedule D – a $107,769 reduction in disallowed expenses
Schedule E – a $2,045 reduction in disallowed expenses
Schedule F – a $45,032 reduction in disallowed expenses
Schedule G – a $7,205 reduction in disallowed expenses
Schedule H – a $201,525 reduction in disallowed expenses

The differences from the DOE Revised Calculation are reflected in the Summary Chart, **Ex. I**, which also reflects the impacts of the above changes on Fringe Benefits, Organizational Overhead, and Working Capital for 1994-95, totaling $491,791 less disallowances and reducing the disallowances for 1994-95 to a total of $1,824,155.

Respectfully submitted,

Steven D. Weinstein
BLANK ROME LLP
Attorneys for Archway Programs, Inc.

SDW:cp

cc: Joyce Atkins, Esq. – Deputy Attorney General *(w/encs, by overnight delivery)*
Michael Walter, Esq. – Deputy Attorney General (*w/encs, by overnight delivery)*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL

INITIAL DECISION

OAL DKT. NO. EDU 10474-08

AGENCY DKT. NO. 271-7/00,

381-10/00, etc.

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY STATE

DEPARTMENT OF EDUCATION,

Respondent.

Steven D. Weinstein, Esq., for petitioner (Florio, Perrucci, Steinhardt & Fader, attorneys)

Joyce D. (Atkins) Williams, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed as to this partial initial decision on August 25, 2010

Decided: September 15, 2010

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

On December 5, 2008, the Commissioner of Education (Commissioner) remanded to the Office of Administrative Law (OAL) that portion of the consolidated

case (OAL Dkt. Nos. 6956-00, 8646-00, 4834-01, 4607-03, 4608-03 and 427-06), which deals with the audits by the New Jersey State Department of Education (DOE) of the records of Archway Programs, Inc. (Archway) for its private school for the handicapped (PSH) for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years (audits in issue).

Archway is a non-profit human services organization that provides various educational, social, psychological and residential services for developmentally disabled and mentally and physically challenged adults and children. It has both PSH programs and non-PSH programs. The PSH programs provide special education services to public school children, ages 3 to 21, with special needs. The number of school districts and the number of students sent to Archway varies from year to year. Archway's PSH programs are subject to state audits.

Archway's PSH programs are operated at two locations, a campus in Atco, Camden County and another campus in Washington Township, Gloucester County.

It was agreed at the hearing in the consolidated case that the former regulations that determined tuition rates for PSHs that were in effect during the years covered by the audits in issue were applicable in the consolidated case. These regulations were previously codified at N.J.A.C. 6:20-4.1 et seq. and were introduced into evidence at the consolidated case as J-1 and R-8. These regulations are also applicable in this matter.

In the final decision as to the consolidated case, the Commissioner adopted the conclusions in my September 2, 2008 initial decision as to the various schedules contained in the five audits in issue, but rejected my recommendation that the Commissioner calculate the final amounts that Archway must return to the sending school districts for the five school years. The Commissioner required that there be a procedure in the OAL to compute the revised audits for the five school years consistent with my initial decision and the Commissioner's final decision.

The remanded matter was transmitted to the OAL on December 5, 2008 for disposition pursuant to N.J.S.A. 52:14B-1 to -15. I was assigned to the case.

I had a conference with the parties on January 7, 2009 regarding the remand. During the conference, I established a schedule whereby the DOE was to submit a recalculation of the 5 audits to determine the exact amounts that Archway had to return to the sending school districts. Archway would have the opportunity to review these recalculations and submit its objections, if any. Based on the filings by the parties, I would then decide if a hearing was necessary or that I could make a determination as to the amounts that Archway had to return to the sending school districts based on the written submissions.

I received the DOE's revised audits on January 23, 2009. Archway filed a response dated April 23, 2009 and listed 21 objections to the DOE's revised audits (Exhibit A, objections contained in Attachment 1) Exhibit A is attached and fully incorporated in this initial decision. I had a telephone conference with the parties on May 7, 2009, and I gave the DOE the opportunity to file a response as to these objections, which I received on June 24, 2009. Also, I gave Archway the opportunity to file a reply, which it did on August 7, 2009.

I held settlement conferences with the parties, and we were able to resolve 19 of the objections raised by Archway. The unresolved objections are number 7, which applies to the 1994-95 school year audit, and number 19, which only refers to the 1998-99 school year audit.

Objection 7 concerns Schedules D (Petting Zoo/Janitorial/Pool), E (Pupil Transportation), F (Construction Labor costs), G (Landscaping/Maintenance/Security) and H (Depreciation). The parties agreed that the applicable regulation as to these schedules is N.J.A.C. 6:20-4.1(d).

By letter dated September 1, 2009, I told the parties that I wanted them to submit briefs as to Archway's objections applicable only to the 1994-95 school year audit and

that initially I wanted only to resolve this audit. It is not disputed that the resolution of the 1994-95 school year audit will have a carryover effect on the later audits.

After receipt of the briefs from the parties, I issued an Order on May 6, 2010 (Exhibit A), in which I concluded that DOE's calculation methodology should be used for Schedules D, E, F, G and H. I ordered that DOE prepare a new audit of the 1994-95 school year using this order and the settlements as to the other objections raised by Archway which relate to this audit. Further, I stated that this revised audit is to be submitted to me and to Archway. Archway would then have the opportunity to review the audit and the opportunity to submit a response as to the mathematical calculations only. Once this is resolved, I indicated I would issue a partial initial decision as to the 1994-95 audit.

I received a revised audit from DOE on June 25, 2010 (Exhibit B). Exhibit B is attached and fully incorporated herein. By letter dated August 24, 2010, Archway indicated no objections to the mathematical calculations in this audit which are consistent with my prior rulings and the decision of the Commissioner (Exhibit C). Exhibit C is attached and fully incorporated herein.

Therefore, I accept the audit for the 1994-95 school year as submitted by DOE on June 25, 2010 (Exhibit B), which includes the amount that Archway is obligated to return to the districts who sent students to Archway's PSH during the 1994-95 school year. I **ORDER** that Archway reimburse these sending districts the amount of their overpayments for the 1994-95 school year within sixty (60) days after the final decision in this matter.

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

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

Within thirteen days from the date on which this recommended partial 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 15, 2010
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

Date Received at Agency: 9/17/10

Date Mailed to Parties: _____

/cad

EXHIBITS

A. My order of May 6, 2010, with attachments

B. DOE's audit for the 1994-95 school year, received on June 25, 2010

C. Letter from Steven D. Weinstein, Esq., on behalf of Archway, dated August 24, 2010

Exhibit B

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PAULA T. DOW
Attorney General

ROBERT M. HANNA
Director

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2010 JUN 29 A 10:31
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

June 25, 2010

Via Hand-Delivery 6/28/2010
Honorable Beatrice Tylutki, T/A
State of New Jersey
Office of Administrative Law
Quakerbridge Plaza, Building 9
Mercerville, NJ 08619

Re: Archway Programs, Inc. v. New Jersey Department of Education, et als.
OAL Docket Nos.: EDU 6956-00, EDU 8646-00, EDU 4834-01, and EDU 4607-03

Dear Judge Tylutki:

Please accept this submission on behalf of the respondent, New Jersey Department of Education ("Department"). The Department files the report attached as its calculation of the amount that Petitioner, Archway Programs, Inc., is obligated to return to its sending districts for the Fiscal Year Ending 1995, pursuant to the Commissioner of Education's decision, dated December 4, 2008 and Your Honor's Order dated May 6, 2010.

Thank you for your attention to this matter.

Respectfully submitted,

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: Joyce D. Williams
Joyce D. (Atkins) Williams
Deputy Attorney General

cc: Steven D. Weinstein, Esq. (via overnight Mail)

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
New Jersey Department of Education
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Joyce (Atkins) Williams
Deputy Attorney General
(609) 633-1972

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ARCHWAY PROGRAMS INC., Petitioner, V. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.

OAL Docket No. EDU 10474-08S

REVISED REPORT
FYE 1995

Archway Programs, Inc. - Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

This report includes the following information:

The recap of the exhibit and schedules from the original fiscal monitoring report, showing a listing of the disallowed costs.

The recap of the exhibit and schedules from the combined first and second level appeal, showing a listing of the disallowed costs.

Adjustments made to the exhibit and schedules as a result of the administrative law judge's decision mailed to the parties on September 3, 2008.

Revisions to exhibit and schedules based on Blank Rome, Counselors at Law, LLP review of revised report.

Adjustments made to the exhibit and schedules as a result of the administrative law judge's Order mailed to the parties on May 6, 2010.

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995
Page 1

Exhibit 1 - OAL Order 5-6-2010

Summary of amounts refundable to school districts

Non-allowable Expenses:		DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
1. Salary expenses	(Schedule A)	$ 260,434.01	$ 230,936.10	$ 136,719.50
2. Salary expenses	(Schedule B)	386,436.20	386,436.20	386,436.20
Subtotal		646,870.21	617,372.30	523,155.70
3. Non-allowable non-salary expenses:	(Schedule C1)	113,744.04	105,265.86	105,265.86
Non-allowable non-salary expenses:	(Schedule C2)	28,495.91	5,545.81	5,545.81
4. Expenditures charged directly to PSH schools which also benefited other Archway programs:				
Petting Zoo and Janitorial Expenses	(Schedule D1)	37,711.87	14,287.41	101,933.56
Pool Expenses	(Schedule D2)	2,938.19	778.85	3,873.05
Pupil Transportation Costs	(Schedule E)	103,274.21	95,943.64	51,684.64
Construction Labor Costs	(Schedule F)	65,469.69	64,682.21	40,656.36
Landscaping, Maintenance, Security, Seasonal Landscaping and Seasonal Maintenance Expenses	(Schedule G)	189,084.86	181,356.50	180,702.13
Depreciation	(Schedule H)	130,899.59	105,991.21	205,936.19
5. Salary expenses	(Schedule I)	32,823.52	37,469.80	0.00
6. Entertainment expenses	(Schedule J)	2,072.04	2,072.04	2,072.04
7. Non-allowable fringe benefit costs	(Schedule K)	256,397.46	237,742.54	217,047.34
8. Non-allowable food service costs	(Schedule L)	86,893.27	84,293.00	84,293.00
9. Reclassified to organizational overhead expenses	(Schedule M1)	99,846.11	99,846.11	99,846.11
10. Non-allowable organizational overhead costs	(Schedule R)	415,137.21	407,871.19	400,460.72
Total non-allowable expenses		2,211,658.18	2,060,518.47	2,022,472.51
Other Adjustments:				
11. Working capital adjustment	(Schedule T)	329,512.00	306,809.00	301,151.00
12. Add: Prior year adjustment-per CPA audit report		(7,768.00)	(7,768.00)	(7,768.00)
Total amount refundable to sending school districts		**$ 2,533,402.18**	**$ 2,359,559.47**	**$ 2,315,855.51**

Exhibit 1 (Continued) - OAL Order 5-6-2010

Non-allowable Organizational Overhead Costs

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Charged in CPA audit report	$ 874,046.00	$ 874,046.00	$ 874,046.00
Less allowable organizational overhead costs:			
(Schedule R)	432,532.99	440,022.49	447,104.81
(Schedule S)	26,375.80	26,152.32	26,480.47
Total	458,908.79	466,174.81	473,585.28
Total non-allowable organizational overhead costs	**$ 415,137.21**	**$ 407,871.19**	**$ 400,460.72**

Working Capital Adjustment

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Increase in working capital per CPA audit report	$ 184,603.00	$ 184,603.00	$ 184,603.00
Decrease in working capital per Schedule T-page 2	144,909.00	122,206.00	116,548.00
Total working capital adjustment	**$ 329,512.00**	**$ 306,809.00**	**$ 301,151.00**

Archway Programs,. Inc.-Camden and Gloucester Counties
Response to Appeal of Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule A - OAL Order 5-6-2010

Salaries of employees functioning in a certified position who did not possess proper certification

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Phillips, Ronald	$ 961.54	$ 961.54	$ 961.54
Bohl (Goetschius), Susan	17,025.40	0.00	0.00
Cobb, Eunice	1,746.92	1,746.92	1,746.92
Cotey, Gus Jr.	5,000.00	0.00	0.00
Hall, Robert	23,539.52	23,539.52	23,539.52
Heenan, Maureen	14,423.00	14,423.00	14,423.00
Howarth, Dean	2,608.00	2,608.00	2,608.00
Hummell, David	8,654.36	8,654.36	8,654.36
Nicolino, Anthony	9,809.00	9,809.00	9,809.00
Novice, Phillis	2,952.00	2,952.00	0.00
Reed (Walker), Nancy	17,309.68	17,309.68	0.00
Wall, Christopher	5,373.00	5,373.00	5,373.00
Wenner, Barbara	4,225.51	4,225.51	4,225.51
Ziemba, Lawrence	4,616.00	4,616.00	0.00
Anderson, Kimberly A.	50.00	50.00	50.00
Brothman, Camille	3,300.00	0.00	0.00
Clements, Thomas E.	45.00	45.00	45.00
Keyes, Thomas	3,080.00	3,080.00	3,080.00
Wood, Mark	150.00	150.00	150.00
Belum, Frank	4,172.51	0.00	0.00
Alldred, Jennifer	1,258.00	1,258.00	1,258.00
Robbins, Helene	26,641.85	26,641.85	0.00
Dreby, Timothy	16,501.04	16,501.04	16,501.04
Gizelback, Deborah J.	5,000.00	5,000.00	5,000.00
Huster, Tracy M.	2,192.60	2,192.60	0.00
Moore, Anthony	11,129.47	11,129.47	0.00
Dugan, Kelly	21,250.00	21,250.00	0.00
Shipley, Jill	8,125.00	8,125.00	0.00
Murphy, Kathleen	27,295.12	27,295.12	27,295.12
Raymond, Diane	11,999.49	11,999.49	11,999.49
Totals	**$ 260,434.01**	**$ 230,936.10**	**$ 136,719.50**

Archway Programs,. Inc.-Camden and Gloucester Counties
Response to Appeal of Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule B - OAL Order 5-6-2010

Salaries of seven employees charged directly to PSD schools, with no record of performing services for PSD schools

Name	DOE Amount	Appeal	OAL Decision - 5/6/2010
Whittaker, Chester	$ 101,767.29	$ 101,767.29	$ 101,767.29
Ilconich, Christopher	4,666.22	4,666.22	4,666.22
Mason, Julie	29,528.98	29,528.98	29,528.98
Mollenhauer, Barbara	52,052.90	52,052.90	52,052.90
Rosen, Steve	53,349.75	53,349.75	53,349.75
Yurchuck, Sally	66,007.06	66,007.06	66,007.06
Snyder, Judith	35,298.00	35,298.00	35,298.00
Johnson, Lavonne	43,766.00	43,766.00	43,766.00
Totals	**$ 386,436.20**	**$ 386,436.20**	**$ 386,436.20**

Schedule C1 - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Price, Elton	$ 2,060.64	$ 2,060.64	$ 2,060.64
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.28	2,184.28	2,184.28
Price, Elton	2,184.12	2,184.12	2,184.12
Walters, Donald, ED D.	2,000.00	2,000.00	2,000.00
Walters, Donald, ED D.	2,000.00	2,000.00	2,000.00
Peretz, Suzanne	400.00	400.00	400.00
NARHA	35.00	0.00	0.00
NARHA	35.00	0.00	0.00
Tassie Livingston, NJCA Membership / Chairperson	50.00	50.00	50.00
Kingsway Learning Center	130.00	130.00	130.00
McGloughlin, Judith	188.86	188.86	188.86
NMDC	215.00	215.00	215.00
Riverside Publishing Co.	125.00	125.00	125.00
Specialized Training Service	99.00	99.00	99.00
Specialized Training Service	198.00	198.00	198.00
Winkler, Paul, Dr. Ed.	52.80	52.80	52.80
ASAH	150.00	150.00	150.00
ASAH	150.00	150.00	150.00
ASAH	1,220.00	1,220.00	1,220.00
Ocean Place Hilton	414.00	414.00	414.00
Behavior Intervention Specialist, Inc.	200.00	0.00	0.00
Subtotal	**$ 33,750.22**	**$ 33,480.22**	**$ 33,480.22**

Schedule C1 (Continued) - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Bally's Park Place	$ 115.00	$ 115.00	$ 115.00
Bally's Park Place	610.00	610.00	610.00
Cash/Education Administration	150.00	150.00	150.00
Bally's Park Place	475.00	475.00	475.00
Vista Convention Services	162.50	162.50	162.50
Cash/Education Administration	250.00	250.00	250.00
DeMesquita, Carole	376.91	376.91	376.91
DeMesquita, Carole	766.10	0.00	0.00
DeMesquita, Carole	450.00	450.00	450.00
DeMesquita, Carole	150.00	150.00	150.00
NAPSEC	417.00	0.00	0.00
NAPSEC	135.00	0.00	0.00
Sundial Beach Resort	1,260.00	1,260.00	1,260.00
AA Data Conversions	320.00	320.00	320.00
Archway Programs Fund	120.00	120.00	120.00
Cash/Education Administration	20.00	20.00	20.00
Cash/Education Administration	68.90	68.90	68.90
Cash/Education Administration	49.99	49.99	49.99
Innovative Promotion	160.00	160.00	160.00
DeMesquita, Carole	94.25	94.25	94.25
Johnson, Lavonne	44.48	44.48	44.48
Johnson, Lavonne	107.00	107.00	107.00
Okoorian, Susan	79.17	79.17	79.17
Borders Book Store	92.75	92.75	92.75
Borders Book Store	149.50	150.00	150.00
Cash/Education Administration	10.00	10.00	10.00
Cash/Education Administration	200.00	200.00	200.00
Cash/Education Administration	65.00	65.00	65.00
Cash/Education Administration	150.00	150.00	150.00
Cash/Education Administration	40.00	40.00	40.00
Cash/Education Administration	100.00	100.00	100.00
Subtotal	**$ 40,938.77**	**$ 39,351.17**	**$ 39,351.17**

Schedule C1 (Continued) - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Davis Block Ordering	$ 42.85	$ 42.85	$ 42.85
Lawrence Erlbaum Associates	143.85	143.85	143.85
Lawrence Erlbaum Associates	36.00	36.00	36.00
National Clearinghouse	62.50	62.50	62.50
National Clearinghouse	34.00	34.00	34.00
AABar, Inc.	32.50	32.50	32.50
Alfax Mfg.	12.24	12.24	12.24
Barbra Engel Therapy Services	51.00	0.00	0.00
Cannon Financial	41.25	41.25	41.25
Cannon Financial	41.25	41.25	41.25
Cannon Financial	41.25	41.25	41.25
Cannon Financial	56.20	56.20	56.20
Cannon Financial	41.25	41.25	41.25
Cannon Financial	41.25	41.25	41.25
Cannon Financial	41.25	41.25	41.25
Cannon Financial	41.25	41.25	41.25
Cannon Financial	41.25	41.25	41.25
Cannon Financial	36.14	36.14	36.14
Cannon Financial	41.25	41.25	41.25
Cash/Challenge School	150.00	150.00	150.00
Cash/Lower School	100.00	100.00	100.00
Cash/Lower School	95.40	95.40	95.40
Cash/Lower School	86.40	86.40	86.40
Cash/Lower School	100.00	100.00	100.00
Cash/Washington Twp. School	600.00	600.00	600.00
Cash/Washington Twp. School	150.00	150.00	150.00
Cash/Washington Twp. School	150.00	150.00	150.00
Cash/Washington Twp. School	23.01	23.01	23.01
Cash/Washington Twp. School	500.00	500.00	500.00
Cash/Upper School	40.00	40.00	40.00
Cheff Center	25.00	25.00	25.00
Subtotal	**$ 43,837.11**	**$ 42,198.51**	**$ 42,198.51**

Schedule C1 (Continued) - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
CPPC	$ 57.00	$ 57.00	$ 57.00
Data Research	107.67	0.00	0.00
Datalogic Systems, Inc.	295.00	295.00	295.00
DeMesquita, Carole	431.91	431.91	431.91
Ebsco Curriculum Materials	132.00	132.00	132.00
Foto 1	72.44	72.44	72.44
Gym-Closet	217.40	217.40	217.40
Gym-Closet	294.36	294.36	294.36
Highsmith	72.80	72.80	72.80
Johnson's Farm	100.00	100.00	100.00
Laureate	1,270.00	1,270.00	1,270.00
Office Max	61.62	61.62	61.62
Office Max	99.95	99.95	99.95
Oral Ledden and Sons, Inc.	556.24	556.24	556.24
Paxton Patterson	583.25	583.25	583.25
Raimondo, Philip	59.00	59.00	59.00
RPM Press, Inc.	42.50	42.50	42.50
S & S Arts and Crafts	84.54	84.54	84.54
Scholastic, Inc.	3.90	3.90	3.90
Scott Foresman	828.63	828.63	828.63
Sportime	696.45	696.45	696.45
Wheaton Village	53.00	3.50	3.50
Winkler, Paul, Dr. Ed.	57.00	57.00	57.00
A & B Silkscreen	211.80	211.80	211.80
Brennan, Carolyn	250.00	250.00	250.00
Cash/Washington Township	131.10	131.10	131.10
Cash/Washington Township	110.00	110.00	110.00
Cash/Washington Township	165.00	165.00	165.00
Cash/Washington Township	500.00	500.00	500.00
Cash/Upper School	7.21	7.21	7.21
Clementon Amusement Park	385.00	56.00	56.00
Subtotal	**$ 51,773.88**	**$ 49,649.11**	**$ 49,649.11**

Schedule C1 (Continued) - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Crosskeys Skating	$ 250.00	$ 250.00	$ 250.00
DeMesquita, Carole	171.00	171.00	171.00
Deptford Cinema B	275.00	275.00	275.00
Deptford Skating	80.00	80.00	80.00
Dunnfields Farm Market	76.50	76.50	76.50
Franklin Institute	400.00	400.00	400.00
Garden State Discovery	160.00	160.00	160.00
Greenberg, Jessica	250.00	250.00	250.00
Little Ceasers	133.20	133.20	133.20
Myhers, Colleen	100.00	100.00	100.00
N.J.Residential Recreation League	50.00	0.00	0.00
NJEA Exhibits Coordinator	400.00	400.00	400.00
Philadelphia Zoo	209.00	209.00	209.00
Rolf, Nancy	500.00	500.00	500.00
Shannon Caterers	500.00	0.00	0.00
Shannon Caterers	994.00	0.00	0.00
Skaters Choice	165.00	165.00	165.00
Skaters Choice	137.50	137.50	137.50
Springdale Farms	395.00	169.85	169.85
Story Book Land	149.50	0.00	0.00
The Golf Farm	150.00	0.00	0.00
Yurin, Ida	100.00	100.00	100.00
Cash/Washington Township	500.00	500.00	500.00
Deptford Skating	75.00	75.00	75.00
Howard, Joan, VMD	540.00	540.00	540.00
Iron Horse Tack Shop	225.00	0.00	0.00
Roesch, Keith	1,200.00	1,200.00	1,200.00
The American Cancer Society	900.00	900.00	900.00
National Health Supply Corp.	43.80	43.80	43.80
Wal-Mart	100.05	100.05	100.05
Galiazzi, Anthony-4/10/95	225.00	225.00	225.00
Subtotal	**$ 61,228.43**	**$ 56,810.01**	**$ 56,810.01**

Schedule C1 (Continued) - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Galiazzi, Anthony-4/24/95	$ 210.00	$ 210.00	$ 210.00
Gallagher, William	240.00	240.00	240.00
Galiazzi, Anthony-5/15/95	225.00	225.00	225.00
Galiazzi, Anthony-5/19/95	195.00	195.00	195.00
Galiazzi, Anthony-6/5/95	195.00	195.00	195.00
Galiazzi, Anthony-6/20/95	225.00	225.00	225.00
Galiazzi, Anthony-6/23/95	120.00	120.00	120.00
Gallagher, William	255.00	255.00	255.00
Gallagher, William	225.00	225.00	225.00
Gallagher, William-4/17/95	180.00	180.00	180.00
Gallagher, William-5/30/95	240.00	240.00	240.00
Johnson, Ronald-6/12/95	225.00	225.00	225.00
Johnson, Ronald-6/23/95	240.00	240.00	240.00
Kimball Security Alarms, Inc.	18.00	0.00	0.00
Medford Heating Oil	53.79	53.79	53.79
Medford Heating Oil	4.23	4.23	4.23
Mobilmedia	401.29	401.29	401.29
General Chemical and Supply	1,746.92	1,746.92	1,746.92
General Chemical and Supply	252.00	252.00	252.00
General Chemical and Supply	755.88	755.88	755.88
INDCO	1,892.86	0.00	0.00
Roberts Brothers, Inc.	417.50	417.50	417.50
N.J.Labworks	275.00	275.00	275.00
Pure Earth Environmental Lab	535.00	0.00	0.00
Comp, USA	919.88	919.88	919.88
DeMesquita, Carole	600.00	600.00	600.00
Sam's Club	349.99	349.99	349.99
Callahan Trucking Company	440.00	440.00	440.00
Ferrucci Nurseries	1,800.00	1,800.00	1,800.00
Gloucester Building Supply, Inc.	4.30	4.30	4.30
Gloucester Building Supply, Inc.	45.83	45.83	45.83
Subtotal	**$ 74,515.90**	**$ 67,651.62**	**$ 67,651.62**

Schedule C1 (Continued) - OAL Order 5-6-2010

Non-salary expenses charged directly to PSD schools which are non-allowable in accordance with N.J.A.C. 6:20-4.4(a)

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Green Lea Garden Center	$ 1,189.00	$ 1,189.00	$ 1,189.00
Greenline Distributors, Inc.	443.90	0.00	0.00
Greenline Distributors, Inc.	25.96	25.96	25.96
Home Depot	544.76	544.76	544.76
Home Depot	2.00	2.00	2.00
Joseph Fazzo, Inc.	250.00	250.00	250.00
Joseph Fazzo, Inc.	130.00	130.00	130.00
Leadbeater & Sons	295.00	295.00	295.00
Leadbeater & Sons	473.39	473.39	473.39
M.A. Bruder and Sons	248.63	248.63	248.63
McNaughton's Nursery	500.00	500.00	500.00
Mr. John	250.00	250.00	250.00
N.J.Labworks	45.00	45.00	45.00
Niagara Pools	707.31	707.31	707.31
Pure Earth Environmental Lab	1,170.00	0.00	0.00
Signworks	247.10	247.10	247.10
South Jersey Agricultural Products, Inc.	373.87	373.87	373.87
Southern Industrial Sand, Inc.	360.00	360.00	360.00
Sterling Heating & Air Conditioning, Inc.	88.12	88.12	88.12
Sterling Heating & Air Conditioning, Inc.	55.00	55.00	55.00
Sterling Heating & Air Conditioning, Inc.	218.00	218.00	218.00
Township of Evesham	500.00	500.00	500.00
Tri-state Fire Protection, Inc.	391.00	391.00	391.00
Mollenhauer, Barbara	9,108.00	9,108.00	9,108.00
Whittaker, Chester M.	12,252.10	12,252.10	12,252.10
Yurchuck, Sally	9,360.00	9,360.00	9,360.00
Total	**$ 113,744.04**	**$ 105,265.86**	**$ 105,265.86**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule C2 - OAL Order 5-6-2010

Non-allowable interest expense for unapproved related party loans

	DOE Amount	Appeal	OAL Order - 5/6/2010
Interest charged to PSD on $300,000 secured note issued to a member of the Board of Trustees	$ 18,630.38	$ 961.94	$ 961.94
Interest charged to PSD on $40,000 unsecured note issued to a member of the Board of Trustees	2,933.31	2,933.31	2,933.31
Interest charged on $100,000 unsecured note issued to a member of the Board of Trustees	6,932.22	1,650.56	1,650.56
Total	**$ 28,495.91**	**$ 5,545.81**	**$ 5,545.81**

Schedule D1 - OAL Order 5-6-2010

Petting zoo and janitorial expenses

Expenses incurred Employees	DOE Amount	Appeal	OAL Order - 5/6/2010
Doebrich, Dovie	$ 7,560.60	$ 7,560.60	$ 7,560.60
Heim, Susan V.	5,856.00	5,856.00	5,856.00
Howe, Leah	17,473.84	17,473.84	17,473.84
Schleinkofer, Amanda K.	9,509.40	9,509.40	9,509.40
Wampole, Dena	22,452.00	22,452.00	22,452.00
Journal entries	(1,258.03)	(1,258.03)	(1,258.03)
Bell, Tim	1,040.00	1,040.00	1,040.00
Berry, Bryant D.	6,562.88	6,562.88	6,562.88
Byrd, Brenda	9,058.34	9,058.34	9,058.34
McNally, Thomas	14,311.39	14,311.39	14,311.39
Money, Maurice	256.00	256.00	256.00
Owens, Wesley	10,210.30	10,210.30	10,210.30
Phy, Edward	13,585.06	13,585.06	13,585.06
Phy, John W.	7,600.52	7,600.52	7,600.52
Stevens, Louise	26,723.31	26,723.31	26,723.31
Taylor, Lawrence M.	393.12	393.12	393.12
White, Richard	1,602.56	1,602.56	1,602.56
Hamilton, John L.	18,435.55	18,435.55	18,435.55
	171,372.84	171,372.84	171,372.84
Reclassification from Schedule G:			
Randall, John		7,774.30	7,774.30
Total payroll	171,372.84	179,147.14	179,147.14
Allocation percentage	78.33%	87.88%	39.73%
Total allocated to PSD programs	134,236.35	157,434.51	71,175.16
Total charged to PSD programs	171,372.84	171,372.84	171,372.84
Subtotal -non-allowable salaries	**$ 37,136.49**	**$ 13,938.33**	**$ 100,197.68**

Schedule D1 (Continued) - OAL Order 5-6-2010

Petting zoo and janitorial expenses

Expenses incurred Expenditures	DOE Amount	Appeal	OAL Order - 5/6/2010
Wampole, Dena	$ 111.67	$ 111.67	$ 111.67
Martyn, Jim	1,000.00	1,000.00	1,000.00
Scavma Bookstore	23.50	23.50	23.50
Carriage Rides	175.00	175.00	175.00
Cash/Education Administration	200.00	200.00	200.00
Howard, Joan, VMD	231.00	231.00	231.00
Howard, Joan, VMD	214.00	214.00	214.00
Ratajski, Bonnie	700.00	700.00	700.00
Transfer from Schedule C1:	2,655.17	2,655.17	2,655.17
Iron Horse Tack Shop		225.00	225.00
Total	2,655.17	2,880.17	2,880.17
Allocation percentage	78.33%	87.88%	39.73%
Total allocated to PSD programs	2,079.79	2,531.09	1,144.29
Total charged to PSD programs	2,655.17	2,880.17	2,880.17
Non-allowable expenses	575.38	349.08	1,735.8.
Total	**$ 37,711.87**	**$ 14,287.41**	**$ 101,933.56**

Allocation percentage	PSD Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	$ 9,251,621	$ 19,772,844
Less: Required billing adjustment (Schedule V)	2,315,856	2,315,856
Revenues after adjustment	$ 6,935,765	$ 17,456,988
Allocation percentage		39.73%

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule D2 - OAL Order 5-6-2010

Pool expenses

Expenditures	DOE Amount	Appeal	OAL Order - 5/6/2010
N.J.Labworks	$ 85.00	$ 85.00	$ 85.00
N.J.Labworks	275.00	275.00	275.00
N.J.Labworks	235.00	235.00	235.00
N.J.Labworks	200.00	200.00	200.00
N.J.Labworks	185.00	185.00	185.00
N.J.Labworks	125.00	125.00	125.00
N.J.Labworks	80.00	80.00	80.00
N.J.Labworks	105.00	105.00	105.00
N.J.Labworks	80.00	80.00	80.00
N.J.Labworks	80.00	80.00	80.00
N.J.Labworks	100.00	100.00	100.00
N.J.Labworks	80.00	80.00	80.00
N.J.Labworks	266.75	266.75	266.75
Niagara Pools	120.09	120.09	120.09
Niagara Pools	145.00	145.00	145.00
Niagara Pools	560.69	560.69	560.69
Niagara Pools	2,533.63	2,533.63	2,533.63
Amount charged	5,256.16	5,256.16	5,256.16
Transfer from Schedule C1:			
Pure Earth Environment Lab		1,170.00	1,170.00
Amount Charged	5,256.16	6,426.16	6,426.16
Allocation percentage	44.10%	87.88%	39.73%
Allowable	2,317.97	5,647.31	2,553.11
Total non-allowable Costs	**$ 2,938.19**	**$ 778.85**	**$ 3,873.05**

Allocation percentage	PSH Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	$ 9,251,621	$ 19,772,844
Less: Required billing adjustment (Schedule V)	2,315,856	2,315,856
Revenues after adjustment	$ 6,935,765	$ 17,456,988
Allocation percentage		39.73%

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule E - OAL Order 5-6-2010

Pupil transportation costs

	DOE Amount	Appeal	OAL Order - 5/6/2010
Transportation department expenses charged to PSD schools	$ 118,174.65	$ 100,857.18	$ 100,857.18
Transportation department expenses:			
Supervisors' salaries			
Iannaco, Marlene	37,226.02	37,226.02	37,226.02
Regalbuto, Thomas	20,895.08	20,895.08	20,895.08
Total salaries	58,121.10	58,121.10	58,121.10
Allocation percentage	3.97%	3.97%	39.73%
Total allocated to PSD programs	2,307.41	2,307.41	23,091.51
Total charged to PSD programs	58,121.10	58,121.10	58,121.10
Non-allowable salaries	55,813.69	55,813.69	35,029.59
Other expenses			
Transportation costs to be allocated	317,204.76	65,645.69	65,645.69
Allocation percentage	3.97%	3.97%	39.73%
Total allocated to PSD programs	12,593.03	2,606.13	26,081.03
Total charged to PSD programs	60,053.55	42,736.08	42,736.08
Non-allowable expenses	47,460.52	40,129.95	16,655.05
Total	**$ 103,274.21**	**$ 95,943.64**	**$ 51,684.64**

Allocation percentage	PSD Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	$ 9,251,621	$ 19,772,844
Less: Required billing adjustment (Schedule V)	2,315,856	2,315,856
Revenues after adjustment	$ 6,935,765	$ 17,456,988
Allocation percentage		39.73%

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule F - OAL Order 5-6-2010

Construction labor costs

Employees:	DOE Amount	Appeal	OAL Order - 5/6/2010
Atkins, David F.	$ 17,011.19	$ 17,011.19	$ 17,011.19
Barnhardt, Isaac M.	26,511.55	26,511.55	26,511.55
Matlack, Thomas K.	19,550.63	19,550.63	19,550.63
Keppel, Peter N.	15,674.10	15,674.10	15,674.10
Total salary	78,747.47	78,747.47	78,747.47
Allocation percentage	8.22%	9.22%	39.73%
Allowable	6,473.04	7,260.52	31,286.37
Charged	71,942.73	71,942.73	71,942.73
Total non-allowable	**$ 65,469.69**	**$ 64,682.21**	**$ 40,656.36**

Allocation percentage	PSD Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	$ 9,251,621	$ 19,772,844
Less: Required billing adjustment (Schedule V)	2,315,856	2,315,856
Revenues after adjustment	$ 6,935,765	$ 17,456,988
Allocation percentage		39.73%

Schedule G - OAL Order 5-6-2010

Landscaping, maintenance, security, seasonal landscaping and seasonal maintenance expenses

Employees	DOE Amount	Appeal	OAL Order - 5/6/2010
Burns, Mark	$ 20,093.20	$ 20,093.20	$ 20,093.20
Dean, Theodore	17,475.10	17,475.10	17,475.10
Howe, William	10,974.00	10,974.00	10,974.00
Lightfoot, Gary	19,733.20	19,733.20	19,733.20
Mc Veigh, Joseph	13,723.88	13,723.88	13,723.88
Randall, John	7,774.30	7,774.30	7,774.30
Matousch, Dennis M.	54,949.50	54,949.50	54,949.50
Kirk, Donna	20,323.90	20,323.90	20,323.90
Annett, Brian	3,379.00	3,379.00	3,379.00
Baldwin, Tim	2,810.50	2,810.50	2,810.50
Fecher, John J.	17,145.01	17,145.01	17,145.01
Palmer, Ralph	492.80	492.80	492.80
Snuffin, Frank	945.00	945.00	945.00
Williams, James	24,371.52	24,371.52	24,371.52
Smith, Joseph	50,186.88	50,186.88	50,186.88
Carhart, Ewing	34,235.20	34,235.20	34,235.20
Fox, Craig M.	822.50	822.50	822.50
Henry, William	2,869.45	2,869.45	2,869.45
Kernan, Michael T.	11,168.51	11,168.51	11,168.51
Minerva, Christopher	4,474.25	4,474.25	4,474.25
Ottenthal, Edward W.	332.50	332.50	332.50
Everetts, Matthew J.	3,001.39	3,001.39	3,001.39
Hughey, Brian	4,969.89	4,969.89	4,969.89
Hughey, Michael	1,890.00	1,890.00	1,890.00
Ludman, Matthew P.	1,428.00	1,428.00	1,428.00
Richards, Andrew M.	2,902.25	2,902.25	2,902.25
	332,471.73	332,471.73	332,471.73
Less: transferred to Schedule D1- Randall, John		(7,774.30)	(7,774.30)
Total Employee's Salary	$ 332,471.73	$ 324,697.43	$ 324,697.43

Schedule G (Continued) - OAL Order 5-6-2010

Landscaping, maintenance, security, seasonal landscaping and seasonal maintenance expenses

Employees	DOE Amount	Appeal	OAL Order - 5/6/2010
Total Employee's Salary	$ 332,471.73	$ 324,697.43	$ 324,697.43
Allocation percentage	38.97%	39.58%	39.73%
Total allocated to PSD	129,564.23	128,515.24	129,002.29
Charged to PSD	285,830.59	278,056.29	278,056.29
Total non-allowable salaries	156,266.36	149,541.05	149,054.00
Expenditures			
Cherry Valley Tractor Sales	296.88	296.88	296.88
Cherry Valley Tractor Sales	12.27	12.27	12.27
Drummond American Corp.	405.85	405.85	405.85
Drummond American Corp.	479.21	479.21	479.21
Drummond American Corp.	420.48	420.48	420.48
Drummond American Corp.	532.07	532.07	532.07
Ferrucci Nurseries	535.15	535.15	535.15
Greenline Distributors, Inc.	453.20	453.20	453.20
Greenline Distributors, Inc.	105.45	105.45	105.45
Sweeney Seed Company	1,000.00	1,000.00	1,000.00
Drummond American Corp.	2,051.67	2,051.67	2,051.67
Drummond American Corp.	266.50	266.50	266.50
General Chemical and Supply	3,395.72	3,395.72	3,395.72
General Chemical and Supply	244.80	244.80	244.80
General Chemical and Supply	1,350.41	1,350.41	1,350.41
General Chemical and Supply	2,789.24	2,789.24	2,789.24
General Chemical and Supply	1,091.13	1,091.13	1,091.13
General Chemical and Supply	157.80	157.80	157.80
General Chemical and Supply	343.40	343.40	343.40
General Chemical and Supply	69.69	69.69	69.69
General Chemical and Supply	566.66	566.66	566.66
General Chemical and Supply	948.80	948.80	948.80
General Chemical and Supply	252.35	252.35	252.35
Mantek	1,228.33	1,228.33	1,228.33
Subtotal	**$ 18,997.06**	**$ 18,997.06**	**$ 18,997.06**

Schedule G (Continued) - OAL Order 5-6-2010

Landscaping, maintenance, security, seasonal landscaping and seasonal maintenance expenses

Expenditures	DOE Amount	Appeal	OAL Order - 5/6/2010
Pep Boys	$ 179.79	$ 179.79	$ 179.79
General Chemical and Supply	211.40	211.40	211.40
Gloucester Building Supply, Inc.	153.01	153.01	153.01
Gloucester Building Supply, Inc.	2,865.40	2,865.40	2,865.40
Gloucester Building Supply, Inc.	275.35	275.35	275.35
Gloucester Building Supply, Inc.	1,157.10	1,157.10	1,157.10
Gloucester Building Supply, Inc.	73.60	73.60	73.60
Gloucester Building Supply, Inc.	45.12	45.12	45.12
Gloucester Building Supply, Inc.	2,509.68	2,509.68	2,509.68
Home Depot	438.00	438.00	438.00
Home Depot	298.00	298.00	298.00
M.A. Bruder and Sons	250.80	250.80	250.80
M.A. Bruder and Sons	14.05	14.05	14.05
M.A. Bruder and Sons	194.10	194.10	194.10
M.A. Bruder and Sons	280.80	280.80	280.80
M.A. Bruder and Sons	17.49	17.49	17.49
M.A. Bruder and Sons	7.00	7.00	7.00
M.A. Bruder and Sons	238.40	238.40	238.40
M.A. Bruder and Sons	357.43	357.43	357.43
Expenses directly attributable to maintenance vehicles	81,917.79	81,917.79	81,917.79
Depreciation on landscaping equipment on depreciation schedule, as submitted	1,592.00	1,592.00	1,592.00
Subtotal	112,073.37	112,073.37	112,073.37
Add: transfer from Schedule C1			
INDCO		1,892.86	1,892.86
Greenline Distributors, Inc.		443.90	443.90
Less: Allowable in full:			
Glousester Building Supply, Inc.		(2,865.40)	(2,865.40)
Total expenditures	$ 112,073.37	$ 111,544.73	$ 111,544.73

Schedule G (Continued) - OAL Order 5-6-2010

Landscaping, maintenance, security, seasonal landscaping and seasonal maintenance expenses

	DOE Amount	Appeal	OAL Order - 5/6/2010
Total expenditures	$ 112,073.37	$ 111,544.73	$ 111,544.73
Allocation percentage	38.97%	39.58%	39.73%
Total allocated to PSD	43,674.99	44,149.40	44,316.72
Total charged to PSD	76,493.49	75,964.85	75,964.85
Total non-allowable expenditures;	32,818.50	31,815.45	31,648.13
Total non-allowable salaries and expenditures	**$ 189,084.86**	**$ 181,356.50**	**$ 180,702.13**

Allocation percentage	PSD Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	$ 9,251,621	$ 19,772,844
Less: Required billing adjustment (Schedule V)	2,315,856	2,315,856
Revenues after adjustment	$ 6,935,765	$ 17,456,988
Allocation percentage		39.73%

Archway Programs,. Inc.-Camden and Gloucester Counties
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Schedule H - OAL Order 5-6-2010

Depreciation

Depreciation on campus assets identified on Archway's depreciation schedule:	DOE Amount	Appeal	OAL Order - 5/6/2010
Atco campus	$ 244,173.00	$ 252,885.00	$ 252,885.00
Allocation	62.98%	70.66%	39.73%
Allocated amount	153,780.16	178,688.54	100,471.21
Charged to PSD	253,515.01	253,515.01	253,515.01
Non-allowable-Atco campus	99,734.85	74,826.47	153,043.80
Washington Campus	94,427.00	94,427.00	94,427.00
Allocation	62.74%	62.74%	39.73%
Allocated amount	59,243.50	59,243.50	37,515.85
Charged to PSD	90,408.24	90,408.24	90,408.24
Non-allowable-Washington Campus	31,164.74	31,164.74	52,892.39
Total	**$ 130,899.59**	**$ 105,991.21**	**$ 205,936.19**

Allocation percentage	PSD Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	$ 9,251,621	$ 19,772,844
Less: Required billing adjustment (Schedule V)	2,315,856	2,315,856
Revenues after adjustment	$ 6,935,765	$ 17,456,988
Allocation percentage		39.73%

Archway Programs,. Inc.-Camden and Gloucester Counties
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Schedule I - OAL Order 5-6-2010

Salary expenses charged to PSD schools in excess of allowable amounts for that position

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Hughey, John D. - Salary	$ 30,159.03	$ 25,794.35	$ 0.00
Hughey, John D. - Travel allowance	0.00	3,995.45	0.00
Winkler, Paul - Salary	2,664.49	0.00	0.00
Winkler, Paul - Travel allowance	0.00	7,680.00	0.00
Total	**$ 32,823.52**	**$ 37,469.80**	**$ 0.00**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995
Page 1

Schedule J - OAL Order 5-6-2010

Entertainment expenses charged directly to PSD schools in excess of maximum allowable amount

Expenditure	DOE Amount	Appeal	OAL Order - 5/6/2010
Allocation from Food Services:			
Food Service charges-12-94	$ 313.00	$ 313.00	$ 313.00
Food Service charges-4-95	117.50	117.50	117.50
Food Service charges-5-95	510.70	510.70	510.70
Food Service charges-6-95	436.48	436.48	436.48
Food service allocation-2-95	102.00	102.00	102.00
Food service allocation-2-95	48.11	48.11	48.11
Food Service-1-31-95	170.25	170.25	170.25
Cash/Education Administration	15.79	15.79	15.79
Samuel's	93.24	93.24	93.24
Francesco's Restaurant	85.30	85.30	85.30
Winkler, Paul, Dr. Ed.	48.20	48.20	48.20
Winkler, Paul, Dr. Ed.	9.00	9.00	9.00
Winkler, Paul, Dr. Ed.	62.89	62.89	62.89
Winkler, Paul, Dr. Ed.	29.10	29.10	29.10
Winkler, Paul, Dr. Ed.	35.70	35.70	35.70
Winkler, Paul, Dr. Ed.	24.22	24.22	24.22
Winkler, Paul, Dr. Ed.	37.44	37.44	37.44
Winkler, Paul, Dr. Ed.	20.17	20.17	20.17
Winkler, Paul, Dr. Ed.	66.85	66.85	66.85
Winkler, Paul, Dr. Ed.	55.75	55.75	55.75
Winkler, Paul, Dr. Ed.	49.55	49.55	49.55
Winkler, Paul, Dr. Ed.	30.97	30.97	30.97
Winkler, Paul, Dr. Ed.	20.00	20.00	20.00
Winkler, Paul, Dr. Ed.	39.75	39.75	39.75
Winkler, Paul, Dr. Ed.	48.00	48.00	48.00
Winkler, Paul, Dr. Ed.	31.13	31.13	31.13
Winkler, Paul, Dr. Ed.	36.00	36.00	36.00
Cash/Education Administration	6.26	6.26	6.26
Cash/Education Administration	4.20	4.20	4.20
Cash/Education Administration	36.00	36.00	36.00
Subtotal	**$ 2,583.55**	**$ 2,583.55**	**$ 2,583.55**

Schedule J - OAL Order 5-6-2010

Entertainment expenses charged directly to PSD schools in excess of maximum allowable amount

Expenditure	DOE Amount	Appeal	OAL Order - 5/6/2010
Cash/Education Administration	$ 11.00	$ 11.00	$ 11.00
Cash/Team	23.30	23.30	23.30
Cash/Ed Administration	20.00	20.00	20.00
Cash/Ed Administration	27.45	27.45	27.45
Cash/Ed Administration	20.00	20.00	20.00
Cash/Ed Administration	32.00	32.00	32.00
Cash/Ed Administration	14.30	14.30	14.30
Cash/Ed Administration	30.00	30.00	30.00
Cash/Upper School	38.00	38.00	38.00
Cash/Upper School	35.00	35.00	35.00
Cash/Washington Township	101.38	101.38	101.38
Cash/Lower School-4/24/95	37.94	37.94	37.94
Cash/Lower School-4/24/95	22.80	22.80	22.80
Cash/Lower School-5/23/95	27.56	27.56	27.56
Cash/Lower School-6/7/95	9.42	9.42	9.42
Cash/Lower School	42.31	42.31	42.31
Cash/Education Administration	19.42	19.42	19.42
Cash/Education Administration	56.97	56.97	56.97
Cash/Lower School	202.50	202.50	202.50
Total	**$ 3,354.90**	**$ 3,354.90**	**$ 3,354.90**

Each program (Atco, Challenge and Washington) is allowed to charge a maximum of $500.00 for entertainment. The expenditures were charged to the programs as follows:

	Expenditure	Limit	Allowable	Non-allowable
Atco	$ 2,482.11	$ 500.00	$ 500.00	$ 1,982.11
Challenge	282.86	500.00	282.86	0.00
Washington	589.93	500.00	500.00	89.93
Total	$ 3,354.90		$ 1,282.86	**$ 2,072.04**

Archway Programs,. Inc.-Camden and Gloucester Counties
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Schedule K - OAL Order 5-6-2010

Non-allowable fringe benefit costs applicable to non-allowable salary costs

	DOE Amount	Appeal	OAL Order - 5/6/2010
Employee fringe benefits charged to PSD -per general ledger	$ 1,227,468.81	$ 1,227,468.81	$ 1,227,468.81
Employees salaries-per general ledger	4,709,027.23	4,709,027.23	4,709,027.23
Adjustments:			
Schedule A	260,434.01	230,936.10	136,719.50
Schedule B	386,436.20	386,436.20	386,436.20
Schedule D1	37,136.49	13,938.33	100,197.68
Schedule E	55,813.69	55,813.69	34,913.34
Schedule F	65,469.69	64,682.21	40,498.87
Schedule G	156,266.36	149,541.05	149,054.00
Schedule I	32,823.52	25,794.35	0.00
Schedule L1	(58,926.56)	(63,190.70)	(63,190.70)
Schedule M1	51,567.89	51,567.89	51,567.8
Total adjustments	987,021.29	915,519.12	836,196.78
	3,722,005.94	3,793,508.11	3,872,830.45
Fringe benefit rate-as computed by Archway	26.09%	26.09%	26.09%
Allowable	971,071.35	989,726.27	1,010,421.47
Non-allowable Fringe Benefit Costs	**$ 256,397.46**	**$ 237,742.54**	**$ 217,047.34**

(a) This amount excludes salary costs for food services.

Schedule L - OAL Order 5-6-2010

Non-allowable food service costs charged directly to PSD schools

	DOE Amount	Appeal	OAL Order - 5/6/2010
Food service costs charged to the PSD schools - per general ledger	$ 145,159.55	$ 145,159.55	$ 145,159.55
Labor costs (Schedule L1)	58,926.56	63,190.70	63,190.70
Food costs (Schedule L2)	73,900.07	79,761.77	79,761.77
Other costs (Schedule L3).	40,893.21	44,136.84	44,136.84
Total costs	173,719.84	187,089.31	187,089.31
Less:			
Reimbursements	105,417.46	116,186.66	116,186.66
Payments received for meals	10,036.10	10,036.10	10,036.10
Total funds received for school meals	115,453.56	126,222.76	126,222.76
Allowable costs for food service	58,266.28	60,866.55	60,866.55
Non-allowable costs for food service	**$ 86,893.27**	**$ 84,293.00**	**$ 84,293.00**

Schedule I.1 - OAL Order 5-6-2010

Food service costs - allowable labor costs

Atco	DOE Amount	Appeal	OAL Order - 5/6/2010
Indirect Labor:	$ 45,970.02	$ 45,970.02	$ 45,970.02
Mack, Patricia			
Zdanowski, Thomas	942.54	942.54	942.54
Total indirect labor	46,912.56	46,912.56	46,912.56
Indirect labor allocation percentage	35.81%	35.01%	35.01%
Indirect labor allocated to school kitchen	16,799.39	16,424.09	16,424.09
Direct employees:			
Bennett, Irene	14,176.73	14,176.73	14,176.73
Kruger, Theresa Ann	18,374.28	18,374.28	18,374.28
Miller, Eileen	11,281.03	11,281.03	11,281.03
Sherrick, Sharon	12,013.58	12,013.58	12,013.58
Smuro, Estella	27.36	27.36	27.36
Velez, Linda	360.00	360.00	360.00
Total labor costs for Atco kitchen	73,032.37	72,657.07	72,657.07
Allocation percentage	57.63%	63.28%	63.28%
Labor cost allowable - Atco	42,088.55	45,977.39	45,977.39
Washington			
Indirect Labor:			
Mack, Patricia	45,970.02	45,970.02	45,970.02
Zdanowski, Thomas	942.54	942.54	942.54
Total indirect labor	46,912.56	46,912.56	46,912.56
Indirect labor allocation percentage	8.57%	9.37%	9.37%
Indirect labor allocated to school kitchen	4,020.41	4,395.71	4,395.71
Direct employees:			
Dolce, Marie	555.10	555.10	555.10
Salamone, Caroline	12,262.50	12,262.50	12,262.50
Total labor costs for kitchens	16,838.01	17,213.31	17,213.31
Total labor cost allowable	**$ 58,926.56**	**$ 63,190.70**	**$ 63,190.70**

Schedule L2 - OAL Order 5-6-2010

Food service costs - allowable food costs

	DOE Amount	Appeal	OAL Order - 5/6/2010
Total food costs-per general ledger	$ 254,898.04	$ 254,898.04	$ 254,898.04
Less:			
Non-allowable food costs (L2, page 4)	824.58	824.58	824.58
Food purchased by other Archway programs	141,780.39	141,780.39	141,780.39
Subtotal	142,604.97	142,604.97	142,604.97
Food purchased for PSD school kitchens	112,293.07	112,293.07	112,293.07
Allocation percentage	65.81%	71.03%	71.03%
Chargeable to PSD programs	**$ 73,900.07**	**$ 79,761.77**	**$ 79,761.77**

Schedule L2 (Continued) - OAL Order 5-6-2010

Food service costs - non-allowable food costs

Vendor	DOE Amount	Appeal	OAL Order - 5/6/2010
Rykoff-Sexton, Inc.	$ 150.00	$ 150.00	$ 150.00
Rykoff-Sexton, Inc.	407.69	407.69	407.69
Schmidt Baking Company, Inc.	19.65	19.65	19.65
State of New Jersey-Dept. of Agriculture	66.00	66.00	66.00
State of New Jersey-Dept. of Agriculture	181.24	181.24	181.24
Total	**$ 824.58**	**$ 824.58**	**$ 824.58**

Schedule L3 - OAL Order 5-6-2010

Food service costs - allowable other costs

	DOE Amount	Appeal	OAL Order - 5/6/2010
Total food services expenditures - per general ledger	$ 538,004.12	$ 538,004.12	$ 538,004.12
Less: Reclassifications (Schedule L3, page 6)	204.83	204.83	204.83
Subtotal	537,799.29	537,799.29	537,799.29
Less: Expenditure amounts in general ledger included in other line items:			
Food purchases	254,898.04	254,898.04	254,898.04
Food Services Salaries	128,047.51	128,047.51	128,047.51
Fringe benefits	34,551.31	34,551.31	34,551.31
General and administrative (Organizational overhead allocation)	52,889.90	52,889.90	52,889.90
	470,386.76	470,386.76	470,386.76
Subtotal	67,412.53	67,412.53	67,412.53
Less: Non-allowable Costs			
Expenditures (Schedule L3, page 7)	2,385.14	2,385.14	2,385.14
Depreciation (Schedule L3, page 8)	2,889.09	2,889.09	2,889.09
	5,274.23	5,274.23	5,274.23
Allowable "other" expenses	62,138.30	62,138.30	62,138.30
Allocation percentage	65.81%	71.03%	71.03%
Total allowable other costs	**$ 40,893.21**	**$ 44,136.84**	**$ 44,136.84**

Schedule L3 (Continued) - OAL Order 5-6-2010

Food service costs - reclassification of other costs

Name		DOE Amount	Appeal	OAL Order - 5/6/2010
LJ A Company, Inc.		$ 34.35	$ 34.35	$ 34.35
LJ A Company, Inc.		19.04	19.04	19.04
LJ A Company, Inc.		16.63	16.63	16.63
LJ A Company, Inc.		53.06	53.06	53.06
LJ A Company, Inc.		62.43	62.43	62.43
LJ A Company, Inc.		19.32	19.32	19.32
Total	(a)	**$ 204.83**	**$ 204.83**	**$ 204.83**

(a) These amounts are included on Schedule M2.

Schedule L3 (Continued) - OAL Order 5-6-2010

Food service costs - non-allowable other costs

Vendor	DOE Amount	Appeal	OAL Order - 5/6/2010
Camden County Municipal Utilities Auth.	$ 42.16	$ 42.16	$ 42.16
Camden County Municipal Utilities Auth.	42.60	42.60	42.60
Cannon Financial	10.31	10.31	10.31
City of Camden Water & Sewer	7.00	7.00	7.00
City of Camden Water & Sewer	8.10	8.10	8.10
City of Camden Water & Sewer	7.52	7.52	7.52
City of Camden Water & Sewer	7.97	7.97	7.97
Franklin Machine Products	147.28	147.28	147.28
Janicorp Serv.	24.18	24.18	24.18
Janicorp Serv.	38.79	38.79	38.79
Leadbeater & Sons	118.00	118.00	118.00
N.M.B. Mechanical, Inc.	340.00	340.00	340.00
N.M.B. Mechanical, Inc.	181.20	181.20	181.20
N.M.B. Mechanical, Inc.	90.00	90.00	90.00
N.M.B. Mechanical, Inc.	192.96	192.96	192.96
NJ American Water Company	8.00	8.00	8.00
NJ American Water Company	26.75	26.75	26.75
NJ American Water Company	20.80	20.80	20.80
NJ American Water Company	23.95	23.95	23.95
NJ American Water Company	23.98	23.98	23.98
Public Service Electric & Gas	60.59	60.59	60.59
Public Service Electric & Gas	113.51	113.51	113.51
Public Service Electric & Gas	89.46	89.46	89.46
Public Service Electric & Gas	74.02	74.02	74.02
Public Service Electric & Gas	111.36	111.36	111.36
Public Service Electric & Gas	136.87	136.87	136.87
Public Service Electric & Gas	139.59	139.59	139.59
Public Service Electric & Gas	41.32	41.32	41.32
Public Service Electric & Gas	112.79	112.79	112.79
Public Service Electric & Gas	89.45	89.45	89.45
Smith Electric Co., Inc.	39.55	39.55	39.55
Sunshine Landscaping	15.08	15.08	15.08
Total	**$ 2,385.14**	**$ 2,385.14**	**$ 2,385.14**

Schedule L3 (Continued) - OAL Order 5-6-2010

Food service costs - non-allowable depreciation

	DOE Amount	Appeal	OAL Order - 5/6/2010
Non-allowable depreciation	**$ 2,889.09**	**$ 2,889.09**	**$ 2,889.09**

Archway Programs,. Inc.-Camden and Gloucester Counties
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Schedule M1 - OAL Order 5-6-2010

Archway Programs, Inc. organizational overhead expenses charged directly to the PSD schools - reclassified to organizational overhead expenses

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Employees			
Hershman, Maurice	$ 19,395.98	$ 19,395.98	$ 19,395.98
Louie, Margaret M.	8,470.41	8,470.41	8,470.41
Nicoletto, Rosalie J.	23,701.50	23,701.50	23,701.50
Subtotal	**51,567.89**	**51,567.89**	**51,567.89**
Expenditures			
B & G Group	330.00	330.00	330.00
LJ A Company, Inc.	1,100.58	1,100.58	1,100.58
LJ A Company, Inc.	604.58	604.58	604.58
LJ A Company, Inc.	154.00	154.00	154.00
LJ A Company, Inc.	449.85	449.85	449.85
LJ A Company, Inc.	480.00	480.00	480.00
LJ A Company, Inc.	1,485.78	1,485.78	1,485.78
LJ A Company, Inc.	1,748.02	1,748.02	1,748.02
LJ A Company, Inc.	616.80	616.80	616.80
Minerva, Christopher	63.00	63.00	63.00
Garden State Communications	80.27	80.27	80.27
Garden State Communications	402.70	402.70	402.70
Garden State Communications	316.98	316.98	316.98
Independence Telecommunications, Inc.	528.25	528.25	528.25
National Business Furniture	3,893.46	3,893.46	3,893.46
National Business Furniture	1,907.00	1,907.00	1,907.00
Sterling Heating & Air Conditioning, Inc.	1,075.00	1,075.00	1,075.00
Depreciation on assets identified on depreciation schedule, as submitted	33,041.95	33,041.95	33,041.95
Total	**$ 99,846.11**	**$ 99,846.11**	**$ 99,846.11**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule M2 - OAL Order 5-6-2010

Organizational overhead expenditures charged directly to other Archway programs, reclassified to organizational overhead

Expenditures	DOE Amount	Appeal	OAL Order - 5/6/2010
LJ A Company, Inc.	$ 211.42	$ 211.42	$ 211.42
LJ A Company, Inc.	122.77	122.77	122.77
LJ A Company, Inc.	93.65	93.65	93.65
LJ A Company, Inc.	144.00	144.00	144.00
LJ A Company, Inc.	301.72	301.72	301.72
LJ A Company, Inc.	354.98	354.98	354.98
LJ A Company, Inc.	121.20	121.20	121.20
Total	**$ 1,349.74**	**$ 1,349.74**	**$ 1,349.74**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule N - OAL Order 5-6-2010

Expenses regarding one on one teachers and aides, which are paid by the applicable sending districts, but were charged directly to PSD schools-reclassified to tuition waivers

Name Employees	DOE Amount	Appeal	OAL Order - 5/6/2010
Decker, John, Jr.	$ 4,518.00	$ 4,518.00	$ 4,518.00
Special class aides	286,772.00	286,772.00	286,772.00
Total salaries	291,290.00	291,290.00	291,290.00
Fringe benefits (26.09%- as computed by Archway)	75,997.56	75,997.56	75,997.56
Total	**$ 367,287.56**	**$ 367,287.56**	**$ 367,287.56**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule O1 - OAL Order 5-6-2010

Non-allowable salary costs charged to organizational overhead expenses

Name	DOE Amount	Appeal	OAL Order - 5/6/2010
Hill, Barbara	$ 26,462.00	$ 26,462.00	$ 26,462.00
Mac Duff, Kristine	23,303.06	23,303.06	23,303.06
Hatoff, Mark	32,508.88	32,508.88	32,508.88
Mason, Sydelle	115,336.88	115,336.88	115,336.88
Snyder, Michael	732.00	732.00	732.00
Hershman, Maurice	19,395.98	19,395.98	19,395.98
Total	**$ 217,738.80**	**$ 217,738.80**	**$ 217,738.80**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule O2 - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
George Singley/Michael Coyel	$ 1,445.00	$ 0.00	$ 0.00
API NJ	50.00	50.00	50.00
Bellace, Victor J.	3,200.00	3,200.00	3,200.00
Bellace, Victor J.	4,000.00	4,000.00	4,000.00
Bellace, Victor J.	3,200.00	3,200.00	3,200.00
Bellace, Victor J.	3,200.00	3,200.00	3,200.00
Bernstein, Frances	2,475.00	2,475.00	2,475.00
Bey, Elaine	1,382.40	1,382.40	1,382.40
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	1,465.35	1,465.35	1,465.35
Bey, Elaine	4,000.00	4,000.00	4,000.00
Citizens Title	1,415.25	1,415.25	1,415.25
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Faber, Gerald	2,000.00	2,000.00	2,000.00
Subtotal	**$ 62,486.50**	**$ 61,041.50**	**$ 61,041.50**

Schedule O2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Faber, Gerald	$ 2,000.00	$ 2,000.00	$ 2,000.00
Fountainhead Associates, Ltd.	1,540.00	1,540.00	1,540.00
Hordis, Barbara	600.00	600.00	600.00
Hordis, Barbara	200.00	168.67	168.67
Hordis, Barbara	230.00	0.00	0.00
Hordis, Barbara	630.00	0.00	0.00
Hordis, Barbara	430.00	0.00	0.00
Hordis, Barbara	600.00	0.00	0.00
Lennox, Thomas, Esq.	270.00	0.00	0.00
National Computer System, System, Inc.	289.29	289.29	289.29
Scanlon, Robert G., Ed. D.	2,500.00	2,500.00	2,500.00
Scanlon, Robert G., Ed. D.	1,000.00	1,000.00	1,000.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	2,500.00	2,500.00	2,500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Subtotal	**$ 84,775.79**	**$ 81,139.46**	**$ 81,139.46**

Schedule O2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Scanlon, Robert G., Ed. D.	$ 500.00	$ 500.00	$ 500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
Scanlon, Robert G., Ed. D.	500.00	500.00	500.00
National Committee for Quality Assurance	180.00	180.00	180.00
Rotary Club of Cherry Hill, Inc.	85.00	85.00	85.00
Rotary Club of Cherry Hill, Inc.	65.00	65.00	65.00
Rotary Club of Cherry Hill, Inc.	65.00	65.00	65.00
Rotary Club of Cherry Hill, Inc.	65.00	65.00	65.00
Business & Professional Research Institute	240.00	240.00	240.00
CIMS-NE, Bradford School Dstr.	150.00	0.00	0.00
Citizens Ambassador Program	192.00	192.00	192.00
Development Corp. for Israel	320.00	320.00	320.00
Hyatt Embarcadero, San Francisco	488.16	488.16	488.16
The Mansion	200.00	200.00	200.00
Marriott Marquis	3,248.75	3,248.75	3,248.75
Mollenhaur, Barbara	292.91	292.91	292.91
Mollenhaur, Barbara	388.00	388.00	388.00
National Seminars Group	79.00	79.00	79.00
Subtotal	**$ 98,834.61**	**$ 95,048.28**	**$ 95,048.28**

Schedule O2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
NJCCAC	$ 100.00	$ 100.00	$ 100.00
Pension Publications	210.00	0.00	0.00
Price, Elton	960.00	960.00	960.00
Price, Elton	700.00	700.00	700.00
Price, Elton	2,350.00	2,350.00	2,350.00
Taylor, Suzanne	88.65	0.00	0.00
C E I Printing	736.00	736.00	736.00
C E I Printing	899.00	899.00	899.00
C E I Printing	748.00	748.00	748.00
Quality Concepts	861.33	861.33	861.33
Quality Concepts	1,081.31	1,081.31	1,081.31
Airborne Express	243.20	0.00	0.00
American Assoc. of School Administrators	7.00	0.00	0.C
Atco Fire Department	1,500.00	1,500.00	1,500.00
Atlantic Wholesale Meat	209.76	209.76	209.76
Bill's Video Tech.	4.08	4.08	4.08
Blatner Association, Inc.	554.00	554.00	554.00
Bravo	2,309.00	2,309.00	2,309.00
Bravo	955.00	955.00	955.00
C& J Florist	55.65	55.65	55.65
Chronicle of Philanthropy	67.50	67.50	67.50
E C P Business Machine	68.00	68.00	68.00
Ellis Meats	552.61	552.61	552.61
Faber, Gerald	30.00	30.00	30.00
Fleur De Lis	120.00	120.00	120.00
Foto 1	17.89	17.89	17.89
Friends of Dr. Roy J. Dawson	70.00	70.00	70.00
Grandesign	1,500.00	1,500.00	1,500.00
Grandesign	1,500.00	1,500.00	1,500.00
Grandesign	1,500.00	1,500.00	1,500.00
Grandesign	3,000.00	3,000.00	3,000.00
Subtotal	**$ 121,832.59**	**$ 117,497.41**	**$ 117,497.41**

Schedule O2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Grandesign	$ 595.96	$ 595.96	$ 595.96
Grandesign	418.24	418.24	418.24
Grandesign	496.80	496.80	496.80
Grandesign	191.00	191.00	191.00
Greater Cherry Hill Chamber of Commerce	400.00	400.00	400.00
Hill, Barbara	79.46	79.46	79.46
Hinpo-Chass, Inc.	1,250.00	1,250.00	1,250.00
Hinpo-Chass, Inc.	2,100.00	2,100.00	2,100.00
Hughey, John. D.	260.00	260.00	260.00
IBM Cherry Hill-Loan Acct.	493.50	493.50	493.50
IBM Cherry Hill-Loan Acct.	45.00	45.00	45.00
Johnson, Lavonne	67.51	67.51	67.51
Johnson, Lavonne	28.65	28.65	28.65
Johnson, Lavonne	95.60	95.60	95.60
Johnson, Lavonne	48.33	48.33	48.33
Johnson, Lavonne	17.98	17.98	17.98
Something Special	390.00	390.00	390.00
Zurbrugg Health Foundation	650.00	650.00	650.00
Maison, Jacques	528.00	528.00	528.00
Maison, Jacques	806.50	806.50	806.50
N.J.Division of Consumer Affairs, Regulated Businesses	30.00	30.00	30.00
Staples	424.47	424.47	424.47
National Computer Systems, Inc.	378.72	378.72	378.72
News Report	19.00	19.00	19.00
Party Warehouse	97.00	97.00	97.00
Phi Delta Kappa-Professional Education Frate	34.00	0.00	0.00
Phi Delta Kappa-Professional Education Frate	138.00	138.00	138.00
Philadelphia Zoo	250.00	250.00	250.00
Pitney Bowes	64.10	0.00	0.00
Plain Dealer	17.00	17.00	17.00
Potted Plant Flower Shop	460.00	460.00	460.00
Subtotal	**$ 132,707.41**	**$ 128,274.13**	**$ 128,274.13**

Schedule O2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Potted Plant Flower Shop	$ 157.00	$ 157.00	$ 157.00
Potted Plant Flower Shop	22.50	22.50	22.50
Potted Plant Flower Shop	43.00	43.00	43.00
Price, Elton	2,000.00	2,000.00	2,000.00
Price, Elton	341.41	341.41	341.41
Project Interchange	1,280.00	1,280.00	1,280.00
Quality Concepts	3,272.63	3,272.63	3,272.63
Quality Concepts	259.00	259.00	259.00
Quality Concepts	291.60	291.60	291.60
Quality Concepts	291.60	291.60	291.60
Quality Concepts	1,235.00	1,235.00	1,235.00
Quality Concepts	2,893.83	2,893.83	2,893.83
Radio Shack-Burlington	115.98	115.98	115.9
Record Breeze	17.00	17.00	17.00
Something Special	1,125.00	1,125.00	1,125.00
Something Special	300.00	300.00	300.00
Specialty Books	178.44	0.00	0.00
Sperduto, Patricia H.	129.00	129.00	129.00
Staples, Inc.	3.92	3.92	3.92
Staples, Inc.	33.44	33.44	33.44
Sterling Discount Computer Store	439.00	0.00	0.00
Sterling Discount Computer Store	30.00	30.00	30.00
Sterling Discount Computer Store	884.00	884.00	884.00
Sterling Discount Computer Store	89.00	89.00	89.00
Temple University	1,115.00	1,115.00	1,115.00
Touchstone	244.00	244.00	244.00
Value Rent-all	511.00	511.00	511.00
Whittaker, Chester M.	3,000.00	3,000.00	3,000.00
Zagara's	500.00	500.00	500.00
Johnson, Lavonne	301.67	301.67	301.67
Johnson, Lavonne	149.32	149.32	149.32
Johnson, Lavonne	144.38	144.38	144.38
Subtotal	**$ 154,105.13**	**$ 149,054.41**	**$ 149,054.41**

Schedule O2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

Name	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Delaware Division of Revenue	$ 18.75	$ 18.75	$ 18.75
Delaware Division of Revenue	75.00	75.00	75.00
Delaware Secretary of State	76.75	76.75	76.75
Delaware Division of Revenue	2.25	2.25	2.25
N.J.Division of Consumer Affairs, Regulated Businesses	60.00	30.00	30.00
N.J.Division of Consumer Affairs, Regulated Businesses	30.00	30.00	30.00
Treasurer/NJ. DEPE	200.00	200.00	200.00
Treasurer/NJ. DEPE	200.00	200.00	200.00
Treasurer/NJ. DEPE	200.00	200.00	200.00
Subtotal	154,967.88	149,887.16	149,887.16
Less: Transferred to Schedule R3-Contributions:			
Atco Fire Department		1,500.00	1,500.00
Zurbrugg Health Foundation		650.00	650.00
Subtotal	0.00	2,150.00	2,150.00
Total	**$ 154,967.88**	**$ 147,737.16**	**$ 147,737.16**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. Sydelle Mason	$ 33.00	$ 33.00	$ 33.00
Dr. James I. Mason	164.89	164.89	164.89
Dr. James I. Mason	59.00	59.00	59.00
Dr. Sydelle Mason	29.80	29.80	29.80
Dr. Sydelle Mason	17.94	17.94	17.94
Dr. Sydelle Mason	274.50	274.50	274.50
Dr. Sydelle Mason	261.35	261.35	261.35
Dr. James I. Mason	172.20	172.20	172.20
Dr. James I. Mason	395.75	395.75	395.75
Dr. James I. Mason	66.61	66.61	66.61
Dr. James I. Mason	116.54	116.54	116.54
Dr. James I. Mason	1,050.00	1,050.00	1,050.0
Dr. James I. Mason	94.67	94.67	94.67
Dr. James I. Mason	1,189.91	1,189.91	1,189.91
Dr. James I. Mason	395.12	395.12	395.12
Dr. James I. Mason	261.00	261.00	261.00
Dr. James I. Mason	86.60	86.60	86.60
Dr. James I. Mason	75.00	75.00	75.00
Dr. James I. Mason	403.00	403.00	403.00
Dr. James I. Mason	272.99	272.99	272.99
Dr. James I. Mason	266.77	266.77	266.77
Dr. James I. Mason	260.00	260.00	260.00
Dr. James I. Mason	101.30	101.30	101.30
Dr. James I. Mason	23.00	23.00	23.00
Dr. James I. Mason	276.41	276.41	276.41
Dr. James I. Mason	156.71	156.71	156.71
Dr. James I. Mason	1,471.40	1,471.40	1,471.40
Dr. James I. Mason	64.62	64.62	64.62
Dr. James I. Mason	130.47	130.47	130.47
Dr. James I. Mason	94.40	94.40	94.40
Subtotal	**$ 8,264.95**	**$ 8,264.95**	**$ 8,264.95**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 36.63	$ 36.63	$ 36.63
Dr. James I. Mason	89.25	89.25	89.25
Dr. James I. Mason	860.14	860.14	860.14
Dr. James I. Mason	522.31	522.31	522.31
Dr. James I. Mason	220.48	220.48	220.48
Dr. Sydelle Mason	135.00	135.00	135.00
Dr. James I. Mason	344.00	344.00	344.00
Dr. James I. Mason	154.70	154.70	154.70
Dr. James I. Mason	142.22	142.22	142.22
Dr. James I. Mason	44.62	44.62	44.62
Dr. James I. Mason	38.87	38.87	38.87
Dr. James I. Mason	246.28	246.28	246.28
Dr. James I. Mason	108.49	108.49	108.49
Dr. James I. Mason	265.00	265.00	265.00
Dr. James I. Mason	119.52	119.52	119.52
Dr. James I. Mason	175.00	175.00	175.00
Dr. James I. Mason	38.44	38.44	38.44
Dr. James I. Mason	400.24	400.24	400.24
Dr. James I. Mason	227.20	227.20	227.20
Dr. James I. Mason	127.19	127.19	127.19
Dr. James I. Mason	105.62	105.62	105.62
Dr. James I. Mason	98.81	98.81	98.81
Dr. James I. Mason	88.47	88.47	88.47
Dr. James I. Mason	150.35	150.35	150.35
Dr. James I. Mason	324.99	324.99	324.99
Dr. James I. Mason	124.00	124.00	124.00
Dr. James I. Mason	80.00	80.00	80.00
Subtotal	**$ 13,532.77**	**$ 13,532.77**	**$ 13,532.77**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 350.00	$ 350.00	$ 350.00
Dr. James I. Mason	306.89	306.89	306.89
Dr. James I. Mason	139.54	139.54	139.54
Dr. James I. Mason	125.00	125.00	125.00
Dr. James I. Mason	1,050.00	1,050.00	1,050.00
Dr. James I. Mason	230.00	230.00	230.00
Dr. James I. Mason	2,688.40	2,688.40	2,688.40
Dr. James I. Mason	(521.07)	(521.07)	(521.07)
Dr. James I. Mason	80.42	80.42	80.42
Dr. James I. Mason	41.50	41.50	41.50
Dr. James I. Mason	254.40	254.40	254.4
Dr. James I. Mason	148.60	148.60	148.60
Dr. James I. Mason	110.14	110.14	110.14
Dr. James I. Mason	24.51	24.51	24.51
Dr. James I. Mason	40.07	40.07	40.07
Dr. James I. Mason	75.00	75.00	75.00
Dr. James I. Mason	164.00	164.00	164.00
Dr. James I. Mason	169.02	169.02	169.02
Dr. James I. Mason	67.55	67.55	67.55
Dr. James I. Mason	41.15	41.15	41.15
Dr. James I. Mason	108.12	108.12	108.12
Dr. James I. Mason	37.58	37.58	37.58
Dr. James I. Mason	225.08	225.08	225.08
Dr. James I. Mason	92.10	92.10	92.10
Dr. James I. Mason	76.90	76.90	76.90
Dr. James I. Mason	117.61	117.61	117.61
Dr. James I. Mason	32.90	32.90	32.90
Subtotal	**$ 19,808.18**	**$ 19,808.18**	**$ 19,808.18**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 167.40	$ 167.40	$ 167.40
Dr. James I. Mason	61.29	61.29	61.29
Dr. James I. Mason	32.66	32.66	32.66
Dr. James I. Mason	1,050.00	1,050.00	1,050.00
Dr. James I. Mason	450.00	450.00	450.00
Dr. James I. Mason	560.73	560.73	560.73
Dr. James I. Mason	1,008.00	1,008.00	1,008.00
Dr. James I. Mason	319.34	319.34	319.34
Dr. James I. Mason	99.35	99.35	99.35
Dr. James I. Mason	63.50	63.50	63.50
Dr. James I. Mason	260.00	260.00	260.00
Dr. James I. Mason	196.29	196.29	196.29
Dr. James I. Mason	65.96	65.96	65.96
Dr. James I. Mason	878.40	878.40	878.40
Dr. James I. Mason	142.80	142.80	142.80
Dr. James I. Mason	811.96	811.96	811.96
Dr. James I. Mason	26.25	26.25	26.25
Dr. James I. Mason	2,241.40	2,241.40	2,241.40
Dr. James I. Mason	85.93	85.93	85.93
Dr. James I. Mason	70.25	70.25	70.25
Dr. James I. Mason	342.69	342.69	342.69
Dr. James I. Mason	100.49	100.49	100.49
Dr. James I. Mason	25.00	25.00	25.00
Dr. James I. Mason	22.50	22.50	22.50
Dr. James I. Mason	62.84	62.84	62.84
Dr. James I. Mason	320.00	320.00	320.00
Dr. James I. Mason	203.84	203.84	203.84
Subtotal	**$ 29,477.05**	**$ 29,477.05**	**$ 29,477.05**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 155.48	$ 155.48	$ 155.48
Dr. James I. Mason	143.10	143.10	143.10
Dr. James I. Mason	94.13	94.13	94.13
Dr. James I. Mason	71.12	71.12	71.12
Dr. James I. Mason	1,500.00	1,500.00	1,500.00
Dr. James I. Mason	540.00	540.00	540.00
Dr. James I. Mason	640.24	640.24	640.24
Dr. James I. Mason	1,006.49	1,006.49	1,006.49
Dr. James I. Mason	235.64	235.64	235.64
Dr. James I. Mason	205.01	205.01	205.01
Dr. James I. Mason	132.00	132.00	132.0(
Dr. James I. Mason	350.00	350.00	350.00
Dr. James I. Mason	50.00	50.00	50.00
Dr. James I. Mason	42.00	42.00	42.00
Dr. James I. Mason	79.41	79.41	79.41
Dr. James I. Mason	50.00	50.00	50.00
Dr. James I. Mason	737.88	737.88	737.88
Dr. James I. Mason	540.80	540.80	540.80
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. Sydelle Mason	113.53	113.53	113.53
Dr. James I. Mason	43.33	43.33	43.33
Dr. James I. Mason	100.00	100.00	100.00
Dr. James I. Mason	100.00	100.00	100.00
Dr. James I. Mason	392.02	392.02	392.02
Dr. James I. Mason	44.97	44.97	44.97
Dr. James I. Mason	30.09	30.09	30.09
Dr. James I. Mason	151.00	151.00	151.00
Dr. James I. Mason	127.40	127.40	127.40
Dr. James I. Mason	499.00	499.00	499.00
Subtotal	**$ 38,651.69**	**$ 38,651.69**	**$ 38,651.69**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 359.02	$ 359.02	$ 359.02
Dr. James I. Mason	40.99	40.99	40.99
Dr. James I. Mason	32.07	32.07	32.07
Dr. James I. Mason	147.18	147.18	147.18
Dr. James I. Mason	109.17	109.17	109.17
Dr. James I. Mason	36.56	36.56	36.56
Dr. James I. Mason	234.80	234.80	234.80
Dr. James I. Mason	158.31	158.31	158.31
Dr. James I. Mason	99.53	99.53	99.53
Dr. James I. Mason	278.05	278.05	278.05
Dr. James I. Mason	163.56	163.56	163.56
Dr. James I. Mason	82.68	82.68	82.68
Dr. James I. Mason	257.50	257.50	257.50
Dr. James I. Mason	370.00	370.00	370.00
Dr. James I. Mason	551.45	551.45	551.45
Dr. Sydelle Mason	17.28	17.28	17.28
Dr. James I. Mason	63.39	63.39	63.39
Dr. James I. Mason	123.05	123.05	123.05
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. James I. Mason	81.30	81.30	81.30
Dr. James I. Mason	107.79	107.79	107.79
Dr. Sydelle Mason	27.27	27.27	27.27
Dr. James I. Mason	692.73	692.73	692.73
Dr. James I. Mason	142.99	142.99	142.99
Dr. James I. Mason	243.56	243.56	243.56
Dr. James I. Mason	189.37	189.37	189.37
Dr. James I. Mason	72.35	72.35	72.35
Subtotal	**$ 44,333.64**	**$ 44,333.64**	**$ 44,333.64**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 170.00	$ 170.00	$ 170.00
Dr. James I. Mason	95.00	95.00	95.00
Dr. Sydelle Mason	19.38	19.38	19.38
Dr. Sydelle Mason	31.25	31.25	31.25
Dr. James I. Mason	65.00	65.00	65.00
Dr. James I. Mason	106.97	106.97	106.97
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. James I. Mason	231.05	231.05	231.05
Dr. Sydelle Mason	19.40	19.40	19.40
Dr. James I. Mason	243.00	243.00	243.00
Dr. James I. Mason	322.50	322.50	322.5
Dr. James I. Mason	50.31	50.31	50.31
Dr. James I. Mason	110.56	110.56	110.56
Dr. James I. Mason	45.21	45.21	45.21
Dr. Sydelle Mason	12.00	12.00	12.00
Dr. James I. Mason	557.94	557.94	557.94
Dr. Sydelle Mason	44.10	44.10	44.10
Dr. James I. Mason	143.10	143.10	143.10
Dr. James I. Mason	580.00	580.00	580.00
Dr. James I. Mason	466.56	466.56	466.56
Dr. James I. Mason	70.00	70.00	70.00
Dr. James I. Mason	238.92	238.92	238.92
Dr. James I. Mason	142.83	142.83	142.83
Dr. James I. Mason	212.12	212.12	212.12
Dr. James I. Mason	63.50	63.50	63.50
Dr. James I. Mason	53.00	53.00	53.00
Dr. James I. Mason	29.06	29.06	29.06
Subtotal	**$ 49,456.40**	**$ 49,456.40**	**$ 49,456.40**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 454.00	$ 454.00	$ 454.00
Dr. James I. Mason	630.00	630.00	630.00
Dr. James I. Mason	241.92	241.92	241.92
Dr. James I. Mason	99.76	99.76	99.76
Dr. James I. Mason	707.76	707.76	707.76
Dr. James I. Mason	61.21	61.21	61.21
Dr. James I. Mason	29.65	29.65	29.65
Dr. James I. Mason	38.75	38.75	38.75
Dr. James I. Mason	97.79	97.79	97.79
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. James I. Mason	180.42	180.42	180.42
Dr. James I. Mason	496.00	496.00	496.00
Dr. James I. Mason	222.00	222.00	222.00
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. James I. Mason	72.61	72.61	72.61
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. James I. Mason	606.00	606.00	606.00
Dr. James I. Mason	1,000.00	1,000.00	1,000.00
Dr. Sydelle Mason	353.89	353.89	353.89
Dr. James I. Mason	85.80	85.80	85.80
Dr. James I. Mason	305.28	305.28	305.28
Dr. James I. Mason	58.30	58.30	58.30
Dr. James I. Mason	210.00	210.00	210.00
Dr. James I. Mason	116.60	116.60	116.60
Dr. James I. Mason	621.00	621.00	621.00
Dr. James I. Mason	415.55	415.55	415.55
Dr. James I. Mason	370.00	370.00	370.00
Subtotal	**$ 59,930.69**	**$ 59,930.69**	**$ 59,930.69**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 200.21	$ 200.21	$ 200.21
Dr. James I. Mason	45.00	45.00	45.00
Dr. James I. Mason	876.98	876.98	876.98
Dr. James I. Mason	415.00	415.00	415.00
Dr. James I. Mason	711.00	711.00	711.00
Dr. James I. Mason	153.52	153.52	153.52
Dr. James I. Mason	185.00	185.00	185.00
Dr. James I. Mason	29.54	29.54	29.54
Dr. James I. Mason	135.32	135.32	135.32
Dr. James I. Mason	96.66	96.66	96.66
Dr. James I. Mason	3,543.95	3,543.95	3,543.9
Dr. James I. Mason	3,543.95	3,543.95	3,543.95
Dr. James I. Mason	303.81	303.81	303.81
Dr. James I. Mason	2,500.00	2,500.00	2,500.00
Dr. James I. Mason	238.78	238.78	238.78
Dr. James I. Mason	500.00	500.00	500.00
Dr. James I. Mason	154.68	154.68	154.68
Dr. James I. Mason	138.23	138.23	138.23
Dr. James I. Mason	472.49	472.49	472.49
Dr. James I. Mason	332.78	332.78	332.78
Dr. James I. Mason	80.60	80.60	80.60
Dr. James I. Mason	162.00	162.00	162.00
Dr. James I. Mason	925.00	925.00	925.00
Dr. James I. Mason	498.00	498.00	498.00
Dr. James I. Mason	548.50	548.50	548.50
Dr. James I. Mason	159.15	159.15	159.15
Dr. James I. Mason	520.00	520.00	520.00
Subtotal	**$ 77,400.84**	**$ 77,400.84**	**$ 77,400.84**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 329.70	$ 329.70	$ 329.70
Dr. James I. Mason	199.50	199.50	199.50
Dr. James I. Mason	137.00	137.00	137.00
Dr. James I. Mason	204.62	204.62	204.62
Dr. James I. Mason	66.81	66.81	66.81
Dr. James I. Mason	107.90	107.90	107.90
Dr. James I. Mason	252.00	252.00	252.00
Dr. James I. Mason	221.35	221.35	221.35
Dr. James I. Mason	171.84	171.84	171.84
Dr. James I. Mason	56.70	56.70	56.70
Dr. James I. Mason	222.00	222.00	222.00
Dr. James I. Mason	25.48	25.48	25.48
Dr. James I. Mason	61.70	61.70	61.70
Dr. James I. Mason	46.37	46.37	46.37
Dr. James I. Mason	30.55	30.55	30.55
Dr. James I. Mason	44.20	44.20	44.20
Dr. James I. Mason	52.78	52.78	52.78
Dr. James I. Mason	33.88	33.88	33.88
Dr. James I. Mason	39.10	39.10	39.10
Dr. James I. Mason	29.27	29.27	29.27
Dr. James I. Mason	38.66	38.66	38.66
Dr. James I. Mason	34.78	34.78	34.78
Dr. James I. Mason	36.23	36.23	36.23
Dr. James I. Mason	57.07	57.07	57.07
Dr. James I. Mason	41.77	41.77	41.77
Dr. James I. Mason	44.00	44.00	44.00
Dr. James I. Mason	24.72	24.72	24.72
Dr. James I. Mason	29.80	29.80	29.80
Dr. James I. Mason	53.80	53.80	53.80
Subtotal	**$ 80,094.42**	**$ 80,094.42**	**$ 80,094.42**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 46.78	$ 46.78	$ 46.78
Dr. James I. Mason	35.52	35.52	35.52
Dr. James I. Mason	22.97	22.97	22.97
Dr. James I. Mason	22.50	22.50	22.50
Dr. James I. Mason	30.04	30.04	30.04
Dr. James I. Mason	40.69	40.69	40.69
Dr. James I. Mason	28.04	28.04	28.04
Dr. James I. Mason	25.41	25.41	25.41
Dr. James I. Mason	26.04	26.04	26.04
Dr. James I. Mason	41.77	41.77	41.77
Dr. James I. Mason	43.55	43.55	43.5.
Dr. James I. Mason	29.74	29.74	29.74
Dr. James I. Mason	30.07	30.07	30.07
Dr. James I. Mason	31.33	31.33	31.33
Dr. James I. Mason	47.01	47.01	47.01
Dr. James I. Mason	32.23	32.23	32.23
Dr. James I. Mason	29.90	29.90	29.90
Dr. James I. Mason	52.38	52.38	52.38
Dr. James I. Mason	27.69	27.69	27.69
Dr. James I. Mason	29.26	29.26	29.26
Dr. James I. Mason	63.74	63.74	63.74
Dr. James I. Mason	51.48	51.48	51.48
Dr. James I. Mason	36.90	36.90	36.90
Dr. James I. Mason	22.97	22.97	22.97
Dr. James I. Mason	24.50	24.50	24.50
Dr. James I. Mason	37.54	37.54	37.54
Dr. James I. Mason	20.56	20.56	20.56
Subtotal	**$ 81,025.03**	**$ 81,025.03**	**$ 81,025.03**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 31.98	$ 31.98	$ 31.98
Dr. James I. Mason	39.41	39.41	39.41
Dr. James I. Mason	33.14	33.14	33.14
Dr. James I. Mason	39.75	39.75	39.75
Dr. James I. Mason	44.12	44.12	44.12
Dr. James I. Mason	53.83	53.83	53.83
Dr. James I. Mason	43.04	43.04	43.04
Dr. James I. Mason	55.36	55.36	55.36
Dr. James I. Mason	48.60	48.60	48.60
Dr. James I. Mason	37.07	37.07	37.07
Dr. James I. Mason	50.39	50.39	50.39
Dr. James I. Mason	51.23	51.23	51.23
Dr. James I. Mason	153.06	153.06	153.06
Dr. James I. Mason	51.23	51.23	51.23
Dr. James I. Mason	51.23	51.23	51.23
Dr. James I. Mason	51.23	51.23	51.23
Dr. James I. Mason	39.76	39.76	39.76
Dr. James I. Mason	50.34	50.34	50.34
Dr. James I. Mason	38.34	38.34	38.34
Dr. James I. Mason	64.07	64.07	64.07
Dr. James I. Mason	155.74	155.74	155.74
Dr. James I. Mason	35.20	35.20	35.20
Dr. James I. Mason	60.00	60.00	60.00
Dr. James I. Mason	311.53	311.53	311.53
Dr. James I. Mason	132.00	132.00	132.00
Dr. James I. Mason	42.40	42.40	42.40
Dr. James I. Mason	65.40	65.40	65.40
Subtotal	**$ 82,854.48**	**$ 82,854.48**	**$ 82,854.48**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 145.30	$ 145.30	$ 145.30
Dr. James I. Mason	65.62	65.62	65.62
Dr. James I. Mason	34.80	34.80	34.80
Dr. James I. Mason	283.64	283.64	283.64
Dr. James I. Mason	41.88	41.88	41.88
Dr. James I. Mason	65.95	65.95	65.95
Dr. James I. Mason	78.40	78.40	78.40
Dr. James I. Mason	47.37	47.37	47.37
Dr. James I. Mason	31.79	31.79	31.79
Dr. James I. Mason	64.75	64.75	64.75
Dr. James I. Mason	36.62	36.62	36.62
Dr. James I. Mason	48.09	48.09	48.09
Dr. James I. Mason	55.90	55.90	55.90
Dr. James I. Mason	64.00	64.00	64.00
Dr. James I. Mason	47.97	47.97	47.97
Dr. James I. Mason	150.00	150.00	150.00
Dr. James I. Mason	131.34	131.34	131.34
Dr. James I. Mason	50.19	50.19	50.19
Dr. James I. Mason	44.45	44.45	44.45
Dr. James I. Mason	58.48	58.48	58.48
Dr. James I. Mason	27.58	27.58	27.58
Dr. James I. Mason	252.60	252.60	252.60
Dr. James I. Mason	236.20	236.20	236.20
Dr. James I. Mason	300.20	300.20	300.20
Dr. James I. Mason	32.46	32.46	32.46
Dr. James I. Mason	41.82	41.82	41.82
Dr. James I. Mason	152.25	152.25	152.25
Subtotal	**$ 85,444.13**	**$ 85,444.13**	**$ 85,444.13**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 32.87	$ 32.87	$ 32.87
Dr. James I. Mason	24.56	24.56	24.56
Dr. James I. Mason	26.00	26.00	26.00
Dr. James I. Mason	49.75	49.75	49.75
Dr. James I. Mason	41.66	41.66	41.66
Dr. James I. Mason	60.35	60.35	60.35
Dr. James I. Mason	190.00	190.00	190.00
Dr. James I. Mason	20.61	20.61	20.61
Dr. James I. Mason	53.68	53.68	53.68
Dr. James I. Mason	43.51	43.51	43.51
Dr. James I. Mason	55.81	55.81	55.81
Dr. James I. Mason	36.92	36.92	36.92
Dr. James I. Mason	52.01	52.01	52.01
Dr. James I. Mason	63.55	63.55	63.55
Dr. James I. Mason	40.00	40.00	40.00
Dr. James I. Mason	55.95	55.95	55.95
Dr. James I. Mason	62.84	62.84	62.84
Dr. James I. Mason	50.72	50.72	50.72
Dr. James I. Mason	145.40	145.40	145.40
Dr. James I. Mason	87.25	87.25	87.25
Dr. James I. Mason	86.07	86.07	86.07
Dr. James I. Mason	29.41	29.41	29.41
Dr. James I. Mason	177.13	177.13	177.13
Dr. James I. Mason	212.00	212.00	212.00
Dr. James I. Mason	39.01	39.01	39.01
Dr. James I. Mason	16.85	16.85	16.85
Dr. James I. Mason	46.00	46.00	46.00
Dr. James I. Mason	130.00	130.00	130.00
Subtotal	**$ 87,374.04**	**$ 87,374.04**	**$ 87,374.04**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 35.10	$ 35.10	$ 35.10
Dr. James I. Mason	23.98	23.98	23.98
Dr. James I. Mason	90.56	90.56	90.56
Dr. James I. Mason	110.00	110.00	110.00
Dr. James I. Mason	45.68	45.68	45.68
Dr. James I. Mason	216.17	216.17	216.17
Dr. James I. Mason	52.80	52.80	52.80
Dr. James I. Mason	43.86	43.86	43.86
Dr. James I. Mason	144.75	144.75	144.75
Dr. James I. Mason	120.60	120.60	120.60
Dr. James I. Mason	249.94	249.94	249.94
Dr. James I. Mason	76.55	76.55	76.55
Dr. James I. Mason	46.16	46.16	46.16
Dr. James I. Mason	32.18	32.18	32.18
Dr. James I. Mason	50.00	50.00	50.00
Dr. James I. Mason	27.11	27.11	27.11
Dr. James I. Mason	78.97	78.97	78.97
Dr. James I. Mason	50.25	50.25	50.25
Dr. James I. Mason	66.35	66.35	66.35
Dr. James I. Mason	458.12	458.12	458.12
Dr. James I. Mason	92.22	92.22	92.22
Dr. James I. Mason	39.78	39.78	39.78
Dr. James I. Mason	212.00	212.00	212.00
Dr. James I. Mason	163.24	163.24	163.24
Dr. James I. Mason	48.97	48.97	48.97
Dr. James I. Mason	60.30	60.30	60.30
Dr. James I. Mason	79.82	79.82	79.82
Subtotal	**$ 90,089.50**	**$ 90,089.50**	**$ 90,089.50**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 44.57	$ 44.57	$ 44.57
Dr. James I. Mason	49.55	49.55	49.55
Dr. James I. Mason	80.55	80.55	80.55
Dr. James I. Mason	131.18	131.18	131.18
Dr. James I. Mason	50.00	50.00	50.00
Dr. James I. Mason	24.77	24.77	24.77
Dr. James I. Mason	87.03	87.03	87.03
Dr. James I. Mason	45.63	45.63	45.63
Dr. James I. Mason	46.00	46.00	46.00
Dr. James I. Mason	183.90	183.90	183.90
Dr. James I. Mason	160.52	160.52	160.52
Dr. James I. Mason	41.24	41.24	41.24
Dr. James I. Mason	23.97	23.97	23.97
Dr. James I. Mason	57.20	57.20	57.20
Dr. James I. Mason	402.27	402.27	402.27
Dr. James I. Mason	401.70	401.70	401.70
Dr. James I. Mason	102.15	102.15	102.15
Dr. James I. Mason	64.83	64.83	64.83
Dr. James I. Mason	59.10	59.10	59.10
Dr. James I. Mason	45.59	45.59	45.59
Dr. James I. Mason	440.26	440.26	440.26
Dr. James I. Mason	375.70	375.70	375.70
Dr. James I. Mason	147.09	147.09	147.09
Dr. James I. Mason	121.00	121.00	121.00
Dr. James I. Mason	117.09	117.09	117.09
Dr. James I. Mason	159.87	159.87	159.87
Dr. James I. Mason	150.00	150.00	150.00
Subtotal	**$ 93,702.26**	**$ 93,702.26**	**$ 93,702.26**

Schedule P - OAL Order 5-6-2010

Non-allowable reimbursements to Drs. James I. and Sydelle Mason charged to organizational overhead

Vendor	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Dr. James I. Mason	$ 396.00	$ 396.00	$ 396.00
Dr. James I. Mason	135.00	135.00	135.00
Dr. James I. Mason	49.20	49.20	49.20
Dr. James I. Mason	10.90	10.90	10.90
Dr. James I. Mason	600.00	600.00	600.00
Dr. James I. Mason	42.88	42.88	42.88
Dr. James I. Mason	116.55	116.55	116.55
Dr. James I. Mason	66.55	66.55	66.55
Dr. James I. Mason	65.67	65.67	65.67
Total	**$ 95,185.01**	**$ 95,185.01**	**$ 95,185.01**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule Q - OAL Order 5-6-2010

Non-allowable fringe benefit costs applicable to non-allowable salary costs

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Total employee fringe benefits charged to organizational overhead	$ 253,595.21	$ 253,595.21	$ 253,595.21
Organizational overhead salaries-per general ledger	849,319.90	849,319.90	849,319.90
Add: Salary expenses charged directly to PSD programs, reclassified to organizational overhead (Schedule M1)	51,567.89	51,567.89	51,567.89
Deduct: Non-allowable salary costs charged to organizational overhead (Schedule O1)	(217,738.80)	(217,738.80)	(217,738.80)
Adjusted salary total	683,148.99	683,148.99	683,148.99
Fringe benefit rate-as computed by Archway	26.09%	26.09%	26.09%
Allowable fringe benefit costs	178,233.57	178,233.57	178,233.57
Non-allowable fringe benefit costs	**$ 75,361.64**	**$ 75,361.64**	**$ 75,361.64**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule R - OAL Order 5-6-2010

Summary of allowable organizational overhead expenses

		DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Archway programs organizational overhead charges - per general ledger		$ 1,762,894.25	$ 1,762,894.25	$ 1,762,894.25
Add:				
1. Reclassified to organizational overhead expenses	(Schedule M1)	99,846.11	99,846.11	99,846.11
2. Reclassified to organizational overhead	(Schedule M2)	1,349.74	1,349.74	1,349.74
Subtotal		1,864,090.10	1,864,090.10	1,864,090.10
Deduct				
3. Non-allowable salary costs	(Schedule O1)	217,738.80	217,738.80	217,738.80
4. Non-allowable costs	(Schedule O2)	154,967.88	147,737.16	147,737.16
5. Non-allowable reimbursements	(Schedule P)	95,185.01	95,185.01	95,185.01
6. Non-allowable fringe benefit costs	(Schedule Q)	75,361.64	75,361.64	75,361.64
Total non-allowable organizational overhead costs		543,253.33	536,022.61	536,022.61
Total allowable organizational overhead costs		**$ 1,320,836.77**	**$ 1,328,067.49**	**$ 1,328,067.49**

Non-allowable organizational overhead costs

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Charged in CPA audit report	$ 874,046.00	$ 874,046.00	$ 874,046.00
Less: Allowable organizational overhead costs:			
(Schedule R-page 2)	432,532.99	440,022.49	447,104.81
(Schedule S)	26,375.80	26,152.32	26,480.47
Total	458,908.79	466,174.81	473,585.28
Total non-allowable organizational overhead costs	**$ 415,137.21**	**$ 407,871.19**	**$ 400,460.72**

Schedule R (Continued) - OAL Order 5-6-2010

Allocation of organizational overhead costs to PSD programs

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Totals	**$ 432,532.99**	**$ 440,022.49**	**$ 447,104.81**

	Organizational Overhead	Amount to be allocated	Allocation Percentage (a)	Overhead Allocated
Expenditures allocated separately due to limitations:				
Salaries and fringe benefits (R1, page 4)	$ 330,338.22			
Salaries and fringe benefits (R1, page 4)		$ 313,513.96	27.71%	$ 86,874.72
Salaries and fringe benefits (R1, page 4)		255,091.42	7.08%	18,060.47
Meals (Schedule R2, page 5)	13,660.07			217.14
Contributions (Schedule R3, page 8)	4,750.00			1,247.33
Allowable organization overhead not separately allocated	979,319.20	979,319.20	34.79%	340,705.15
Total	$1,328,067.49			$ 447,104.81

Allocation percentage (a)	Atco	Challenge	Camden Co.	Gloucester Co.	Total
Total direct costs-PSD (Schedule R, page 3)	$ 4,343,451	$ 605,397	$ 4,948,848	$ 1,265,034	$ 6,213,882
Total direct costs-all Archway programs	$ 17,859,892	$ 17,859,892	$ 17,859,892	$ 17,859,892	$ 17,859,892
Percentage of direct and general and administrative costs of PSD schools to total direct costs of all Archway programs	24.32%	3.39%	27.71%	7.08%	34.79%

Total expenses-per CPA audit report			$ 19,723,982
Less:			
Organizational overhead expenses-per general ledger		$ 1,762,894	
Expenditures charged directly to programs, reclassified to organizational overhead (Schedules M-1 & M-2)		101,196	1,864,090
Total direct costs-all Archway programs			$ 17,859,892

Schedule R (Continued) - OAL Order 5-6-2010

Summary of total direct costs-PSD

		DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Ten month and extended school year programs:				
Direct and general and administrative charges to PSD schools		$ 8,200,732.84	$ 8,200,732.84	$ 8,200,732.84
Deduct Non-allowable Expenses:				
1. Salaries	(Schedule A)	260,434.01	230,936.10	136,719.50
2. Salaries	(Schedule B)	386,436.20	386,436.20	386,436.20
Subtotal		646,870.21	617,372.30	523,155.70
3. Non-allowable non-salary expenses:	(Schedule C1)	113,744.04	105,265.86	101,534.10
Non-allowable non-salary expenses:	(Schedule C2)	28,495.91	5,545.81	5,545.81
4. Non-allowable expenditures:				
Petting Zoo and Janitorial Expenses	(Schedule D1)	37,711.87	14,287.41	101,933.56
Pool Expenses	(Schedule D2)	2,938.19	778.85	3,873.05
Pupil Transportation Costs	(Schedule E)	103,274.21	95,943.64	51,684.64
Construction Labor Costs	(Schedule F)	65,469.69	64,682.21	40,656.36
Landscaping, maintenance, security, seasonal landscaping and seasonal maintenance expenses	(Schedule G)	189,084.86	181,356.50	180,702.13
Depreciation	(Schedule H)	130,899.59	105,991.21	205,936.19
5. Salaries	(Schedule I)	32,823.52	37,469.80	0.00
6. Entertainment expenses:	(Schedule J)	3,354.90	3,354.90	3,354.90
7. Non-allowable fringe benefit costs	(Schedule K)	256,397.46	237,742.54	217,047.34
8. Non-allowable food service costs:	(Schedule L)	86,893.27	84,293.00	84,293.00
9. Organizational overhead expenses:	(Schedule M1)	99,846.11	99,846.11	99,846.11
10. Expenses regarding one on one teachers and aides	(Schedule N)	367,287.56	367,287.56	367,287.56
Total non-allowable direct and general and administrative costs		2,165,091.39	2,021,217.70	1,986,850.45
Total direct costs-PSD		**$ 6,035,641.45**	**$ 6,179,515.14**	**$ 6,213,882.39**

Schedule R1 - OAL Order 5-6-2010

Salary expenses in excess of allowable amounts for that position charged to organizational overhead

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Camden Co.	**$ 313,513.96**	**$ 330,338.22**	**$ 313,513.96**
Gloucester Co.	**$ 255,091.42**	**$ 300,589.73**	**$ 255,091.42**

	Title	Salary	Travel Allowance	Total Compensation Received	Maximum Allowable Compensation Camden Co.	Maximum Allowable Compensation Gloucester Co.
Mason, James	Executive director	$ 118,782.06	$ 17,424.00	$ 136,206.06	$ 131,250.00	$ 109,975.00
Sperduto, Patricia	Director of finance	86,691.88	10,176.00	96,867.88	90,536.00	76,800.00
Wiegand, Elizabeth	Personnel director	56,512.12	8,484.00	64,996.12	62,941.00	51,618.00
Total compensation		$ 261,986.06	$ 36,084.00	$ 298,070.06	284,727.00	238,393.00
Less: travel allowances included in total compensation not subject to fringe benefits					36,084.00	36,084.00
Salaries subject to fringe benefits					248,643.00	202,309.00
Fringe benefits rate as computed by Archway					26.09%	26.09%
Allowable fringe benefits					64,870.96	52,782.42
Total					**$ 313,513.96**	**$ 255,091.42**

Total compensation received	$ 298,070.06
Fringe benefits on salaries $261,986.06 X 26.09%	68,352.16
Total compensation and fringe benefits	366,422.22
Less: Travel allowance	36,084.00
Total salaries and fringe benefits charged to organizational overhead	$ 330,338.22

DOE-R-90

Schedule R2 - OAL Order 5-6-2010

Entertainment expenses charged directly to organizational overhead in excess of maximum allowable amount

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Atco	$ 0.00	$ 0.00	$ 0.00
Challenge	217.14	217.14	217.14
Washington	0.00	0.00	0.00
Total	**$ 217.14**	**$ 217.14**	**$ 217.14**

Schedule R2 (Continued) - OAL Order 5-6-2010

Entertainment expenses charged directly to organizational overhead

Expenditure	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
1841 House	$ 251.45	$ 251.45	$ 251.45
1841 House	212.65	212.65	212.65
1841 House	266.85	266.85	266.85
Embers Restaurant & Lounge	310.55	310.55	310.55
Embers Restaurant & Lounge	289.00	289.00	289.00
Embers Restaurant & Lounge	236.70	236.70	236.70
Embers Restaurant & Lounge	171.30	171.30	171.30
Embers Restaurant & Lounge	450.60	450.60	450.60
Embers Restaurant & Lounge	357.35	357.35	357.35
Embers Restaurant & Lounge	237.60	237.60	237.60
Embers Restaurant & Lounge	163.70	163.70	163.70
Embers Restaurant & Lounge	242.95	242.95	242.95
Embers Restaurant & Lounge	303.30	303.30	303.30
Samuel's	986.70	986.70	986.70
Samuel's	986.70	986.70	986.70
Hughey, John D.	260.00	260.00	260.00
Hughey, John D.	250.00	250.00	250.00
Sperduto, Patricia H.	145.12	145.12	145.12
Sperduto, Patricia H.	20.00	20.00	20.00
Sperduto, Patricia H.	37.83	37.83	37.83
Sperduto, Patricia H.	22.55	22.55	22.55
Sperduto, Patricia H.	22.00	22.00	22.00
Sperduto, Patricia H.	20.00	20.00	20.00
Sperduto, Patricia H.	57.98	57.98	57.98
Taylor, Suzanne	25.01	25.01	25.01
Zelly's Deli	243.25	243.25	243.25
Zelly's Deli	80.00	80.00	80.00
Embers Restaurant & Lounge	213.95	213.95	213.95
Embers Restaurant & Lounge	239.35	239.35	239.35
Food Service charges-12-94	543.70	543.70	543.70
Food Service charges-1 &2-95	1,607.29	1,607.29	1,607.29
Food Service charges-4-95	250.00	250.00	250.00
Subtotal	**$ 9,505.43**	**$ 9,505.43**	**$ 9,505.43**

Schedule R2 (Continued) - OAL Order 5-6-2010

Entertainment expenses charged directly to organizational overhead

Expenditure	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Food Service charges-3-95	$ 572.47	$ 572.47	$ 572.47
Food Service charges-5-95	678.40	678.40	678.40
Food Service charges-6-95	463.47	463.47	463.47
Mama Ventura Restaurant	282.32	282.32	282.32
Sperduto, Patricia H.	380.30	380.30	380.30
Zelly's Deli	157.68	157.68	157.68
Subtotal	**12,040.07**	**12,040.07**	**12,040.07**
Transferred from R3			
World Affairs Council of Philadelphia	1,200.00	1,200.00	1,200.00
United Way of Camden County	420.00	420.00	420.00
Total	**$ 13,660.07**	**$ 13,660.07**	**$ 13,660.07**

Schedule R3 - OAL Order 5-6-2010

Contribution expenses charged to organizational overhead in excess of maximum allowable amount

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Atco	$ 750.00	$ 750.00	$ 750.00
Challenge	133.00	133.00	161.03
Washington	336.30	336.30	336.30
Total	**$ 1,219.30**	**$ 1,219.30**	**$ 1,247.33**

	Contributions Expenses (R3, page 8)	Allocation Percentage (R-1-page 2)	Allocation	School Limit	Organizational Overhead Allowable
Atco	$ 4,750.00	24.32%	$ 1,155.20	$ 750.00	$ 750.00
Challenge	4,750.00	3.39%	161.03	750.00	161.03
Washington	4,750.00	7.08%	336.30	750.00	336.30
Total		**34.79%**	**$ 1,652.53**	**$ 2,250.00**	**$ 1,247.33**

Schedule R3 (Continued) - OAL Order 5-6-2010

Contribution expenses charged to organizational overhead in excess of maximum allowable amount

Expenditure	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
World Affairs Council of Philadelphia	$ 1,200.00	$ 1,200.00	$ 1,200.00
Greater Cherry Hill Chamber of Commerce	275.00	275.00	275.00
American Heart Association	100.00	100.00	100.00
Atco EMS	100.00	100.00	100.00
Atco EMS	100.00	100.00	100.00
Friendship Community Church	50.00	50.00	50.00
National Conference, The	250.00	250.00	250.00
Southern NJ Regional Children's Hospital	300.00	300.00	300.00
The American Cancer Society	300.00	300.00	300.00
The American Cancer Society	300.00	300.00	300.00
United Way of Camden County	420.00	420.00	420.00
Heart Day at the Greenbrier	200.00	200.00	200.0
U.S. Holocaust Memorial Museum	500.00	500.00	500.00
Fraternal Order of Police	125.00	125.00	125.00
Subtotal	**4,220.00**	**4,220.00**	**4,220.00**
Transferred from Schedule O2:			
Atco Fire Department	1,500.00	1,500.00	1,500.00
Zurbrugg Health Foundation	650.00	650.00	650.00
Subtotal	**6,370.00**	**6,370.00**	**6,370.00**
Transferred to Schedule R2:			
World Affairs Council of Philadelphia	1,200.00	1,200.00	1,200.00
United Way of Camden County	420.00	420.00	420.00
Subtotal	**1,620.00**	**1,620.00**	**1,620.00**
Total	**$ 4,750.00**	**$ 4,750.00**	**$ 4,750.00**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule S - OAL Order 5-6-2010

Tuition waivers

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Tuition waivers payroll and fringe benefits (Schedule N)	$ 367,287.56	$ 367,287.56	$ 367,287.56
Allocation of organizational overhead costs to tuition waivers (Schedule S-page 2)	26,375.80	26,152.32	26,480.47
Allowable cost for tuition wavers	393,663.36	393,439.88	393,768.03
Certified annual tuition waivers-per CPA audit report	437,152.00	437,152.00	437,152.00
Non-allowable costs-Tuition Waivers	**$ 43,488.64**	**$ 43,712.12**	**$ 43,383.97**

Schedule S (Continued) - OAL Order 5-6-2010

Allocation of organizational overhead costs to tuition waivers

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Totals	**$ 26,375.80**	**$ 26,152.32**	**$ 26,480.47**

	Organizational Overhead	Amount to be allocated	Allocation Percentage	Organizational Overhead Allocated
Expenditures allocated separately due to limitations:				
Salaries and fringe benefits (R1, page 4)	$ 330,338.22			
Salaries and fringe benefits (R1, page 4)		$ 313,513.96	1.80%	$ 5,643.25
Salaries and fringe benefits (R1, page 4)		255,091.42	0.26%	$ 663.24
Meals (Schedule R2, page 5)	13,660.07			0.00
Contributions (Schedule R3, page 8)	4,750.00			0.00
Allowable organization overhead no separately allocated	979,319.20	979,319.20	2.06%	20,173.98
Totals	**$ 1,328,067.49**			**$ 26,480.47**

Allocation percentage	Camden Co.	Gloucester Co.	Total
Allowable direct expenses - Tuition Waivers (Schedule S-1, page 1)	$ 319,781	$ 47,507	$ 367,288
Total direct expenses (Schedule R-1, page 2)	$ 17,859,892	$ 17,859,892	$ 17,859,892
Percentage of tuition waiver costs to total direct costs	1.80%	0.26%	2.06%

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule T - OAL Order 5-6-2010

Working Capital Fund Computation

	DOE Amount	Initial Appeal Results	OAL Order - 5/6/2010
Total working capital adjustment	**$ 329,512**	**$ 306,809**	**$ 301,151**

	Total	Atco School		Challenge School		Washington School	
		Ten month school year	Extended school year	Ten month school year	Extended school year	Ten month school year	Extended school year
Total public school placement expenditures-per CPA audit report	$ 8,637,634	$ 5,506,402	$ 603,622	$ 645,794	$ 70,460	$ 1,636,802	$ 174,554
Deduct: Non-allowable costs (Below)	1,979,097	1,261,653	138,305	147,967	16,144	375,032	39,996
Adjusted public school placement expenditures	6,658,537	4,244,749	465,317	497,827	54,316	1,261,770	134,558
Times: Working capital fund percentage (N.J.A.C. 6:20-4.6)	0.15	0.15	0.15	0.15	0.15	0.15	0.15
Working capital A	998,781	636,712	69,798	74,674	8,147	189,266	20,184
Less: Prior year working capital fund balance	1,115,329	747,106	76,358	101,157	10,569	163,609	16,530
Working capital B	**$ (116,548)**	**$ (110,394)**	**$ (6,560)**	**$ (26,483)**	**$ (2,422)**	**$ 25,657**	**$ 3,654**

Non-allowable Cost to be Excluded

Total non-allowable cost (Exhibit 1)	$ 2,022,473
Less: Costs attributed to tuition waivers (Schedule S, page 1)	43,384
Plus: reconciling adjustment	8
Total non-allowable cost to be excluded from tuition calculation	$ 1,979,097

Working Capital Adjusment

Increase in working capital per CPA audit report	$ 184,603
Decrease in working capital-above	116,548
Total working capital adjustment	**$ 301,151**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule U - OAL Order 5-6-2010

Schedule of Tuition Rate Computation

	Total	Atco School		Challenge School		Washington School	
		Ten month school year	Extended school year	Ten month school year	Extended school year	Ten month school year	Extended school year
Total public school placement expenditures-per CPA audit report	$ 8,637,634	$ 5,506,402	$ 603,622	$ 645,794	$ 70,460	$ 1,636,802	$ 174,554
Deduct: Non-allowable costs (Schedule T)	1,979,097	1,261,653	138,305	147,967	16,144	375,032	39,996
Add/(Deduct): Working capital fund (Schedule T)	(116,548)	(110,394)	(6,560)	(26,483)	(2,422)	25,657	3,654
Total public school placement expenditures and working capital fund	$ 6,541,989	$ 4,134,355	$ 458,757	$ 471,344	$ 51,894	$ 1,287,427	$ 138,212
Divided by:							
Ten month school year - public school pupils A.D.E. - per CPA audit report		208.5152		25.6110		79.5280	
Extended school year - public school pupils total enrolled days - per CPA audit report			3,939		265		1,325
Revised actual cost per pupil		$ 19,827.60	$ 116.47	$ 18,403.97	$ 195.83	$ 16,188.35	$ 104.31
Actual tution rate charged		26,786.00	156.84	25,215.00	265.89	21,611.00	139.02
Tuition rate adjustment-to be refunded to schools		**$ 6,958.40**	**$ 40.37**	**$ 6,811.03**	**$ 70.06**	**$ 5,422.65**	**$ 34.71**

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1994 - June 30, 1995

Schedule V - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds

	Refund			
	Atco	Challenge	Washington	Total
Barrington Borough	$ 9,896.90		$ 5,422.65	$ 15,319.55
Bellmawr Borough	8,309.95		3,223.64	11,533.59
Berlin Borough	5,335.18			5,335.18
Beverly City	10,979.01			10,979.01
Black Horse Pike	27,966.12	$ 14,539.37		42,505.49
Bridgeton	6,958.40			6,958.40
Buena Regional	1,237.65	4,253.24		5,490.89
Burlington Township	3,285.41			3,285.41
Camden City	286,841.90	107,443.84	10,923.36	405,209.10
Cherry Hill Township	18,846.53	11,803.05		30,649.58
Chesilhurst	20,603.53			20,603.53
Cinnaminson	2,937.79			2,937.79
Clayton			6,958.49	6,958.49
Clementon	12,911.91			12,911.91
Collingswood Borough	9,393.74	(116.00)	6,366.22	15,643.96
Cumberland Regional	6,924.40			6,924.40
Deerfield			8,460.30	8,460.30
Delran	4,814.84			4,814.84
Deptford Township	12,219.80	(116.00)	7,351.07	19,454.87
DYFS	107,788.84		73,121.40	180,910.24
East Windsor Regional	8,265.91	(218.00)		8,047.91
Eastern Regional	25,614.85			25,614.85
Egg Harbor Township	31,349.82			31,349.82
Elizabeth	1,791.64			1,791.64
Elk Township			4,097.08	4,097.08
Estell Manor	579.36			579.36
Evesham Township	39,585.74			39,585.74
Ewing Township	8,774.45	1,854.44		10,628.89
Fairfield Township	6,958.40			6,958.40
Folsom	(61.00)			(61.00)
Galloway Township	17,026.35			17,026.35
Gateway Regional	5,296.21		1,686.80	6,983.01
Subtotal	**$ 702,433.63**	**$ 139,443.94**	**$ 127,611.01**	**$ 969,488.58**

Schedule V (Continued) - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds

	Refund			
	Atco	Challenge	Washington	Total
Gibbsboro Borough	$ 1,351.55			$ 1,351.55
Glassboro	1,700.13		$ 24,853.94	26,554.07
Gloucester City	13,477.73	$ (134.00)		13,343.73
Gloucester Township	25,555.04	899.69	86,714.15	113,168.88
Greater Egg Harbor Township	13,090.59			13,090.59
Haddon Heights	12,539.29	5,600.26		18,139.55
Haddon Township	2,782.96		37,336.28	40,119.24
Hainesport	6,958.40			6,958.40
Hamilton Twsp.-Mercer Co.	29,939.81			29,939.81
Hopewell Township			6,637.80	6,637.80
Kingsway	10,132.45	(88.00)	5,422.65	15,467.10
Lakewood	2,684.42			2,684.42
Lawnside Borough	21,932.43	7,719.50	6,603.11	36,255.04
Lower Camden County Regiona	124,469.89	10,462.62	10,845.30	145,777.81
Lenape	2,859.91			2,859.91
Lindenwold Borough	12,772.97		17,021.39	29,794.36
Little Egg Harbor	6,958.40			6,958.40
Lumberton	(62.00)			(62.00)
Magnolia	13,917.80	530.67	14,430.27	28,878.74
Maple Shade Township	10,133.96			10,133.96
Medford Township	8,309.95			8,309.95
Merchantville Borough	21,852.00			21,852.00
Monroe Township	65,599.97		52,593.07	118,193.04
Morrestown	8,983.84			8,983.84
Mount Ephraim			361.24	361.24
Mount Holly Township	9,935.15			9,935.15
Mount Laurel Township	3,439.27			3,439.27
National Park			13,175.13	13,175.13
Paulsboro		(116.00)		(116.00)
Pemberton Township	127,373.27	4,086.62		131,459.89
Pennsauken Township	58,864.46	15,357.81	1,837.77	76,060.04
Penns Grove	8,309.95			8,309.95
Subtotal	**$1,328,297.22**	**$ 183,763.11**	**$ 405,443.11**	**$1,917,503.44**

Schedule V (Continued) - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds

	Refund			
	Atco	Challenge	Washington	Total
Pine Hill Borough	$ 8,294.04			$ 8,294.04
Pinelands	6,881.49			6,881.49
Pittsgrove	6,958.40		$ 1,386.26	8,344.66
Rancocas	2,319.46			2,319.46
Runnemede			12,020.28	12,020.28
Somerdale	4,976.07			4,976.07
South Gloucester	1,198.69		10,845.30	12,043.99
Southern Regional	8,618.60			8,618.60
Sterling	3,285.41	5,556.49		8,841.90
Stratford Borough	(50.00)			(50.00)
Tabernacle Township	10,900.12			10,900.12
Toms River	5,759.71			5,759.71
Trenton	171,644.39	2,800.13		174,444.52
Voorhees	10,219.66	2,335.95	4,157.39	16,713.00
Washington Township	15,672.92		6,637.80	22,310.72
Waterford Township	231.74			231.74
West Deptford		3,402.67	12,170.87	15,573.54
West Hampton Township	2,551.22			2,551.22
Westville			2,742.17	2,742.17
Willingboro Township	32,021.11	4,389.48		36,410.59
Winslow Township	5,317.28	241.00	11,699.21	17,257.49
Woodbury	4,175.44		3,313.30	7,488.74
Woodlynne Township	1,351.50		12,326.52	13,678.02
Total	**$1,630,624.47**	**$ 202,488.83**	**$ 482,742.21**	**$2,315,855.51**

Schedule V - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds - Atco

	Ten month school year			Extended school year			Tuition waivers			
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	Total Refund
Barrington Borough	26,786	$ 19,827.60	$ 6,958.40	$ 5,489	$ 4,076.45	$ 1,412.55	$ 15,376	$ 13,850.05	$ 1,525.95	$ 9,896.90
Bellmawr Borough	26,786	19,827.60	6,958.40	5,428	4,076.45	1,351.55				8,309.95
Berlin Borough	20,537	15,201.82	5,335.18							5,335.18
Beverly City	42,263	31,283.99	10,979.01							10,979.01
Black Horse Pike	91,370	67,633.93	23,736.07	10,857	8,152.90	2,704.10	15,376	13,850.05	1,525.95	27,966.12
Bridgeton	26,786	19,827.60	6,958.40							6,958.40
Buena Regional	4,763	3,525.35	1,237.65							1,237.65
Burlington Township	12,648	9,362.59	3,285.41							3,285.41
Camden City	1,076,497	796,847.45	279,654.29	23,944	18,052.85	5,891.15	13,069	11,772.54	1,296.46	286,841.90
Cherry Hill Township	61,905	45,823.57	16,081.43	10,918	8,152.90	2,765.10				18,846.53
Chesilhurst	74,109	54,857.02	19,251.98	5,428	4,076.45	1,351.55				20,603.53
Cinnaminson	11,309	8,371.21	2,937.79							2,937.79
Clementon	49,704	36,792.09	12,911.91							12,911.91
Collingswood Borough	36,161	26,767.26	9,393.74							9,393.74
Cumberland Regional	26,786	19,827.60	6,958.40	(34)		(34.00)				6,924.40
Delran	13,096	9,693.71	3,402.29	5,489	4,076.45	1,412.55				4,814.84
Deptford Township	39,584	29,301.23	10,282.77	7,877	5,939.97	1,937.03				12,219.80
DYFS	328,991	243,526.55	85,464.45	87,897	65,572.61	22,324.39				107,788.84
East Windsor Regional	31,993	23,682.09	8,310.91	(45)		(45.00)				8,265.91
Eastern Regional	74,703	55,297.19	19,405.81	16,424	12,229.35	4,194.65	20,302	18,287.61	2,014.39	25,614.85
Egg Harbor Township	110,270	81,624.28	28,645.72	10,857	8,152.90	2,704.10				31,349.82
Elizabeth	5,655	4,185.61	1,469.39				3,246	2,923.75	322.25	1,791.64
Estell Manor	2,231	1,651.64	579.36							579.36
Evesham Township	112,204	83,055.83	29,148.17	41,768	31,330.43	10,437.57				39,585.74
Ewing Township	28,573	21,150.10	7,422.90	5,428	4,076.45	1,351.55				8,774.45
Fairfield Township	26,786	19,827.60	6,958.40							6,958.40
Folsom				(61)		(61.00)				(61.00)
Galloway Township	65,776	48,688.65	17,087.35	(61)		(61.00)				17,026.35
Gateway Regional	20,387	15,090.79	5,296.21							5,296.21
Gibbsboro Borough				5,428	4,076.45	1,351.55				1,351.55
Glassboro	6,546	4,845.87	1,700.13							1,700.13
Gloucester City	50,446	37,341.32	13,104.68				3,758	3,384.95	373.05	13,477.73
Gloucester Township	71,430	52,874.26	18,555.74	27,085	20,382.25	6,702.75	2,989	2,692.45	296.55	25,555.04
Greater Egg Harbor Township	44,047	32,604.51	11,442.49	5,428	4,076.45	1,351.55	2,989	2,692.45	296.55	13,090.59
Subtotal	$ 2,621,128	$ 1,940,217.91	$ 680,914.83	$ 275	$ 206,501.31	$ 69,042.69	$ 77,105	$ 69,453.85	$ 7,651.15	757,608.67

Schedule V - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds - Atco

	Ten month school year			Extended school year			Tuition waivers			
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	Total Refund
Haddon Heights	$ 38,095	$ 28,198.81	$ 9,896.19	$ 10,796	$ 8,152.90	$ 2,643.10				$ 12,539.29
Haddon Township	10,714	7,931.04	2,782.96							2,782.96
Hainsport	26,786	19,827.60	6,958.40							6,958.40
Hamilton Twsp.-Mercer Co.	92,859	68,736.34	24,122.66	16,224	12,229.35	3,994.65	$ 18,365	$ 16,542.50	$ 1,822.50	29,939.81
Kingsway	26,786	19,827.60	6,958.40	5,428	4,076.45	1,351.55	18,365	16,542.50	1,822.50	10,132.45
Lakewood	6,546	4,845.87	1,700.13	2,231	1,747.05	483.95	5,039	4,538.66	500.34	2,684.42
Lawnside Borough	79,613	58,931.59	20,681.41	5,211	3,959.98	1,251.02				21,932.43
Lower Camden County Regional	429,171	317,681.77	111,489.23	41,275	30,981.02	10,293.98	27,078	24,391.32	2,686.68	124,469.89
Lenape	5,805	4,296.64	1,508.36	5,428	4,076.45	1,351.55				2,859.91
Lindenwold Borough	49,404	36,570.03	12,833.97	(61)		(61.00)				12,772.97
Little Egg Harbor	26,786	19,827.60	6,958.40							6,958.40
Lumberton				(62)		(62.00)				(62.00)
Magnolia	53,573	39,655.20	13,917.80							13,917.80
Maple Shade Township	33,780	25,004.59	8,775.41	5,435	4,076.45	1,358.55				10,133.96
Medford Township	26,786	19,827.60	6,958.40	5,428	4,076.45	1,351.55				8,309.95
Merchantville Borough	70,833	52,432.11	18,400.89	13,584	10,132.89	3,451.11				21,852.00
Monroe Township	223,066	165,118.30	57,947.70	16,237	12,229.35	4,007.65	36,731	33,086.38	3,644.62	65,599.97
Morrestown	26,786	19,827.60	6,958.40	2,666	1,979.99	686.01	13,497	12,157.57	1,339.43	8,983.84
Mount Holly Township	38,245	28,309.85	9,935.15							9,935.15
Mount Laurel Township	8,036	5,948.28	2,087.72	5,428	4,076.45	1,351.55				3,439.27
Pemberton Township	450,005	333,103.68	116,901.32	31,453	23,643.41	7,809.59	26,821	24,158.64	2,662.36	127,373.27
Pennsauken Township	204,913	151,681.14	53,231.86	18,734	14,092.87	4,641.13	9,994	9,002.53	991.47	58,864.46
Penns Grove	26,786	19,827.60	6,958.40	5,428	4,076.45	1,351.55				8,309.95
Pine Hill Borough	26,489	19,607.51	6,881.49	5,489	4,076.45	1,412.55				8,294.04
Pinelands	26,489	19,607.51	6,881.49							6,881.49
Pittsgrove	26,786	19,827.60	6,958.40							6,958.40
Rancocas	8,928	6,608.54	2,319.46							2,319.46
Somerdale	15,922	11,785.53	4,136.47	3,169	2,329.40	839.60				4,976.07
South Gloucester	4,613	3,414.31	1,198.69							1,198.69
Southern Regional	27,975	20,707.95	7,267.05	5,428	4,076.45	1,351.55				8,618.60
Sterling	12,648	9,362.59	3,285.41							3,285.41
Stratford Borough				(50)		(50.00)				(50.00)
Tabernacle Township	36,756	27,207.43	9,548.57	5,428	4,076.45	1,351.55				10,900.12
Toms River	22,173	16,413.29	5,759.71							5,759.71
Subtotal	$ 4,785,281	$ 3,542,171.01	$ 1,243,114.73	$ 485,871	$ 364,667.57	$ 121,203.43	$ 232,995	$ 209,873.95	$ 23,121.05	$ 1,387,439.21

Schedule V - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds - Atco

	Ten month school year			Extended school year			Tuition waivers			
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition bil.ing	Refund	Total Refund
Trenton	$ 578,430	$ 428,167.11	$ 150,262.89	$ 70,118	$ 52,178.56	$ 17,939.44	$ 34,685	$ 31.242.94	$ 3,442.06	$ 171,644.39
Voorhees	22,173	16,413.29	5,759.71	17,854	13,394.05	4,459.95				10,219.66
Washington Township	39,732	29,410.28	10,321.72	21,657	16,305.80	5,351.20				15,672.92
Waterford Township	892	660.26	231.74							231.74
West Hampton Township	9,822	7,270.78	2,551.22							2,551.22
Willingboro Township	117,850	87,241.44	30,608.56	5,489	4,076.45	1,412.55				32,021.11
Winslow Township	15,030	11,125.27	3,904.73	5,489	4,076.45	1,412.55				5,317.28
Woodbury	16,072	11,896.56	4,175.44							4,175.44
Woodlynne Township				5,428	4,076.45	1,351.55				1,351.50
Total	$ 5,585,282	$ 4,134,356.00	$ 1,450,930.74	$ 611,906	$ 458,775.33	$ 153,130.67	$ 267,680	$ 241.116.89	$ 26,563.11	$ 1,630,624.47

Schedule V - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds - Challenge

	Ten month school year			Extended school year			Tuition waivers			
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	Total Refund
Black Horse Pike	$ 49,590	$ 36,195.09	$ 13,394.91				$ 11,532	$ 10,387.54	$ 1,144.46	$ 14,539.37
Buena Regional	15,271	11,145.44	4,125.56				1,280	1,152.32	127.68	4,253.24
Camden City	317,712	232,094.31	85,617.69	$ 51,849	$ 38,186.85	$ 13,662.15	82,259	74,095.00	8,164.00	107,443.84
Cherry Hill Township	44,010	32,206.95	11,803.05							11,803.05
Collingswood Borough				(116)		(116.00)				(116.00)
Deptford Township				(116)		(116.00)				(116.00)
East Windsor Regional				(218)		(218.00)				(218.00)
Ewing Township	6,864	5,009.56	1,854.44							1,854.44
Gloucester City				(134)		(134.00)				(134.00)
Gloucester Township	3,456	2,556.31	899.69							899.69
Haddon Heights	20,732	15,131.74	5,600.26							5,600.26
Kingsway	(88)		(88.00)							(88.00)
Lawnside Borough	28,781	21,061.50	7,719.50							7,719.50
Lower Camden County Regional	30,504	22,493.33	8,010.67	9,306	6,854.05	2,451.95				10,462.62
Magnolia	2,268	1,737.33	530.67							530.67
Paulsboro	(116)		(116.00)							(116.00)
Pemberton Township	15,129	11,042.38	4,086.62							4,086.62
Pennsauken Township	51,560	37,728.14	13,831.86				15,376	13,850.05	1,525.95	15,357.81
Sterling	19,165	14,007.26	5,157.74				4,015	3,616.25	398.75	5,556.49
Trenton	10,366	7,565.87	2,800.13							2,800.13
Voorhees				9,190	6,854.05	2,335.95				2,335.95
West Deptford Township	12,912	9,509.33	3,402.67							3,402.67
Willingboro Township	16,249	11,859.52	4,389.48							4,389.48
Winslow Township	241		241.00							241.00
Total	$ 644,606	$ 471,344.06	$ 173,261.94	$ 69,761	$ 51,894.95	$ 17,866.05	$ 114,462	$ 103,101.16	$ 11,360.84	$ 202,488.83

Schedule V - OAL Order 5-6-2010

Schedule of Tuition Rate Refunds - Washington

	Ten month school year			Extended school year			Tuition waivers			
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	Total Refund
Barrington Borough	$ 21,611	$ 16,188.35	$ 5,422.65							$ 5,422.65
Bellmawr Borough	12,846	9,622.36	3,223.64							3,223.64
Camden City	37,100	27,790.54	9,309.46	$ 4,866	$ 3,650.85	$ 1,215.15	$ 4,015	$ 3,616.25	$ 398.75	10,923.36
Clayton	27,733	20,774.51	6,958.49							6,958.49
Collingswood Borough	20,530	15,378.93	5,151.07	4,866	3,650.85	1,215.15				6,366.22
Deerfield	21,611	16,188.35	5,422.65	4,866	3,650.85	1,215.15	18,365	16,542.50	1,822.50	8,460.30
Deptford Township	29,296	21,944.93	7,351.07							7,351.07
DYFS	224,875	168,449.49	56,425.51	66,869	50,173.11	16,695.89				73,121.40
Elk Township	16,329	12,231.92	4,097.08							4,097.08
Gateway Regional	6,723	5,036.20	1,686.80							1,686.80
Glassboro	99,050	74,196.06	24,853.94							24,853.94
Gloucester Township	306,157	229,335.50	76,821.50	39,621	29,728.35	9,892.65				86,714.15
Haddon Township	144,044	107,922.87	36,121.13	4,866	3,650.85	1,215.15				37,336.28
Hopewell Township	21,611	16,188.35	5,422.65	4,866	3,650.85	1,215.15				6,637.80
Kingsway	21,611	16,188.35	5,422.65							5,422.65
Lawnside Borough	21,611	16,188.35	5,422.65	4,727	3,546.54	1,180.46				6,603.11
Lower Camden County Regional	43,222	32,376.70	10,845.30							10,845.30
Lindenwold Borough	67,835	50,813.61	17,021.39							17,021.39
Magnolia	51,866	38,852.04	13,013.96				14,265	12,848.69	1,416.31	14,430.27
Monroe Township	168,445	126,178.48	42,266.52	34,060	25,555.95	8,504.05	18,365	16,542.50	1,822.50	52,593.07
Mount Ephraim	1,441	1,079.76	361.24							361.24
National Park	47,665	35,705.02	11,959.98	4,866	3,650.85	1,215.15				13,175.13
Pennsauken Township	7,324	5,486.23	1,837.77							1,837.77
Pittsgrove	5,524	4,137.74	1,386.26							1,386.26
Runnemede	47,905	35,884.72	12,020.28							12,020.28
South Gloucester	43,222	32,376.70	10,845.30							10,845.30
Voorhees	16,569	12,411.61	4,157.39							4,157.39
Washington Township	21,611	16,188.35	5,422.65	4,866	3,650.85	1,215.15				6,637.80
West Deptford Township	48,504	36,333.13	12,170.87							12,170.87
Westville	10,927	8,184.83	2,742.17							2,742.17
Winslow Township	41,781	31,296.94	10,484.06	4,866	3,650.85	1,215.15				11,699.21
Woodbury	13,206	9,892.70	3,313.30							3,313.30
Woodlynne Township	48,930	36,603.48	12,326.52							12,326.52
Total	$ 1,718,715	$ 1,287,427.10	$ 431,287.90	$ 184,205	$ 138,210.75	$ 45,994.25	$ 55,010	$ 49,549.94	$ 5,460.06	$ 482,742.21

#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

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

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

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)

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

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.

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)

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.

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:

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

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 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.

454-10
OAL DKT. NO. EDU 4588-10
AGENCY DKT. NO. 82-4/10

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTOPHER DAGGET,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY SPECIAL SERVICES	:	DECISION
SCHOOL DISTRICT, ATLANTIC COUNTY.	:	

The record of this matter, the parties' proposed Settlement and Release, the supplemental certification from the 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 careful review of the record, the Commissioner concurs with the Administrative Law Judge that, under the circumstances of this matter, 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 of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

Accordingly, the parties' settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision and its underlying record shall be forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/29/10
Date of Mailing: 10/29/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4588-10
AGENCY DKT. NO. 82-4/10

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER DAGGETT, ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT, ATLANTIC COUNTY.

Louis J. Greco, Esq., for petitioner, Atlantic County Special Services School District

Ned Rogovoy, Esq., for respondent, Christopher Daggett

Record Closed: September 1, 2010 Decided: September 8, 2010

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 25, 2010, 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 August 18, 2010.

2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):

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 days and unless 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 8, 2010
DATE

W. TODD MILLER, ALJ

Date Received at Agency: SEP 16 2010

Date Mailed to Parties: SEP 16 2010

/sd

Louis J. Greco, Esq.

800 Route 50, Suite 2B
Mays Landing, NJ 08330

Tel. (609) 625-2300 Fax. (609) 625-2340
email: lou@lgreco law.com

RECEIVED
2010 SEP -1 A 10: 11
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

August 31, 2010

Honorable William Todd Miller
Office of Administrative Law
1601 Atlantic Avenue, Sixth Floor
Atlantic City, NJ 08401

RE: In the Matter of Tenure Hearing of Christopher Daggett
OAL Dkt. No. 4588-10

Dear Judge Miller;

Enclosed herewith please find an original and one copy of Resolution of the Board of Education of the Atlantic County Special Services School District approving the proposed settlement in the referenced matter. Please incorporate this item into the record of proceedings.

Respectfully yours;

Louis J. Greco, Esquire

Cc: Beth Buoro (w/o enc.)
Ned Rogovoy (w/enc.)

RECEIVED
2010 SEP -1 A 10:11
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RESOLUTION
OF
THE ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT
BOARD OF EDUCATION

WHEREAS, the Atlantic County Special Services School District ("ACSSSD") Board of Education has filed tenure charges against professional teaching staff member Christopher Daggett ("Daggett") for misuse of school computers and related misconduct; and

WHEREAS, the matter has been assigned for trial before Administrative Law Judge W. Todd Miller; and

WHEREAS, there are extensive documents, proofs and trial days possible which could result in significant expense for both sides; and

WHEREAS, Respondent Daggett has filed an answering statement with the New Jersey Department of Education in which he admits the underlying facts giving rise to the charges; and

WHEREAS, the parties have conferred with each other and with Judge Miller;

NOW THEREFORE, BE IT RESOLVED, as follows:

The ACSSSD Board of Education hereby determines that it is in its best interests and the best interests of the public to agree to the settlement agreement attached hereto which includes the resignation of Daggett from the employment of the ACSSSD and 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. Even though Daggett has filed an answering statement admitting the underlying facts giving rise to the charges, the punishment to be imposed, if any, remains contested and it is anticipated that trial in this matter may take several days.
2. The anticipated trial would result in substantial financial expense to the Board of Education both with respect to attorney's fees and loss of staff time.
3. The Board of Education will remain at risk should a trial occur since there is no guarantee of a favorable outcome.
4. But for the agreement between the parties, the Board of Education would have to continue paying Daggett's salary under the tenure hearing law possibly for an extended period of time.
5. It is clearly a business decision to come to the agreement between the Board of Education and Daggett 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 Daggett resign from the ACSSSD and not seek re-employment therein.

BE IT FURTHER RESOLVED, that Louis J. Greco, Esquire, Solicitor to the Board of Education, is hereby authorized to execute this agreement in behalf of the Board.

The foregoing resolution was moved by Judith Gallagher; and seconded by Sarah Beth Johnson.

ROLL CALL VOTE

NAME	AYES	NOES
Thomas J. Dowd	Did not attend	
Judith A. Gallagher	Y	

Marilyn Gallagher Y

Sarah B. Johnson Y

Philip S. Munafo Y

Ruth G. Tunnell Did NOT attend

Joseph F. Zondlo Y

CERTIFICATION

I, Terry Nowotny, Board Secretary of the Board of Education of the Atlantic County Special Services School District do hereby certify that the foregoing Resolution was approved by the Board in a roll call vote as herein set forth in executive session, at the regular meeting of the Board held on August 26, 2010.

Dated: August 26, 2010

Terri Nowotny

Terry Nowotny, Board Secretary

EDU 4588-10

IMO Tenure Hearing of Christopher DAggett	Commissioner of Education of New Jersey Agency Docket No. 82-4/10 Stipulation of Settlement

The parties agree as follows:

1. Respondent agrees to resign from his employment with the Atlantic County Special Services School District ("ACSSSD").
2. Respondent agrees that he will not seek employment with ACSSSD in the future.
3. Respondent will be allowed to retrieve his personal belongings at ACSSSD.
4. ACSSSD will respond to future inquiries about Respondent by disclosing the date span of his employment only with no further details.

8/18/2010

ACSSSD Solicitor
Louis J. Greco

Christopher DAggett
Pro Se / Counsel of Attorney of NJ for
8/18/10

I, Christopher Daggett, hereby resign my teaching position with the Atlantic County Special Services School District Board of Education effective as of 8/18/2010

Chris Daggett

witness: Ted Rogovoy cc to CD 8/18/10
Attorney for BOE

OAL DKT. NO. EDU 3656-10
AGENCY DKT. NO. 55-3/10

IN THE MATTER OF THE TENURE HEARING OF JOHN LEWKOWICZ, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.	COMMISSIONER OF EDUCATION DECISION

Upon review of the record of this matter, the "Settlement Agreement" (Agreement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, the Commissioner is constrained to remand the settlement.

The parties have, in paragraphs 3 and 8 of the Agreement, set forth terms and duties over which the Commissioner of Education has no jurisdiction. More specifically, performance of the terms in those paragraphs turn on the determinations of other government entities – such as the Division of Pensions – which determinations have apparently not yet been made. While the balance of the Agreement's provisions appear to be consonant with the standards set forth in *N.J.A.C.* 6A:3-5.6 and *In re Cardonick,* 1990 *S.L.D.* 842, the terms of the entire agreement appear to be interdependent, and there is no language in the agreement directing that the acceptable provisions survive the elimination of those that are invalid.

Accordingly, the matter is remanded to the OAL for revision of the agreement or a hearing on the merits.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|29|10
Date of Mailing: 10|29|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03656-10

AGENCY REF. NO. 55-3/10

IN THE MATTER OF THE TENURE HEARING OF JOHN LEWKOWICZ, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Kenyatta K. Stewart, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

Richard J. Simon, Esq., for respondent

Record Closed: September 7, 2010 Decided: September 14, 2010

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

On March 23, 2010 the School District of the Township of Irvington ("the District") certified tenure charges of conduct unbecoming against the respondent, John Lewkowicz, a tenured teacher employed by the District. Lewkowicz filed an answer denying the charges on March 30, 2010. Having deemed the charges sufficient, if true, to warrant dismissal or reduction in salary, the New Jersey Department of Education transmitted the charges to the Office of Administrative Law ("OAL") on April 16, 2010.

On the date that the hearing was to commence, August 3, 2010, the parties engaged in settlement discussions and reached an agreement which was memorialized into a settlement document on September 7, 2010. The Assistant Superintendent of the District and the attorney for the district approved the settlement terms.

Based upon a review of the attached settlement agreement, I **FIND** as follows:

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

2. Pursuant to the settlement agreement, Mr. Lewkowicz will retire from his position of employment effective on the day that the settlement is approved by the Commissioner of Education.

3. Mindful that the Irvington School District is an Abbott District with stringent budget limitations, it is the best interests of the parties and the public to resolve this matter without risking an uncertain conclusion after protracted and costly litigation. The settlement is financially prudent. The petitioner will be paid only for his accumulated 79 sick days. In addition, his health benefits will continue for a period of nine (9) months following the approval of the settlement by the Commissioner.

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

5. By the terms of the proposed settlement agreement, Mr. Lewkowicz has entered into this agreement with a full understanding of his rights.

6. Furthermore, the agreement stipulates that Mr. Lewkowicz fully acknowledges that he understands that additional proceedings may occur before the State Board of Examiners.

7. The agreement does not contain any provisions which restrict public access under the Open Public Records Act.

I therefore **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of this settlement is in the public interest.

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

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

9/14/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: September 17, 2010

Date Mailed to Parties: SEP 17 2010
db

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2010 SEP -8 P 3:52

SETTLEMENT AGREEMENT

In consideration of the mutual covenants and promises provided herein, by and between the Irvington Board of Education (hereafter "Petitioner") whose address is 1 University Place, Irvington, New Jersey 07111 and ~~Joseph~~ John JL Lewkowicz (hereafter " Respondent"), whose address is 377 Oak Street, Perth Amboy, 08861, the parties hereby state and agree as follows:

WHEREFORE Petitioner and Respondent agree that the nature of the charges stemming from the matter discussed in further detail herein deal with allegations of providing a learner's permit to an individual who was not an Irvington High School student; and

WHEREFORE Respondent has been employed by the Petitioner in the Irvington School District for a period of approximately twenty two (22) years; and

WHEREFORE Petitioner is a Abbott School District that is currently facing economic hardship and due to reasons of economy and efficiency and the inherent difficulties in proving the charges as stated in the pleadings submitted to the Court, and Respondent, opposing the charges and facing the risk of losing his State issued teaching certification, have determined that resolution of the allegations and claims made herein are in the best interest; and

WHEREFORE Petitioner and Respondent hereby agree and voluntarily give their consent to the settlement in the within matter as set forth herein; and

WHEREFORE Respondent has entered into this Agreement with a full understanding of his rights; and

WHEREFORE Respondent is aware that the Commissioner of Education may forward the pleading and other related documents in this matter to the State Board of Examiners for a determination on Respondent's teaching certification; and

WHEREFORE this Agreement is consistent with public policy, and

WHEREFORE Petitioner and Respondent have had adequate time to consult with their respective legal counsel in this matter and are fully satisfied with the legal representation provided; and

WHEREFORE Petitioner and Respondent have fully discussed and resolved all outstanding issues and have no further questions for the Court; and

NOW THEREFORE The parties hereto agree as follows:

1. Petitioner shall dismiss all tenure charges against Respondent with prejudice.

2. Respondent shall file for disability pension within 30 days following approval of the Settlement Agreement by the Commissioner of Education. Health benefits shall continue to be provided by Petitioner to Respondent for a period of nine (9) months following the date of approval of the Settlement Agreement by the Commissioner of Education. Should the Respondent be approved for disability pension within said nine months his health insurance benefits shall terminate on the date that his disability pension commences. The Petitioner shall take no action to impede or disrupt Respondent's application process for disability pension and cooperation with Respondent upon request.

3. Respondent shall proceed with his workers' compensation claim against Petitioner until his application for disability pension is approved. Petitioner shall take no action to impede or delay Respondent's workers' compensation claim. Immediately upon approval of Respondent's disability pension said workers' compensation matters shall be dismissed with prejudice.

4. Respondent shall waive any and all back pay from March 15, 2010, the date of the suspension without pay by Petitioner.

5. Respondent shall waive any and all pay raises that have been allocated by Petitioner since March 15, 2010.

6. Respondent shall waive any and all lawsuits/ litigation in law or equity against Petitioner.

7. Petitioner shall pay the Respondent within 30 days, 75 sick days at $150.00 per day for total of $11,250.00 in lump sum payment.

8. The parties hereto agree that Respondent will retire due to his claim of psychiatric disability from Petitioner upon approval of the within Settlement Agreement by the Commissioner of Education.

9. Neither party to this Settlement Agreement shall hinder or interfere with the other party's ability to comply with the terms and conditions set forth herein.

SIGNATURES The parties hereto by signing this Agreement acknowledge their rights and obligations pursuant to the terms and conditions set forth herein. The representative on behalf of Petitioner signs this document with full authority to bind the Petitioner hereto.

Witnessed by:

Attorney for Respondent

Richard J. Simon, Esq.

9-7-10
Date

By:
John Lewkowicz, Respondent

Witness

9/3/10
Date

By:
Reggie Lamptey, CPA
Assistant Superintendent for
Business/Board Secretary

Hunt, Hamlin & Ridley
Attorney for petitioner
Irvington Board of Education

Witness

9/3/10
Date

By:
Kenyatta K. Stewart, Esq.

456-10

GARDEN STATE SCHOOL BUS CONTRACTORS ASSOCIATION AND JAVIER FERNANDEZ,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF DIRECTORS OF THE PASSAIC COUNTY EDUCATION SERVICES COMMISSION AND K & M TRANSPORTATION, INC. AND BONDEX INSURANCE COMPANY,	:	
RESPONDENT.	:	

SYNOPSIS

Garden State School Bus Contractors Association (GSSBCA) and Javier Fernandez, a citizen and taxpayer, filed the within petition seeking to set aside the allegedly unlawful contracts awarded by respondent Passaic County Educational Services Commission (PCESC) to respondent K&M Transportation (K&M), claiming that such unlawful contracts have harmed the taxpayers of Passaic County, the safety of their children, and the legitimacy of the bid process. This action arises out of bids that K&M submitted on several PCESC bus routes; K&M was declared lowest bidder on eight routes, but disclosed immediately after the bid opening that it only had the capacity to operate two routes; PCESC cautioned K&M not to repeat this improper action, but nonetheless tendered contracts on two of the eight routes on which K&M had bid. PCESC filed a motion for summary disposition of this matter, contending that petitioners lacked standing to bring the action.

The ALJ found, *inter alia,* that: as a threshold matter, petitioner Fernandez had standing to bring the within action as a taxpayer of Passaic County, but GSSBCA did not have standing as the facts of the case support neither a finding that its members were directly harmed by the bid awards nor a finding of fraud or systemic bidding irregularities that would harm the GSSBCA in the future; PCESC deviated from proper bidding procedure, creating the appearance of impropriety, and such actions were arbitrary, capricious and unreasonable; however, petitioners' demand that the contracts with K&M be set aside is moot because the contract was fully performed by June 30, 2010. Accordingly, the ALJ dismissed the petition.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ's findings, granted PCESC's motion for summary decision, and dismissed the petition.

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

October 29, 2010

OAL DKT. NO. EDU 12414-09
AGENCY DKT. NO. 315-11/09

GARDEN STATE SCHOOL BUS CONTRACTORS ASSOCIATION AND JAVIER FERNANDEZ,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF DIRECTORS OF THE PASSAIC COUNTY EDUCATION SERVICES COMMISSION AND K & M TRANSPORTATION, INC. AND BONDEX INSURANCE COMPANY,	:	
RESPONDENT.	:	

Petitioners Garden State School Bus Contractors Association (the Association) and taxpayer Javier Fernandez (Fernandez) instituted this controversy, alleging that the action of the respondent Board of Directors of the Passaic County Education Services Commission (PCESC) in awarding two bus routes to respondent K&M Transportation (K&M) was *ultra vires*. More specifically, K&M had bid on several routes, had been declared lowest bidder on eight routes, but – immediately after the bid opening – disclosed that it only had the capacity to operate two routes. PCESC cautioned K&M that its actions were improper and could not be repeated, but tendered contracts on two – as opposed to eight – routes.

The facts are amply set forth in the Initial Decision of the Office of Administrative Law (OAL). The relief demanded in the amended petition was: the setting aside of the two contracts awarded to K&M; the f orfeiture of K&M's bid guarantees, *i.e.* bond

contracts with respondent Bondex Insurance Company, and/or reimbursement by PCESC to "the taxpayers" of the differential between K&M's bid and the second lowest responsible bids for the six routes which K&M won but did not perform.[1]

As a threshold matter, the Administrative Law Judge (ALJ) discussed the jurisdictional issue of standing. He determined that Fernandez did have standing as a Passaic County taxpayer. For the reasons set forth in the Initial Decision, the Commissioner agrees with this determination.

On the other hand, the ALJ concluded that the Association did not have standing to challenge the awarding of the two contracts to K&M. While a supplemental affidavit submitted by association member Al Van Riper certified that approximately eight association members submitted bids for various routes in PCESC's bid offering, there is no evidence that they submitted bids for the eight routes that K&M won, let alone that they were the next responsible bidders on those eight routes. Absent such proofs, no concrete stake in this controversy has been shown by the association, and it fails to meet the definition of an interested party set forth in *N.J.A.C.* 6A:3-1.2: "a person who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." Here, the Association's interests are no greater than those of the general public.

In addition, the Commissioner notes that the undisputed facts of this matter do not support the existence of an ongoing pattern of improper bid practices. While the PCESC departed from regulations by improperly allowing K&M to perform only two of the eight contracts that it won, and by failing to demand the bid guarantee for the remaining six contracts, the Commissioner agrees with the ALJ that the facts of this case do not support a finding of fraud or systemic bidding irregularities that will unquestionably harm the Association in the future.

[1] The Commissioner has reviewed the record below, the Initial Decision and the parties' exceptions.

Thus, the Commissioner is not persuaded that the serious issues of public administration and statutory interpretation present in *O'Shea v. New Jersey School Construction Corp.*, 388 *N.J. Super.* 312 (App. Div. 2006) and the other cases cited by petitioner – which issues justified standing for the complaining associations in those cases – are at issue in the present controversy.

In summary, the interests that were implicated by PCESC's actions were not those of the petitioning association but rather those of the taxpayers[2] – which are represented by petitioner Fernandez. The Commissioner consequently concurs with the ALJ's determination that the Association lacks standing in this case.

There is no question, however, that PCESC's post bid-opening, *ex parte* discussion with K&M – as well as its failure to reject K&M as a bidder and to demand the forfeit of the bid guarantee – were deviations from proper bidding procedure. At the very least those actions created the appearance of impropriety, regardless of the financial and practical considerations that may have led to them. Such actions were inconsistent with the legislative intent underlying the public bidding laws. *See, e.g. Terminal Construction Corp. v. Atlantic City Sewerage Auth.*, 67 *N.J.* 403, 409-10 (1975) (Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition). The Commissioner therefore concurs with the ALJ's determination that PCESC's actions were arbitrary, capricious and unreasonable. PCESC is cautioned not to repeat such conduct.

What remains for the Commissioner's consideration are the demands for relief in the petition. While the Commissioner has found arbitrariness in PCESC's actions, she is mindful that the contracts in question have now been fully performed. As the ALJ found, this renders

[2] *See, e.g. Terminal Construction Corp. v. Atlantic City Sewerage Auth.*, 67 *N.J.* 403, 409-10 (1975).

moot petitioners' demand that the contracts with K&M be set aside. *See, e.g., Plumsted Township Bus Drivers Association v. Board of Education of the Township of Plumsted, Ocean County,* 1988 *S.L.D.* 1850. In that case a board of education failed to formally approve an invitation to bid and related specifications, and failed to honor various procedural bidding requirements. As with the present controversy, by the time the litigation had taken its course the contract had been fully performed. The Commissioner consequently found that

> [w]hile the Board is to be admonished for its failure to comply with the strictures of the school bidding laws, a declaratory judgment or order finding that such violations did occur would still provide no relief available to the Commissioner to grant at this time since the contract in question has expired during the course of this litigation.
> *Id.* at 1852.

The Commissioner further agrees with the ALJ that no basis exists to grant the alternate form of relief set forth in the petition, *i.e.,* an order directing PCESC, as bond obligee, to demand from Bondex Insurance Company the disbursal of funds guaranteed by the bond K&M purchased for its bid. *N.J.A.C.* 6A:27-9.4(e)(2) instructs that such a "bid bond . . . shall be forfeited upon refusal of the successful bidder to execute a contract . . . ." The facts of the instant controversy indicate that K&M did not refuse any contracts. Rather, PCESC decided against tendering the six contracts that K&M won but indicated it could not perform. The Commissioner will not order PCESC to demand performance of a bond where no performance is due.

The amended petition also articulates as alternative relief reimbursement by K&M and PCESC to "the taxpayers of Passaic County" of the differential between K&M's bid and the second lowest responsible bids for the six routes which K&M won but did not perform. As there are no facts in the record 1) identifying such a differential, 2) indicating whether funds are

available for such "reimbursement," or 3) proving that such funds could be delivered to the taxpayers of the member districts without cost and at a net savings, the Commissioner cannot grant the requested relief.

Accordingly, PCESC's motion for summary disposition is granted, and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 456-10

Date of Mailing: 10|29|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12414-09

AGENCY DKT. NO. 315-11/09

GARDEN STATE SCHOOL BUS CONTRACTORS ASSOICATION AND JAVIER FERNANDEZ,

Petitioner,

v.

BOARD OF DIRECTORS OF THE PASSAIC COUNTY EDUCATION SERVICES COMMISSION AND K & M TRANSPORTATION, INC. AND BONDEX INSURANCE COMPANY,

Respondent.

Charles M. Fisher,, Esq., for petitioners (Windels, Marx, Lane & Mittendorf, Attorneys)

Deryls M. Gutierrez, Esq., for respondent, Passaic County Educational Serv. Comm. (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Robert Brotman, Esq., for K & M Transportation, Inc.

Derek A. Popeil, Esq. for Bondex Insurance Company (Dreifuss, Bonacci & Parker, attorneys)

Record Closed: May 12, 2010 Decided: June 17, 2010

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

BACKGROUND

On or about July 27, 2009, Passaic County Educational Services Commission (PCESC) advertised for public bids for the 2009-2010 Student Transportation Services for special education school children. The bid specifications contained a provision captioned "Bid Guarantee," which required each bidder to provide security, which could take on a number of forms, including a bid bond. The Bid Specifications further provided that the bid guarantee "shall be forfeited upon refusal of a bidder to execute a contract." PCESC sought bids for up to 65 separate and distinct transportation routes. Furthermore, the Bid Specifications set forth that the "contractor shall provide and maintain an adequate number of school buses, including spares, to safely transport any and all students assigned to the routes contained in this bid and to ensure uninterrupted service in the event of mechanical breakdown."

K&M Transportation, Inc. (K&M) submitted bids on twenty-nine (29) different transportation routes. As part of its bid package, K&M provided a bid bond from Bondex Insurance Company (Bondex). The bid bond identified K&M as the Principal, PCESC as the Obligee and Bondex as the Surety, in an amount that was not to exceed five percent (5%) of K&M's bid.

The bid opening was held on August 5, 2009, and K&M was deemed the lowest responsible bidder on eight (8) routes with its bid having been rejected on the remaining routes. However, K&M advised PCESC that it only had sufficient vehicles to accept two contracts. The PCESC made a determination that it was "in the best interest of the Commission" to award two (2) routes to K&M, namely routes 3025 and 3026. Subsequently, PCESC awarded K&M a contract for these routes and K&M executed that contract. The difference between K&M's bids on the other six routes for which it was the lowest bidder and the bids of the next lowest bidders is about $30,886.20.[1]

[1] This is the result of petitioners' calculations. In its answers to petitioners' interrogatories, PCESC states that this information will be supplied. (Fisher Cert., Exh. J, no. 33).

LEGAL DISCUSSION AND ANALYSIS

PCESC's challenge to petitioners' standing

This matter involves a motion by PCESC to dismiss the complaint by Garden State School Bus Contractors Association (GSSBCA) and Javier Fernandez (collectively "petitioners") for lack of standing. PCESC contends that GSSBCA has asserted no claim that any of the companies that bid on the bus routes in question are members of GSSBCA. PCESC adds that the petition merely names one individual, Javier Fernandez, as a taxpayer; however, even as a taxpayer, Fernandez has no standing to assert claims against respondent PCESC. PCESC asserts that petitioners lack standing to challenge an award of a contract claiming that the bid specifications were illegally drafted or inappropriate after the bids have been awarded. PCESC claims that GSSBCA has no specific interest that will be directly affected by this case.

"Standing" refers to the petitioner's ability or entitlement to maintain an action before a court or administrative agency. Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001), certif. den. 171 N.J. 442 (2002). To possess standing, a party "must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden County, 170 N.J. 439, 449 (2002). New Jersey courts have adopted a generous approach toward recognition of standing in order that aggrieved parties will not be denied easy access to the legal system. See Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98 (1971). S. Lefelt, Administrative Law & Practice, 37 N.J. Practice Series § 7.4 (2d ed. 2000).

Taxpayer Standing

It is well-settled that citizens and taxpayers have standing to enforce competitive bidding statutes. Waszen v. Atlantic City, 1 N.J. 272, 276 (1949) ("a citizen and taxpayer . . . as such . . . may attack the award [of a public contract] and also raise the

question of the illegality of the specifications."); Camden Plaza Parking v. City of Camden, 16 N.J. 150, 158 (1954); James Petrozello Co., Inc. v. Chatham Twp., 75 N.J. Super. 173, 179 (App. Div. 1962); J. Turco Paving Contractor, Inc. v. City Council of Orange, 89 N.J. Super. 93 (App. Div. 1965). See Loigman v. Twp. Comm. of Middletown, 297 N.J. Super. 287, 295-96 (App. Div. 1997) ("Other situations where taxpayers may challenge governmental action involve claims of illegal bidding procedures.").

The purpose of competitive bidding statutes "is to secure competition and to guard against favoritism, improvidence, extravagance and corruption," Trap Rock Indus., Inc. v. Kohl, 59 N.J. 471, 479 (1971) (quoting Hillside Twp, Union County v. Sternin, 25 N.J. 317, 322 (1957), and "to secure for the public the benefits of unfettered competition," Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975). "Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good . . . . It, of course, serves the public interest to permit suits to enforce the policy of these statutes. To that end, a taxpayer may sue." Trap Rock, supra, 59 N.J. at 479.

Thus, case law has consistently held that taxpayers have standing to attack the award of a public contract and also raise the question of the illegality of the bid specifications. It is undisputed that petitioner Javier Fernandez is a resident and taxpayer of Passaic County. Therefore, petitioner Fernandez has standing to bring this action to enforce the competitive bidding statutes and to set aside the alleged unlawful award of these public contracts.

Associational Standing

Petitioner GSSBCA is a non-profit association of school bus contractors. Amended Verified Petition, ¶8. "Many of GSSBCA's members have offices and/or depots located within the boundaries of Passaic County, New Jersey. In addition, there are at least five members of the GSSBCA with offices or depots in Passaic County that regularly submit bids to the PCESC for student transportation services." Certification of

Al Van Riper, ¶4-5 (April 20, 2010). GSSBCA contends that it has standing to bring this action to enforce the competitive bidding statutes and to set aside the alleged unlawful award of these public contracts.

New Jersey "statutes and appellate decisions give wide recognition to suits by associations." Crescent Park, supra, 58 N.J. at 106. Nonetheless, there are accepted limits as to who may seek to vindicate rights belonging to others. Courts will not render advisory opinions or function in the abstract or entertain proceedings by parties "who are mere intermeddlers" or are "merely interlopers or strangers to the dispute." Crescent Park, supra, 58 N.J. at 107. Despite a broad standing policy, our courts require some real and direct interest be present before granting third party standing to seek judicial review of agency action. Camden County, supra, 170 N.J. at 447. Generally, two prerequisites must exist to establish standing: First, petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and, second, his position must be truly adverse to the opposing party. Home Builders League of So. Jersey, Inc. v. Berlin Twp., 81 N.J. 127, 132 (1979). Sometimes the first requirement is described in terms of the "substantial likelihood of harm" to the complainant if the requested relief is not granted. Home Builders, supra, 81 N.J. at 134. Where a case is of great public interest, however, "any slight additional private interest" will be sufficient to afford standing. Salorio v. Glaser, 82 N.J. 482, 491 (1980). But courts still continue to look for some measurable amount of detrimental impact on the complaining party's personal rights.

Similar restrictions are imposed on those who would initiate administrative proceedings before the Commissioner of Education (Commissioner). While N.J.S.A. 18A:6-9 confers upon the Commissioner jurisdiction to hear and determine "all controversies and disputes arising under the school laws," the Commissioner adopted regulations clarifying exactly who may be considered interested persons for the purpose of such hearings. N.J.A.C. 6A:3-1.2 defines "interested person(s)" as someone "who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." Such language is consistent with the Administrative Procedure Act, which limits the definition of a contested case to proceedings where the

"legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined." N.J.S.A. 52:14B-2(b).

Here, GSSBCA reliance on O'Shea v. N.J. Sch. Constr. Corp., 388 N.J. Super. 312 (App. Div. 2006), to support its contention that it has standing, is misplaced. In O'Shea the court held that an association of New Jersey-based mechanical contracting firms and its executive director had representational standing to challenge a bidding practice of the Schools Construction Corporation (SCC). The plaintiff association sought mandamus-type relief to compel the SCC to end its practice of permitting general contractors to substitute major trade subcontractors for those the general contractor named in its bidding documents. In the present matter, petitioners are not challenging a specific PCESC bidding practice or policy; rather, they are challenging the legality of the award of a public contract for transportation services.

GSSBCA has made no assertion that it represents taxpaying businesses in Passaic County or that any of its constituent members have an individual interest in the award of the transportation contracts at issue. In short, GSSBCA has no real stake in the outcome of these proceedings and has not demonstrated a substantial likelihood of its constituencies suffering genuine harm. Thus, GSSBCA lacks standing.

Bondex's challenge to petitioners' standing

Bondex also moves to dismiss petitioners' complaint for lack of standing because pursuant to the terms of the Bid Bond issued by Bondex, the only beneficiary or "Obligee" was PCESC. Thus, Bondex asserts that petitioners are not beneficiaries of the Bid Bond and, therefore, cannot maintain a claim against Bondex.

Petitioners aver that they are not asserting direct claims against Bondex, nor are they seeking to have K&M's bond paid to them. Rather, petitioners seek an order either directing PCESC to call for the forfeiture of K&M's bond, or directing Bondex to turn the bond directly over to the County. Petitioners state that they named Bondex as a party

so that it cannot later complain that it did not have an opportunity to participate and/or be heard.

It should be noted that the education statute, Title 18A, specifically N.J.S.A. 18A:6-9, grants the Commissioner jurisdiction to hear and determine controversies and disputes arising under school law or under the rules of the State Board of Education or the Commissioner of Education. Accordingly, the Commissioner and, therefore, the OAL have jurisdiction over school transportation contract disputes which fall under Chapter 39 of the education statute. This jurisdiction over school bus contracts was affirmed by the New Jersey Supreme Court in Rankin v. Bd. of Educ. of Egg Harbor Twp., 134 N.J.L. 342 (Sup. Ct. 1946), aff'd 135 N.J.L. 299 (E. & A. 1947). Therefore, the Commissioner of Education has the jurisdiction to hear the present dispute concerning the awarding of school bus transportation contracts.

However, purely contractual disputes do not fall under the school laws. See Fair Lawn Bd. of Educ. v. Fair Lawn Plaza Taxi, Inc., 55 N.J. Super. 357 (App. Div. 1959) (where the Superior Court has jurisdiction to hear breach-of-contract cases involving the transportation of pupils where money damages are sought). A surety agreement is an indemnification contract, which in the public bidding context insures the agency and the bidder. Only those parties insured under the contract have enforceable rights under the surety agreement. Therefore, since the relief sought in this proceeding can be likened to money damages, the Commissioner of Education does not have jurisdiction to award such relief by compelling Bondex to pay to PCESC the bid guarantee posted by K&M in the event that K&M refused to enter into a contract and, consequently, PCESC failed to call for the forfeiture of the bid guarantee. See Hudson County Transport, Inc. v. State-Operated Sch. District of Jersey City, 92 N.J.A.R.2d (EDU) 635, 636.

Thus, petitioners do not have standing to petition for the requested relief regarding K&M's bid guarantee, which was issued by Bondex.

CONCLUSION

The New Jersey Supreme Court recognizes a taxpayer's right to sue to enforce competitive bidding statutes. However, GSSBCA has no standing as an association to litigate on behalf of its constituencies, since it has no real stake in the outcome of these proceedings and has not demonstrated a substantial likelihood of its constituencies suffering genuine harm. Thus, petitioner taxpayer have standing to bring the present claim. Likewise, petitioners lack standing to petition the Commissioner for the relief requested seeking an order either directing PCESC to call for the forfeiture of K&M's bond, or directing Bondex to turn the bond directly over to the County.

SUMMARY DECISION STANDARD

Petitioners filed a cross-motion for summary decision (in response to respondents' motions to dismiss) claiming that the transportation contracts awarded to K & M Transportation, Inc. (K&M) are unlawful and must be set aside as a matter of law because K & M bid on more bus routes than it has buses to cover.

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), the motion for 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." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. at 536. 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). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539.

The facts in this matter are undisputed. Since no genuine issue exists as to any material fact this matter is ripe for summary decision.

LEGAL AUTHORITY

The purpose of competitive bidding for local public contracts is not protection of individual interests of bidders, but rather advancement of the public interest in securing the most economical result by inviting competition in which all bidders are placed on equal footing. See Twp. of River Vale v. R.J. Longo Construction Co., 127 N.J. Super. 207 (Law Div. 1974). Courts have consistently held that the purpose of the competitive bidding process is to secure the most economical result in the expenditure of public moneys by promoting uninhibited competition and guarding against "favoritism, improvidence, extravagance and corruption" and "to secure for the public the benefits of unfettered competition." Terminal Construction Corp. v. Atlantic City Sewerage Auth., 67 N.J. 403, 410 (1975).

> To achieve these purposes all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside. This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process. As Justice Francis observed in Township of Hillside v. Sternin, 25 N.J. 317, 326 (1957), "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way."

[Ibid.]

However, as important as competition in public bidding may be, competition is not an end in itself. Other factors – experience, responsibility, honesty and skill – are all important to assure that public work is properly performed in the public interest. Consequently, there is no absolute mandate that "an agency must, in every action it takes, promote competition at the expense of all other concerns." George Harms Construction Co. v. N.J. Turnpike Auth., 137 N.J. 8, 44 (1994) (Handler, J., concurring). If soundness, efficiency, and integrity can otherwise be assured, "[t]he ability to perform the work required is of the very essence of any contract for public work," Bil Jim Construction. v. Manchester Twp. Bd. of Educ., 236 N.J. Super. 603, 605 (App. Div.1989).

These goals are also intended to be achieved through the Public School Contracts Law (PSCL), which is applicable in the present matter. Tec Elec., Inc. v. Franklin Lakes Bd. of Educ., 284 N.J. Super. 480, 488 (Law Div. 1995) (citing F.S.D. Industries, Inc. v. Bd. of Educ. of the City of Paterson, 166 N.J. Super. 330, 334 (App. Div. 1979)). Under the PSCL, the contract must be awarded to the lowest responsible bidder. N.J.S.A. 18A:18A-37. The "lowest responsible bidder" is the one whose response to a request for bids offers the lowest price and is responsive and who is responsible. N.J.S.A. 18A:18A-2(t). "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipments, and facilities available. N.J.S.A. 18A:18A-2(x). "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request. N.J.S.A.18A:18A-2(y). "Quite plainly, ability to perform is of the very essence of any contract for public work." Donald F. Begraft, Inc. v. Franklin Bd. of Educ., 133 N.J. Super. 415, 417 (App. Div. 1975).

Likewise, the statutory provisions entitled "Transportation to and from Schools" (hereinafter "Transportation Act"), N.J.S.A. 18A:39-1 to -25, govern the procedures

concerning the bidding process and the awarding of transportation services contracts in relation to public schools. The Department of Education (DOE) has promulgated regulations concerning pupil transportation contracts under the authority of N.J.S.A. 18A:39-21 and -24. These regulations are found at N.J.A.C. 6A:27-9.1 to -9.16. Similar to other bidding statutes, it is the object of the Transportation Act to "prevent fraud, favoritism and extravagance, to safeguard the taxpayers and protect the lowest responsible bidder." N.J.A.C. 6A:27-9.3.

The courts in this State have recognized a municipal body's discretionary authority in dealing with contract bid irregularities. George Harms Constr. Co. v. Bor. of Lincoln Pk., 161 N.J.Super. 367, 379 (Law Div. 1978). "[A] municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and perfunctory role. It has inherent discretionary power, and what is more, a duty to secure, through competitive bidding, the lowest responsible offer, and to effectuate that accomplishment it may waive minor irregularities." Univ. Bus Co. v. State-Operated Sch. Dist. of Paterson, 93 N.J.A.R.2d (EDU) 553, 554-55[2] (citation omitted).

DISCUSSION

Respondent PCESC advertised for bids on 65 separate and distinct transportation routes, and reserved the right to reject any and all bids. K&M submitted bids on twenty-nine (29) different transportation routes. K&M was deemed the lowest responsible bidder on eight (8) routes with its bid having been rejected on the remaining routes. However, K&M advised PCESC that it only had sufficient vehicles to accept two contracts. PCESC made a determination that it was "in the best interest of the Commission" to award two (2) routes to K&M, namely routes 3025 and 3026. Subsequently, PCESC awarded K&M a contract for these routes and K&M executed that contract.

[2] A supplemental decision to this case is available at 94 N.J.A.R.2d (EDU) 223, where the State Board of Education dismissed petitioner's appeal for failure to file said appeal within the statutory time limit.

The specifications provide that "[t]he contractor shall provide and maintain an adequate number of school buses, including spares, to safely transport any and all students assigned to the routes contained in this bid and to assure uninterrupted service in the event of mechanical breakdown." Cert. of Charles M. Fisher, [3] dated April 20, 2010, Exh. A[4] at 2. Petitioner places its reliance on this language in the Bid Specifications to assert that K&M was not a responsible bidder since it did not have sufficient equipment and/or personnel to perform on the 29 transportation routes upon which it bid. The Bid Specifications did not require any bidder to confirm at the time of bidding that they had the "equipment and personnel" needed to perform on all routes on which they submitted a bid; it only required that all bidders maintain an adequate number of school buses to safely transport students on routes which they would be assigned should their bid be accepted and a contract awarded. Moreover, a bidder is not required to possess all required equipment and/or personnel at the time of submitting its bid; rather, should the bid be accepted and a contract awarded, it is the bidder's responsibility to obtain the required equipment. See Hudson County Transport v. State-Operated Sch. Dist. of Jersey City, 92 N.J.A.R.2d (EDU) 635 (where ALJ Klinger concluded that the requirement of specific type of buses does not discourage competitive bidding although most vendors do not have this equipment, because a bidder willing to obtain the equipment will presumably plan for it and account for the cost in the bid submitted and bidders with no interest in obtaining the required equipment need not bid). Competitive public bidding fosters competition among bidders. The more companies that can bid on a project, the greater the likelihood that the public entity will receive the lowest possible contract price from responsible bidders. Skakel v. Twp. of North Bergen, 37 N.J. 369, 378 (1962). Thus, bidding procedures cannot be prohibitively restrictive to prevent smaller companies from competitively bidding for public contracts. Therefore, K&M's action of bidding for 29 routes with the knowledge that it could not perform on all 29 routes because it only had two buses and two drivers is not improper under the competitive bidding framework.

[3] Hereinafter, Fisher Cert.
[4] Exhibit A is a true and correct copy of PCESC's Bid Specifications for Student Transportation Services for the 2009-2010 school year.

Under the present circumstances, K&M was deemed the lowest responsible bidder[5] on eight routes with its bid having been rejected on the remaining routes. After the bids were opened, and it was determined that K&M was the lowest responsible bidder on eight routes, PCESC contacted K&M at which time PCESC was informed that K&M lacked the ability to provide service on all eight of the routes it was awarded. Here, K&M did not obtain the required equipment; instead K&M advised PCESC that it only had sufficient vehicles to accept two contracts.

Pursuant to N.J.A.C. 6A:27-9.10(a), PCESC was required to award transportation contracts to the "lowest responsible bidder." PCESC has discretion in determining whether a bidder is responsible. To determine that a bidder is not responsible, a public entity must find that the bidder is so lacking in experience, financial ability, equipment and facilities to justify that he or she would be unable to carry out the contract, if awarded. N.J.A.C. 6A:27-9.10(e). After PCESC was informed that K&M only had two vehicles, it was clear that K&M was no longer a responsible bidder as it did not have sufficient financial and material resources (buses) at its disposal to enable it to perform fully the transportation services required of it under its accepted bid, eight routes. However, PCESC made the determination that it was "in the best interest of the Commission" to award two routes to K&M.

The Bid Specifications did not limit PCESC's discretion to award contracts to various bidders for different transportation routes. PCESC argues that it was within its discretion to modify the number of bus routes it would award K&M. PCESC argues that support for its ability to contract for these routes can be found in N.J.A.C. 6A:27-9.3(d)(3), which mandates that bid specifications reflect a board of education's reservation of right to change any route or trip arrangement. This rule is inapposite to the present circumstances. Here, K&M made a representation in its bid of the accepted eight routes that it was unable to fulfill. Upon learning of this, PCESC did not modify the bus route or any specifics of the bid; instead, it chose to tender a contract on a portion of K&M's accepted bid (two routes) and not tender a contract on the remaining six accepted bids.

[5] Fishert Cert., Exh. J at 6 (PCESC Answers to Interrogatories, No. 14)

Once PCESC discovered K&M did not have sufficient financial and material resources (buses) to fully perform the transportation services required of it under its accepted bid, eight routes, K&M could no longer be considered a responsible bidder. It follows that its bid should have then been disqualified. As noted above, the bidding process does not prevent bidding on more routes than a bidder has equipment for at the time of bidding. However, a bidder runs the risk of obligating itself to more bus routes than it can handle. Had PCESC tendered a contract to K&M for all eight routes of its accepted bid, the integrity of the bidding procedures would have been protected through the available remedy of the surety in the event K&M failed to execute the contracts. See N.J.S.A. 18A:39-4. However, PCESC failed to offer K&M a contract for the six remaining routes, thus, technically K&M never refused to execute a contract, which is a necessary prerequisite to forfeit the bid guarantee. Ibid. Is that within the agency's discretion?

A contractual obligation arises upon the acceptance of a bid. Bd. of Educ. of the Borough of Fair Lawn v. Fair Lawn Plaza Taxi, Inc., 55 N.J. Super. 357, 361 (App. Div. 1959). It should be noted that an obligation on the part of the winning bidder to transport the pupils did not thereby arise. The contractual obligation upon acceptance of a bid is separate and apart from the performance contract to provide transportation services that would have existed had the written contract, to which the invitation to bid referred, been executed by PCESC and K&M. The contractual obligation, which did come into existence by virtue of PCESC's acceptance of K&M's bid, submitted in response to PCESC's invitation, obligated K&M to enter into the school transportation contract with PCESC once awarded.

In Fair Lawn, the court found that

> the invitation [to bid], the bid of defendant in response thereto, and the award constituted far more than "preliminary steps" in the creation of a performance contract. They, of themselves, created a contract, separate and distinct from the contemplated *performance* contract. The obligation created was described in Lupfer & Remick v. Board of Chosen Freeholders of Atlantic County, 87 N.J. Eq. 491, 497

> (Ch. 1917), as a vested right of contract, supported by an adequate consideration, therein described as "the privilege of bidding and the legal assurance to the successful bidder of an award as against all competitors."
>
> [Id. at 361-62 (emphasis in original).]

However, the key distinction here is that PCESC did not actually "award" the contract for six of eight routes of K&M's accepted bid. When dealing with transportation contracts for public school students, even though a contractor's submission is a single bid proposal, in actuality it is a package of separate bids for individual bus routes. It is clear from case law that it is common practice in the bidding process for transportation services for a school district, or, in this instance, an educational services commission, to pronounce a bidder as the lowest responsible bidder on certain routes within its bid and reject others. However, there is no reportable case law that has considered whether after bids for certain routes have been accepted, it is within the agency's discretion to then reject a portion of the accepted bids upon after-acquired knowledge concerning the bidder and award contracts for the remaining portion.

PCESC's determination that K&M was the lowest responsible bidder on eight routes, followed by PCESC's failure to tender a contract on all eight of K&M's accepted bids may taint the bidding process. To allow such a contract to stand would allow a bidder, after the bids were accepted to clarify its bid or withdraw a portion of its bid while still reaping the benefit of an awarded contract despite its lack of sufficient equipment or personnel to perform on all accepted bids. Such bidding practice does not promote competition on an equal footing and does not guard against favoritism, Hillside, supra, 25 N.J. at 322. Even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process, aside from PCESC's failure to collect the bid guarantee, all awards made or contracts entered into where any such practice may have played a part, will be set aside. Terminal, supra, 67 N.J. at 410; see Hillside, supra, 25 N.J. at 326. Thus, under this strict standard, K&M's contract must be set aside.

However, there certainly is some discretion built into the competitive bidding process when dealing with education agencies, however, the level of discretion allowed is the central focus here. It is a well established rule that discretionary decisions of an educational agency will only be vacated where it acts in an arbitrary, capricious and unreasonable manner against the protections afforded by the public bidding laws. Perhaps what PCESC did was in fact in the best interest of its constituents. Conceivably, PCESC was simply exercising its discretion because in their view manipulation or corruptive dealing was not taking place here and it felt that offering K&M the two contracts was best for the taxpayers and best for the budget. Exercising its discretion may not have been contrary to the various public bidding laws. However, based on the standard articulated in Univ. Bus Co., supra, is PCESC's action of waiving performance on six additional bus routes a waiver of a minor irregularity?

It should be noted that the term of the contract runs from September 1 through June 30. The academic year is nearly complete and K&M continues to provide the transportation services under the terms of its contract with PCESC. To call for the contract to be re-bid at this late juncture may be contrary to the public interest. Even though the bidding process may have been tainted, the public still received the benefit of receiving the most economical result in the expenditure of public moneys, despite PCESC's failure to take the necessary actions for forfeiture of the bid guarantee.

Whether PCESC has discretion to award the contract once a bidder is deemed the lowest responsible bidder.

The statutory provisions entitled "Transportation to and from Schools" (hereinafter "Transportation Act"), N.J.S.A. 18A:39-1 to -25, requires public advertisement for bids and awards of a contract to the lowest responsible bidder. N.J.S.A. 18A:39-3.[6] See N.J.A.C. 6A:27-9.10(a). In the present matter it is undisputed

[6] N.J.S.A. 18A:39-3(a) provides, in its entirety:

> No contract for the transportation of pupils to and from school shall be made, when the amount to be paid during the school year for such transportation shall exceed $ 7,500.00 or the amount determined pursuant to subsection b. of this section, and have the approval of the executive county superintendent of schools, unless the board of

that PCESC determined K&M to be the lowest responsible bidder on eight routes. Cert. of Charles M. Fisher,[7] dated April 20, 2010, Exh. J[8] at No. 14. After the bids were opened, and it was determined that K&M was the lowest responsible bidder, K&M was contacted, at which time K&M informed Sonia Figueroa (Ms. Figueroa), PCESC transportation supervisor, that it only had two vehicles available for two routes on the bid. At this point no written contract had been tendered to K&M, thus, the issue presented is whether PCESC still had discretion regarding whether to award the contract to K&M even after it deemed K&M to be the lowest responsible bidder.

The courts in this State have recognized a municipal body's discretionary authority in dealing with public contracts. "The courts should not substitute its judgment for that of a governing body and should not attempt to exercise supervision over a municipal discretionary authority absent a showing of arbitrariness." Ace-Manzo, Inc. v. Twp. of Neptune, 258 N.J. Super. 129 (Law Div. 1992); George Harms Constr. Co. v. Bor. of Lincoln Pk., 161 N.J.Super. 367, 379 (Law Div. 1978). "[A] municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and perfunctory role. It has inherent discretionary power, and what is more, a duty to secure, through competitive bidding, the lowest responsible offer, and to effectuate that accomplishment it may waive minor irregularities." Univ. Bus Co. v. State-Operated Sch. Dist. of Paterson, 93 N.J.A.R.2d (EDU) 553, 554-55[9] (citation omitted).

A contractual obligation upon the bidder to enter into a contract comes into existence upon the acceptance of a bus company's bid. Bd. of Educ. v. Fair Lawn Plaza Taxi, Inc., 55 N.J. Super. 357, 361 (App. Div. 1959). This obligation is separate and apart from the performance obligation, which only arises after the contract has

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> education making such contract shall have first publicly advertised for bids therefor in a newspaper published in the district or, if no newspaper is published therein, in a newspaper circulating in the district, once, at least 10 days prior to the date fixed for receiving proposals for such transportation, and shall have awarded the contract to the lowest responsible bidder.

[7] Hereinafter, Fisher Cert.
[8] Exhibit J contains PCESC's Answers to Interrogatories.

been executed. See Ibid. As described by the court in Lupfer v. Bd. of Chosen Freeholders, 87 N.J. Eq. 491, 497 (Ch. 1917),

> [a] competitive bid submitted under statutory privilege and regulation is in the nature of an option to the municipality, based upon a valuable consideration, to which the principles of law governing options, generally, are applicable. The consideration passing is the privilege of bidding and the legal assurance to the successful bidder of an award as against all competitors. *Such an option pending action consistent with its terms . . . is a vested right of contract, of which the municipality cannot be deprived, except, perhaps, by its consent . . .*
>
> [Id. at 497-98 (emphasis added).]

Therefore, by virtue of PCESC's acceptance of K&M's bid, a contractual obligation came into existence, which obligated K&M to enter into the school transportation contract with PCESC. However, PCESC still retained the discretion to release K&M from its contractual obligation. Normally, this scenario is most often carried out where a successful bidder moves to withdraw its bid. See e.g. Intertech Assoc., Inc. v. City of

[9] A supplemental decision to this case is available at 94 N.J.A.R.2d (EDU) 223, where the State Board of Education dismissed petitioner's appeal for failure to file said appeal within the statutory time limit.

Paterson, 255 N.J. Super. 52, 60 (App. Div. 1992);[10] Conduit & Foundation Corp. v. Atlantic City, 2 N.J.Super. 433 (Ch. Div. 1949).[11]

Thus, PCESC's decision to release K&M from the additional six contracts after discovering K&M only had vehicles available for two routes on the bid was within its discretion. Nevertheless, PCESC does not have unfettered discretion. A school board's discretionary decision should only be reversed if the record reveals that it was arbitrary, capricious or unreasonable. Plumstead Twp. Bus Drivers Ass'n v. Plumstead Twp. Bd. of Educ., 1988 S.L.D. 1833, 1842, adopted Comm'r 1988 S.L.D. 1850.

In Katinsky v. Pennsauken Twp. Bd. of Educ., 93 N.J.A.R.2d (EDU) 1, the school board contacted the successful bidder, after awarding the bidder the contract, to determine the type of computer it anticipated supplying. ALJ Duncan concluded that, despite the incidental conversation between the board and the successful bidder, there was nothing improper in the bid award and that no information supplied during the

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[10] While unilateral mistake of a fact unknown to the other party is not ordinarily grounds for avoidance of a contract, rescission in the context of public bids on the basis of unilateral mistake made in good faith has been afforded under certain circumstances. Cataldo Constr. Co. v. County of Essex, 110 N.J.Super. 414, (Ch. Div. 1970); Conduit & Foundation, supra. See also Terminal Constr. Corp. v. Atlantic Cty. Sewerage Auth., 67 N.J. 403, 407-08 (1975). "To qualify for the equitable relief sought, the party must show special circumstances justifying a departure from the generally controlling principle that parties are bound by the contracts they make for themselves." Cataldo Constr. Co., supra, 110 N.J.Super. at 418. These special circumstances have been described as: (1) the mistake must be of so great a consequence that to enforce the contract as actually made would be unconscionable; (2) the matter as to which the mistake was made must relate to the material feature of the contract; (3) *the mistake must have occurred notwithstanding the exercise of reasonable care by the party making the mistake*, and (4) the requested rescission cannot cause serious prejudice to the other party, except for loss of bargain. Conduit & Foundation, supra, 2 N.J.Super. at 440.

[Intertech Assoc., supra, 255 N.J. Super. at 60.]

[11] In Conduit & Foundation, supra, a successful bidder was granted rescission for unilateral mistake where an error caused the bid to be entered at $ 143,171 instead of $ 193,421. The next highest bid was $ 205,395. The error occurred as a result of the *mistaken* omission of a $ 50,250 item on the final estimate. Explanation for the error was that the two people who prepared the bid were tired, having worked on it for two days, and that each one thought the other had included the item in the final computations. Finding, nonetheless, a reasonable degree of care was exercised, notice of the mistake and attempt to withdraw the bid occurred before award, the mistake was material and rescission could be effectuated without serious prejudice to the governmental body, the court concluded the bidder could avoid his error by way of rescission.

conversation altered or supplemented the specifications or induced the Board to award the contract to other than the lowest bidder. However, ALJ Duncan did point out that, "Such conversations should be discouraged as contrary to the paramount aims of the bidding statutes that all bidders bid upon the same thing and that the public know clearly what the bidder must give and the Board must receive for a consideration plainly stated." Katinsky, supra, 93 N.J.A.R.2d (EDU) at 3.

Likewise, in the present matter, Ms. Figueroa had a private, undisclosed conversation with K&M, after PCESC found K&M to be the lowest responsible bidder. At that time K&M informed Ms. Figueroa that it could only accept and execute contracts on two of the routes. In that conversation, Ms. Figueroa cautioned K&M "that because this was respondent's [K&M] first experience in the bid process, they [PCESC] would not hold it [K&M] responsible for the bids it could not perform, and that this was a warning not to do it again." Fisher Cert., Exh. E[12] at No. 29. PCESC then awarded K&M two bus route contracts, which K&M executed. Ibid. Contrary to Katinsky, supra, information supplied during the conversation between PCESC and K&M induced PCESC to award six bus route contracts to other than the lowest bidder. It is undisputed that the six routes, for which K&M was deemed the lowest responsible bidder, were awarded to the next lowest bidder.

This private undisclosed conversation is repugnant to the public bidding laws. It creates the appearance of impropriety and is capable of becoming a vehicle for corruption or favoritism, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding. See Terminal Construction Corp. v. Atlantic City Sewerage Auth., 67 N.J. 403, 410 (1975) ("all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside. *This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process.*" (emphasis added)). In this matter, no other bidder was given the opportunity to converse with Ms. Figueroa post bid and explain its bid. Releasing a successful

[12] Exhibit E contains K&M's Answers to Interrogatories.

bidder from its contractual obligation where the successful bidder made no application to withdraw its bid and there was no mistake by the successful bidder cannot be condoned. Thus, PCESC's decision to release K&M was "arbitrary, capricious or unreasonable" and in violation of the public bidding laws.

Pursuant to N.J.S.A. 18A:39-4, a bid bond "*shall* be forfeited" upon the refusal of a bidder to execute a contract. Ibid. (emphasis added). N.J.S.A. 18A:39-4 reads in its entirety:

> Each transportation bid shall be accompanied by information required on a standard form of questionnaire approved by the state board and by a cashier's or certified check for 5% of the annual amount of the contract, which deposit *shall* be forfeited upon the *refusal* of a bidder *to execute a contract*; otherwise, checks shall be returned when the contract is executed and a bond filed.
>
> [Ibid. (emphasis added).]

Likewise, N.J.A.C. 6A:27-9.4(e) provides:

> Bidders shall submit a guarantee payable to the district board of education to ensure that, *if a contract is awarded*, the successful bidder *shall* enter into that contract and furnish a performance surety bond.
>
> 1. The guarantee to be submitted shall be a certified check, cashier's check or bid bond as required by the district board of education. No other form of guarantee is authorized.
>
> 2. The bid bond, cashier's or certified check *shall* be forfeited upon *refusal* of the successful bidder *to execute a contract*; otherwise, the guarantee shall be returned when the contract is executed and a performance bond filed.
>
> [Ibid. (emphasis added).]

Ordinarily, the statutory use of the word 'shall' is mandatory or imperative while use of the word 'may' is permissive or directory. Harvey v. Essex County Bd. of Chosen Freeholders, 30 N.J. 381, 391-92 (1959); Tenafly v. Centex Homes Corp., 139 N.J.

Super. 490, 499 (Law Div. 1976); Society for Animal Rights, Inc. v. Mahwah, 138 N.J. Super. 322, 339 (Law Div. 1975). "Absent a clear indication of legislative intent in the purpose and context of the statute compelling a contrary understanding, the courts will so construe these terms." Knox v. Krause, 152 N.J. Super. 278, 282 (Law Div. 1977) (citing Harvey, supra; Tenafly, supra; Society for Animal Rights, supra.)

The language of N.J.S.A. 18A:39-4 is clear; there is no indication in the statutory scheme or case law that would indicate a contrary legislative purpose. N.J.S.A. 18A:39-4 is mandatory and imperative in its direction that the bid bond "*shall* be forfeited" upon the refusal of a bidder to execute a contract.

However, both N.J.S.A. 18A:39-4 and N.J.A.C. 6A:27-9.4(e) provide that the triggering event for a claim on the bid bond is the refusal of a successful bidder to execute a contract. "The provision . . . relating to the deposit . . . is in the nature of a penalty, to be construed strictly and to be interpreted as working a forfeiture *only* if the contract was lawfully awarded and wrongfully declined." Lupfer, supra, 87 N.J. Eq. at 493 (emphasis added). Here, there was no refusal to execute a contract. K&M was tendered only two contracts, which K&M executed and, thus far, has fully performed. Therefore, the triggering event for a claim on the bond is not present and the bid bond cannot be forfeited.

Whether the remedy of voiding the contract is appropriate at this juncture?

The other remedy the petitioner is seeking is an order declaring the contract with K&M to be null and void. This is virtually moot by the fact that the contract in question will expire during the Commissioner's review. See Plumstead Bus Drivers, supra, 1988 S.L.D. 1833, 1834, 1852, where like the instant matter the contract was to expire during the Commissioner's review of the initial decision. In concurring with the ALJ that the matter was moot, the Commissioner stated, "while the Board is to be admonished for its failure to comply with the strictures of the school bidding laws, a declaratory judgment or order finding that such violations did occur would still provide no relief available to the

Commissioner to grant at this time since the contract in question has expired during the course of this litigation." Id. at 1852.

CONCLUSION

The matter is appropriate for summary decision as there are no genuine issues as to any material facts. Although this matter is appropriate for summary decision, the matter is moot because there are no available remedies. The contract will be fully performed by June 30, 2010.

ORDER

It is **ORDERED** that the petition of PCESC and Javier Fernandez is **DISMISSED**.

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

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

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

June 17, 2010

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 6/17/10

Date Mailed to Parties: 6/17/10

sej

459-10R

L.S., on behalf of minor child, E.S., et al.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This is a remand of a matter in which forty-seven parents challenged the Board's revised attendance zone and transportation policies, contending that the adoption of the revised policies was arbitrary and capricious, and in violation of applicable law. The matter was remanded to adjudicate the issue of whether the procedures for adoption of the revised policies violated the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to 21 (OPMA). Additionally, on remand petitioners contend that respondent failed to comply with its own bylaws with respect to the adoption of attendance zone and transportation policies, as well as with the Commissioner's final decision in the original proceeding, which ordered the Board to revise these policies to bring them into compliance with *N.J.S.A.* 18A:39-1 and *N.J.A.C.* 6A:27-1.2.

The ALJ found, *inter alia*, that: respondent Board provided adequate notice of its meetings where consideration was given to Policy 8600 Transportation and Policy 8110 Attendance Zones; meetings were open to the public, with opportunity for public comment; accordingly, there was no violation of the OPMA; the Board did not comply with the adoption schedule outlined in its bylaws in the original adoption of policies 8600 and 8110, which were therefore invalidated; Policy 8600 Transportation was revised at the direction of the Commissioner's December 2009 decision and properly adopted pursuant to the bylaws; however, Policy 8110 Attendance Zones – although reviewed as per the Commissioner's previous decision – was never validly adopted by the Board. Accordingly, the ALJ ordered that respondent adopt a version of Policy 8110 in accordance with its bylaws and other applicable law within 60 days of the final decision in this matter.

Upon a full and independent review, the Commissioner adopted the recommended decision of the OAL for the reasons stated therein, directed the Board to adopt a version of its Policy 8110 pursuant to the ALJ's order, 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.

October 29, 2010

OAL DKT. NO. EDU 1020-10
(EDU 7387-09 ON REMAND)
AGENCY DKT. NO. 101-5/09

L.S., on behalf of minor child, E.S., et al.,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WESTFIELD, UNION COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

This matter was remanded to the Office of Administrative Law on January 4, 2010 – consistent with the Commissioner's December 30, 2009 decision – for expansion of the record and the Administrative Law Judge's (ALJ) recommendation as to one remaining issue, *i.e.*, whether petitioners have established their Open Public Meetings Act (OPMA) charge against respondents and, if so, the possible implication(s), if any, such a violation might have on the underlying case.[1] The record on remand and the resultant Initial Decision of the OAL have been reviewed. The parties did not file exceptions to the ALJ's decision.

Upon due consideration, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons clearly stated in his decision.

[1] On remand, petitioners submitted to the ALJ additional factual assertions contending that the Board failed to comply with its bylaws with respect to the February 2009 adoption of Policy 8600 Transportation and Policy 8110 Attendance Zones, and a charge that the Board had failed to comply with the Commissioner's December 30, 2009 decision directive to revise these two policies.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is directed to adopt a version of its Policy 8110 Attendance Zones in accordance with its bylaws and other applicable law within 60-days of the date of this decision. The instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/29/10

Date of Mailing: 11/01/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01020-10
AGENCY DKT. NO. 101-5/09
(Remand of OAL Dkt. No. EDU 07387-09)

L.S., ON BEHALF OF MINOR CHILD, E.S., ET AL.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WESTFIELD, UNION COUNTY,

Respondent.

James T. Seery, pro se

Michelle M. Schott, Esq., for respondent
(Methfessel & Werbel, attorneys)

Record Closed: September 21, 2010 Decided: September 21, 2010

BEFORE **RICHARD McGILL**, ALJ:

This is a remand of a matter in which forty-seven parents ("petitioners") challenge revised attendance zone and transportation policies of the Westfield Board of Education ("respondent"), alleging that they are arbitrary and capricious and in violation

of existing laws. The purpose of the remand is to adjudicate the issue whether the procedures for adoption of the revised policies violated the Open Public Meetings Act ("OPMA"). N.J.S.A. 10:4-6 to -21. In addition, petitioners maintain that respondent failed to comply with its own bylaws with respect to the adoption of attendance zone and transportation policies. Petitioners also contend that respondent failed to comply with the Decision from the original proceeding. Both parties now move for summary decision.

PROCEDURAL HISTORY

An Initial Decision was issued in this matter on November 18, 2009, deciding all issues with respect to the parties' cross-motions for summary decision with the exception of the question concerning the OPMA. Due to the sparseness of the presentations related to the OPMA, a determination could not be made with respect to this issue.

A Final Decision was issued on December 30, 2009, adopting the Initial Decision. The matter was remanded to the Office of Administrative Law solely for the adjudication of the one remaining OPMA issue.

The remand was transmitted to the Office of Administrative Law on January 4, 2010, for determination as a contested case. Petitioners filed a motion for summary decision on April 12, 2010. Respondent submitted its motion for summary decision on April 29, 2010, and a supplemental filing on May 7, 2010. Petitioners submitted a reply on May 18, 2010.

MOTIONS FOR SUMMARY DECISION

A. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R. 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. Id. at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid.

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

B. Issues

The main issue in this proceeding on remand is whether respondent's Policy 8110 Attendance Zones and Policy 8600 Transportation are void due to failure to comply with provisions of the OPMA. A second issue is whether respondent has complied with its bylaws in regard to the adoption of Policy 8110 Attendance Zones and Policy 8600 Transportation. The third issue is whether respondent has failed to comply with a direction in the Decision from the original proceeding ordering respondent to revise its Policy 8600 Transportation and Policy 8110 Attendance Zones.

C. Facts

In support of its motion for summary decision, respondent submitted a statement of facts which focuses on the issue of compliance with the OPMA. Petitioners have not directly challenged respondent's statement of facts.

In their motion for summary decision, petitioners incorporated by reference their previous filings in this matter. Petitioners also submitted additional factual assertions to the effect that respondent failed to comply with its bylaws in regard to the February 2009 adoption of Policy 8600 Transportation and Policy 8110 Attendance Zones.

The facts as set forth in respondent's statement are material and unchallenged. Based thereon, I **FIND** as follows:

1. Portions of public meetings on October 7, 2008; November 8, 2008; December 16, 2008; January 13, 2009; January 21, 2009; February 3, 2009; and February 24, 2009; addressed the issues of projected enrollment beginning with the 2009-2010 school year, new state regulations for an intermediate school enrollment plan, and guidelines for making attendance zone recommendations and plans for redistricting.

2. On January 21, 2009, the school superintendent and other district administrators attended a parent meeting at Washington School, where redistricting options were presented, explained and discussed.

3. The proposed redistricting policies were presented at respondent's meeting on February 3, 2009, accompanied by a power point presentation.

4. On February 23, 2009, the written report of the Long Range Planning Committee was posted on respondent's website.

5. Due to the large number of individuals (estimated at 100 persons) who wanted to speak at the meeting on February 24, 2009, respondent instituted a policy of limiting individual speaking time to two minutes.

6. That limitation was largely ignored, and the meeting lasted into the early morning hours.

7. The meetings on February 3, 2009, and February 24, 2009, were each between four and five hours in length, and most of those meetings were devoted to hearing the concerns of members of the public and answering their questions related to the policies in question in this matter.

8. The Decision dated December 30, 2009, contains the following language:

> The Board is hereby directed – no later than 60 days from the date of this decision – to revise its Policy #8600 (Transportation) and Policy #8110 (Attendance Zones) to reflect that the provision of transportation will be made to RIS and to provide such transportation to this school for all students who attend RIS, or are eligible to do so, and reside beyond two miles therefrom.

9. As adopted on February 24, 2009, Policy 8600 Transportation contained the following language:

> The Board shall provide transportation to the extent required by law for high school students living beyond two and one-half miles from school and for intermediate and elementary school students living beyond two miles from school. For students who qualify for bussing at the intermediate level, transportation will only be provided to Edison School.

10. Respondent revised its Policy 8600 Transportation in February 2010. The only substantial change to Policy 8600 Transportation was a revision to the above-quoted language to state as follows:

> The Board shall provide transportation for high school students living beyond two and one-half miles from school and for intermediate and elementary school students living beyond two miles from the school they attend or are eligible to attend.

11. Policy 8100 Attendance Zones contains the following language: "Transportation will be provided in accordance with Policy 8600 (Transportation)."

12. Respondent reviewed Policy 8110 Attendance Zones in January and February 2010 but did not make any changes.

The following is a summary of petitioners' factual assertions. In its original filing, petitioners maintained in regard to the OPMA that respondent did not provide adequate notice and opportunity for the public to comment. Further, respondent provided false and misleading information to the public through its responses to citizens' requests pursuant to the Open Public Records Act ("OPRA"). N.J.S.A. 47:1A-1 to -13. Additionally, respondent provided false and misleading information on more than one occasion in written presentations to the public regarding the number of students projected to attend Roosevelt Intermediate School ("RIS") and Edison Intermediate School ("EIS") over the course of the next five years.

Additionally, petitioners contend that respondent's Policy 0131 Bylaws and Policies requires respondent to follow certain procedures in regard to proposals for new or revised policies. Specifically, the final vote on adoption shall be taken four or more weeks after the regular or special meeting at which a policy proposal is first placed on the agenda. According to petitioners, the first reading of Policy 8600 Transportation and Policy 8110 Attendance Zones was on February 3, 2009, and respondent's approval came on February 24, 2009. Thus, respondent approved the revision twenty-one days after the first reading, and therefore, respondent violated its bylaws in regard to Policy 8600 Transportation and Policy 8110 Attendance Zones. Finally, petitioners maintain that respondent failed to provide a timely response to an OPRA request for a copy of Policy 0131 Bylaws and Policies.

In response, respondent cites a portion of Policy 0131 Bylaws and Policies which requires that the process of adoption of policies shall extend over two or more regular or special meetings. Respondent maintains that it complied with this requirement. Further, respondent maintains that it has followed a practice of approving proposed policies over the course of two or more regularly scheduled meetings regardless of whether four weeks separated the two meetings. In support of this contention, respondent presented a list of sixty-five policies showing the dates of first reading and approvals. According to respondent, the notion of voting for approval four or more weeks later reflected a bygone practice of having one meeting per month. But as petitioners point out, the approvals of only three of the sixty-five policies came less than twenty-eight days after the first reading, and of the three, two were the policies in this case. Finally, respondent provided annual notice of all of its meetings for 2009.

As discussed below, some of petitioners' factual assertions are not material in relation to the issues to be considered in this proceeding. Nonetheless, based upon petitioners' factual assertions and respondent's responses thereto, I **FIND** as follows:

13. Respondent provided annual notice of all of its meetings for 2009.

14. Respondent's meetings concerning Policy 8600 Transportation and Policy 8110 Attendance Zones were open to the public.

15. Respondent's Policy 0131 Bylaws and Policies requires respondent to follow certain procedures in regard to proposals for new or revised bylaws or policies.

16. One requirement is that the final vote on adoption shall be taken four or more weeks after the regular or special meeting at which a policy proposal is first placed on the agenda.

17. Another requirement is that the process for adoption of policies shall extend over two or more regular or special meetings.

18. The first reading of Policy 8600 Transportation and Policy 8110 Attendance Zones was on February 3, 2009.

19. Respondent's approval of these policies came on February 24, 2009.

20. Respondent did not have a practice of disregarding the four-week requirement.

21. The first reading of a revised version of Policy 8600 Transportation took place on January 26, 2010.

22. Respondent adopted the revised version of Policy 8600 Transportation on February 23, 2010.

23. Policy 8110 Attendance Zones was reviewed on January 26, 2010, and again on February 23, 2010.

D. Law and Analysis

The Commissioner of Education has jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. Additionally, the Commissioner of Education has incidental jurisdiction to decide questions concerning the OPMA which arise in the context of a school law case. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184, 187 (App. Div. 1979).

1. OPMA

The OPMA secures the right of members of the public to be present at meetings of public bodies and to witness in full detail all phases of the deliberation, policy formulation and decision making of public bodies. N.J.S.A. 10:4-7. In furtherance of this policy, no public body subject to certain exceptions shall hold a meeting, unless adequate notice thereof has been provided to the public. N.J.S.A. 10:4-9. "Adequate notice" means written advance notice of at least forty-eight hours, giving the time, date, location and, to the extent known, the agenda for the meeting. N.J.S.A. 10:4-8(d). At least once every year, a public body must provide notice of its schedule of regular meetings during the succeeding year. N.J.S.A. 10:4-18. Compliance with N.J.S.A. 10:4-18 satisfies the notice requirement of N.J.S.A. 10:4-8(d); there is no need for a separate notice as to the agenda. Witt v. Gloucester County Bd. of Chosen Freeholders, 94 N.J. 422, 432-33 (1983).

Subject to exceptions, all meetings of public bodies shall be open to the public at all times. N.J.S.A. 10:4-12(a). A board of education must set aside a portion of every meeting, the length thereof to be determined by the board of education, for public comment on any school district issue that may be of concern to the public. Ibid. Any action taken by a public body at a meeting which does not conform with the provisions of the OPMA shall be voidable in an appropriate proceeding. N.J.S.A. 10:4-15(a). A public body may take corrective or remedial action by acting de novo at a public

meeting held in conformity with the OPMA and other applicable law regarding any action which may otherwise be voidable. Ibid.

Petitioners' contention that the adoption of Policy 8600 Transportation and Policy 8110 Attendance Zones violated provisions of the OPMA is based in large measure on petitioners' view that respondent provided false and misleading information in response to requests made pursuant to the OPRA. There are three responses to petitioners' contention. First, respondent acknowledged that certain papers provided in response to OPRA requests contained inaccurate information, but since they were public records, they were provided in response to the requests. Second, it must be borne in mind that this assertion came from petitioners' original filing. Petitioners are in substance arguing the merits of their contention with respect to attendance zones. The alleged falseness was really the product of a different analysis of the data. This issue was previously resolved in this proceeding and may not be argued at this point. The same may be said for petitioners' argument that respondent provided false and misleading information on more than one occasion in written presentations to the public regarding the number of students projected to attend RIS and EIS over the course of the next five years. Finally, to the extent that petitioners believe that they did not receive appropriate responses to their OPRA requests, their remedy was to seek relief pursuant to N.J.S.A. 47:1A-6, which is subject to a forty-five day statute of limitations. Mason v. City of Hoboken, 196 N.J. 51, 70 (2008).

Petitioners' assertion that respondent did not provide adequate notice or opportunity to comment does not have any basis other than petitioners' claim that respondent provided false and misleading information. Respondent provided adequate notice through the annual schedule of meetings pursuant to N.J.S.A. 10:4-18. Further, respondent's meetings were open to the public, and respondent gave members of the public the opportunity to comment on the proposed policies on February 3, 2009, and February 24, 2009. As permitted by N.J.S.A. 10:4-12(a), respondent set a time limit for public comments. Nonetheless, the time limit was generally ignored, and the meetings continued for four or five hours with one running until after midnight. Under the

circumstances, petitioners have not demonstrated a violation of the OPMA based upon the contentions in their original filing.

Petitioners also maintain that the failure to comply with Policy 0131 Bylaws and Policies violates the OPMA, but they offer no real argument in support of this proposition. The OPMA does not require a waiting period of four weeks between the time that a policy proposal is first placed on the agenda and the final vote on adoption. More generally, the OPMA does not require compliance with an entity's bylaws. It follows that petitioners' argument is without merit.

Respondent provided adequate notice of its meetings where consideration was given to Policy 8600 Transportation and Policy 8110 Attendance Zones. The meetings were open to the public, and members thereof were given an opportunity to offer comments and did so. Under the circumstances, I **CONCLUDE** that there were no violations of the OPMA in regard to the adoption of respondent's Policy 8600 Transportation and Policy 8110 Attendance Zones. Therefore, these policies are not void due to failure to comply with provisions of the OPMA.

2. Compliance with Bylaws

Petitioners contend that Policy 8600 Transportation and Policy 8110 Attendance Zones are void because respondent failed to comply with its bylaws in regard to the adoption thereof. As noted above, Policy 0131 Bylaws and Policies requires that the final vote on adoption shall be taken four or more weeks after the regular or special meeting at which a policy proposal is first placed on the agenda. Here, the final vote on adoption was taken on February 24, 2009, which was twenty-one days or three weeks, after the policy proposal was first placed on the agenda on February 3, 2009. Respondent's claim that it routinely disregards this requirement is not supported by its data which shows that respondent failed to comply with respect to only three out of sixty-five policy proposals. And two of the three were the policies in this proceeding. Moreover, respondent offered no legitimate reason for disregarding the four-week

requirement. It follows that respondent failed to comply with its Policy 0131 Bylaws and Policies when it adopted Policy 8600 Transportation and Policy 8110 Attendance Zones.

The next question concerns the consequences when a board of education fails to comply with its bylaws. Respondent relies on cases which hold that where a board of education acts in a manner inconsistent with its own procedural rules, the action remains valid so long as the measure does not violate a procedure required by statute. Blessing v. Bd. of Educ. of the Borough of Palisades Park, 1974 S.L.D. 1133; Polonsky v. Red Bank Bd. of Educ., 1967 S.L.D. 93; Silverstris v. Bayonne Bd. of Educ., 1959-1960 S.L.D. 184. But more recently it has been held that bylaws designed to give notice to the public before official action is taken have binding effect and that action taken in disregard thereof must be set aside. Matawan Regional Teachers Ass'n v. Matawan-Aberdeen Reg. Sch. Dist. Bd. of Educ., 223 N.J. Super. 504, 509-10 (App. Div. 1988).

Here, the bylaw in question requires that the final vote on adoption shall be taken four or more weeks after the regular or special meeting at which a policy proposal is first placed on the agenda. The apparent purpose of this bylaw is to give the public notice before official action is taken and to allow time for careful deliberation. Respondent's claim that the twenty-eight day requirement is generally disregarded because meetings are now scheduled more frequently than once a month is not supported by data provided by respondent. Under the circumstances, I **CONCLUDE** that the original adoption of Policy 8600 Transportation and Policy 8110 Attendance Zone must be invalidated for failure to comply with Policy 0131 Bylaws and Policies.

3. Compliance with Decision

The next issue is whether respondent has complied with a direction in the Decision from the original proceeding ordering respondent to revise its Policy 8600 Transportation and Policy 8110 Attendance Zones. The pertinent language states as

follows: "The Board is hereby directed – no later than 60 days from the date of this decision – to revise its Policy #8600 (Transportation) and Policy #8110 (Attendance Zones) to reflect that the provision of transportation will be made to RIS and to provide such transportation to this school for all students who attend RIS, or are eligible to do so, and reside beyond two miles therefrom." Petitioners contend that respondent failed to revise Policy 8110 Attendance Zones.

The language which created the violations of school busing laws including N.J.S.A. 18A:39-1 and N.J.A.C. 6A:27-1.2 was actually in Policy 8600 Transportation, which was incorporated by reference into Policy 8110 Attendance Zones. Aside from the language incorporated by reference, there was no violation of the school busing laws in Policy 8110 Attendance Zones.

Respondent has now revised Policy 8600 Transportation such that there is no violation of the school busing laws. Accordingly, no violation of the school busing laws is incorporated by reference into Policy 8110 Attendance Zones. Therefore, I **FIND** and **CONCLUDE** that respondent has fully complied with the above-quoted direction in the Decision from the original proceeding in this matter.

4. Relief

With respect to the relief, Policy 8600 Transportation was revised in accordance with the direction in the Decision in the original proceeding. The first reading of the revised version was on January 26, 2010, and the vote on approval occurred on February 23, 2010. These dates indicate compliance with Policy 0131 Bylaws and Policies. Under the circumstances, respondent's failure in February 2009 to comply with the requirement in Policy 0131 Bylaws and Policies to take the vote on adoption four or more weeks after the meeting at which the policy proposal was first placed on the agenda has been corrected and is now mooted. Therefore, I **CONCLUDE** that no relief is warranted with respect to Policy 8600 Transportation.

The situation with respect to Policy 8110 Attendance Zones is somewhat different. Like Policy 8600 Transportation, respondent did not comply with the requirement under Policy 0131 Bylaws and Policies to take the vote on adoption of Policy 8110 Attendance Zones four or more weeks after the meeting at which this policy was first placed on the agenda. The difference is that respondent did not adopt a new version of Policy 8110 Attendance Zones in 2010. Instead, respondent reviewed this policy on January 26, 2010, and again on February 23, 2010. Since respondent has not validly adopted Policy 8110 Attendance Zones, I **CONCLUDE** that action must be taken to do so promptly to correct this situation. In order to avoid disruption, respondent will have sixty days from the Final Decision in this matter to adopt Policy 8110 Attendance Zones in accordance with its bylaws.

Accordingly, it is **ORDERED** that:

1. Petitioners' motion for summary decision in regard to the OPMA is denied.

2. Respondent's motion for summary decision in regard to the OPMA is granted.

3. Petitioners' motion for summary decision in regard to the alleged failure to comply with the Decision from the original proceeding is denied.

4. Respondent shall within sixty (60) days of the final decision in this matter adopt a version of its Policy 8110 Attendance Zones in accordance with its bylaws and other applicable law.

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

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

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

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 21, 2010

DATE

RICHARD McGILL, ALJ

Date Received at Agency: 9/21/10

SEP 2 2 2010

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cml

MARGARET SIDBERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school psychologist employed by respondent Board for 10 years – appealed the district's withholding of her salary increment for the 2009-2010 school year, contending that the Board failed to notify her in writing of the decision to withhold her increment as required by *N.J.S.A.* 18A:29-14. Petitioner argues that for this reason, the withholding should be nullified. The Board asserted that petitioner did receive a letter, dated April 28, 2009, advising her of the Board's intent to withhold petitioner's entire increment for the 2009-2010 school year.

The ALJ found, *inter alia*, that: petitioner's critical responsibility as case manager and psychologist was to ensure timely completion of IEPs, and the ultimate responsibility for timely completion lay with the petitioner; the concerns of respondent Board regarding petitioner's failure to produce fully completed IEPs in a timely manner justified the withholding of her salary increment; and petitioner's salary withholding should not be nullified on the basis of a procedural failure to satisfy the statutory requirements of *N.J.S.A.* 18A:29-14, as the de novo hearing held in the OAL cured any procedural deficiencies that may have been brought about by the Board's alleged failure to provide the required ten day notice. The ALJ concluded that petitioner had not met her burden to prove that the withholding of her salary increment was arbitrary or capricious, and accordingly dismissed the petition.

The Commissioner fully concurred with the findings and conclusions of the ALJ in this matter, and adopted the Initial Decision as the final decision. The petition was dismissed.

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

November 8, 2010

OAL DKT. NO. EDU 06610-09
AGENCY DKT. NO. 166-7/09

MARGARET SIDBERRY,	:	
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, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner. The Trenton City Board of Education (Board) did not file exceptions.

The petitioner takes exception to the Administrative law Judge's (ALJ) finding that the Board's decision to withhold her increment for the 2009-2010 school year was reasonable despite the Board's failure to comply with the notice requirements contained in *N.J.S.A.* 18A:29-14. The petitioner argues that the Board did not provide her with notice of the increment withholding and the reasons therefore within ten days of the Board's decision, as required by *N.J.S.A.* 18A:29-14. Petitioner argues that because of the procedural violations, the Commissioner should vacate the withholding and restore her increment.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the Board's decision to withhold the petitioner's increment was reasonable based upon her failure to timely produce fully completed individual education plans. The Commissioner is also in accord with the ALJ – for the reasons fully detailed on pages 13-14 of his decision – that that the salary withholding should not be nullified on the basis that the Board did not satisfy the procedural requirements outlined in *N.J.S.A.* 18A:29-14. It was abundantly clear from the

record that the petitioner was fully aware of the reason why her increment was withheld. Accordingly, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11|08|10

Date of Mailing: 11|08|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06610-09
AGENCY DKT. NO. 166-7/09

MARGARET SIDBERRY,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF TRENTON,
MERCER COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Dana M. Lane, Esq., for respondent (Hill Wallack, attorneys)

Record Closed: August 17, 2010 Decided: September 24, 2010

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Margaret Sidberry, appeals from the denial of a salary increment for the 2009-2010 school year based upon her alleged unsatisfactory performance as a

school psychologist at Trenton Central High School (TCHS), a public school within the school district of the City of Trenton (respondent).

On or about July 20, 2009, petitioner filed a notice of appeal with the Commissioner of the Department of Education. On September 14, 2009, this matter was filed with 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. Thereafter, a hearing was held on April 15, 2010. The parties requested permission to file written closing arguments, which were received on or before June 1, 2010. In her written closing summation, petitioner argued that the procedural requirements of N.J.S.A. 18A:29-14 were not followed by respondent. Specifically, petitioner argued that respondent did not notify petitioner in writing of their decision to withhold her increment, and the reasons therefore, within ten days of the date of the action taken by respondent to withhold said increment. The petitioner testified that she never received any document notifying her of the withholding of the increment, or the reasons therefore. Thus, notwithstanding the substantive questions raised, petitioner urged that she should be made whole based upon this procedural violation. In its rebuttal, respondent produced a letter ("Letter") sent to petitioner from Patricia L. Lucas, then Interim Assistant Superintendent for Human Resources, dated April 28, 2009, advising petitioner of the Board's intention to withhold petitioner's entire increment for the 2009-2010 school year. Respondent alleged that this Letter was sent to petitioner by certified and regular mail on April 29, 2009, and that the Letter was confirmed as received by the United States Post Office, therefore proving that the respondent Trenton Board of Education ("Board") had fulfilled all of its legal obligations under the aforementioned statute. Petitioner denied receiving the Letter. On June 8, 2010, in a telephone conference with the parties, the record was reopened, and a hearing scheduled for July 14, 2010, for the purpose of taking testimony regarding the issue of receipt of the Letter by petitioner. At the request of the parties, the hearing was adjourned until August 17, 2010. On that date, additional testimony was taken, and the record closed.

FACTUAL DISCUSSION

The following matters are not in dispute, and I therefore **FIND** them as **FACT** herein:

Petitioner was employed in September 2000, and was subsequently tenured, as a school psychologist with the Trenton Board of Education ("Board"). During the 2007-2008 school year, she was a member and case manager of Child Study Team Four at TCHS. In June 2008, she learned she would be transferred from TCHS to the elementary school within the district. Petitioner was contacted by her supervisor, Andrew Morgan, the Director of Special Education and Related Services, to discuss the status of several individual education plans (IEP's) which Morgan believed to be incomplete or missing. Petitioner was responsible to oversee and complete these IEP's, and as part of her job requirements, to comply with applicable federal and state laws and regulations for special education. (R-6). As a result of the failure to resolve the issues, petitioner was invited before the Board to discuss her job performance, and the potential withholding of a salary increment. Petitioner's salary increment was withheld for the 2009-2010 school year.

Witnesses for Petitioner Sidberry

Margaret Sidberry

Margaret Sidberry has been a psychologist for approximately ten years, spending all of those years employed by respondent. She received a telephone call from Andrew Morgan in August 2008, advising her that seventy-seven of the IEP's for which she was responsible, were incomplete. An IEP is a lengthy document containing facts about a child's history, and what services the district must provide. These are prepared by the case manager after consultation with the child study team. The information in the IEP comes from a review of the file history, the child's teachers, and the annual meeting with the child and their parents. The petitioner would put the information for the IEP together, and usually give it to her secretary to type. After

typing, the IEP would be returned to petitioner, who would copy it and put it in the student's file. This would complete her job with regard to the IEP.

Morgan requested that the petitioner bring the IEP's to a meeting with him. Petitioner attended the meeting, bringing with her the class list and her 2007-2008 IEP information, to prove the proper completion of the IEP's. The list contained information concerning IEP's which were not compliant, but they were not students under the responsibility of petitioner. The list also contained the names of ninth graders who were not students under the responsibility of petitioner during the prior year. In addition, some IEP's on the list were completed but not typed, and others were not yet due because they had not yet reached their anniversary. Petitioner testified that IEP's are reviewed annually, and that not all IEP's are revised in June of the school year. Petitioner denied that she was directed by Morgan to turn in the IEP's by June 30, 2008.

The meeting with Morgan was in late August 2008, and petitioner was preparing to leave TCHS. As such, the IEP's when completed, would be put into the child's file, and distributed by another child study team member to the appropriate teacher. Morgan was satisfied with petitioner's explanation, and agreed that the IEP's were written and developed, and that the only issue was regarding the typing of the IEP's, which would be completed shortly thereafter. The reason some IEP's were not typed was because petitioner did not want to give them to the secretary while the secretary was out of the office. Instead, petitioner would keep the IEP's on her desk, and then give the typing to the secretary when she returned from vacation. Petitioner stated that while she did not always have the luxury of a secretary, a secretary was not mandatory, or required to complete the IEP's. However, during the 2007-2008 school year, it was the responsibility of the secretary to type the IEP's.

Petitioner had no further contact with Morgan until she received an official reprimand in a letter from him dated October 3, 2008. (R-1). Petitioner disagreed with the contents of said letter, but complied with the deadline therein. The IEP's were completed, however some were not typed, and others were uncorrected. She was not

directed, nor responsible, to ensure delivery of the IEP's to the teachers for the new school year. The new psychologist arriving at TCHS to take her position would be responsible for delivering the IEP's. Petitioner's responsibility, upon her transfer, was to distribute the IEP's for her new students.

On or about October 7, 2008, petitioner received another letter from Morgan. (R-2). Upon reviewing the list of missing IEP's, petitioner realized that these were not current IEP's relating to her new assignment, but rather were names and IEP's with whom she had dealt in her prior assignment at TCHS. Those children and IEP's were no longer her responsibility.

Or about October 24, 2008, petitioner received a third letter from Morgan, who was concerned about violations of the New Jersey Administrative Code. (R-3.) Those IEP's referenced therein were also related to her prior team four assignment at TCHS.

On or about October 31, 2008, petitioner received another letter from Morgan. (R-4). Once again, those IEP's referenced therein were related to her prior team four assignment at TCHS. All of the IEP's for students under the responsibility of petitioner were in compliance. Those IEP's not in compliance were not her students during the previous year.

Petitioner met with Morgan on four or five occasions between August and December 2008. At the last meeting in December, Morgan told her that all the IEP's were completed, copied and available to the team for distribution. Petitioner assumed that all issues were resolved.

Petitioner met again with Morgan in March 2009, entering into an improvement plan on March 24, 2009. (P-4). Subsequently, in April 2009, she received a "Rice" notice, delivered to her not in the mail, but by a security guard, advising her that she could appear at the April 27, 2009, meeting of the Board to discuss the withholding of her increment for the 2009-2010 year. (P-1, R-5). On April 27, 2009, she addressed a letter to the Board detailing why her increment should not be withheld. (P-2). Although

she appeared at the Board meeting, she was never notified by the Board of the withholding of her increment, or the reasons for it. She never received the letter which the Board alleges it sent to her advising of the action that it took (R-7), until her attorney sent it to her. Petitioner opens all mail that comes to her residence, and the only other resident is legally blind. She subsequently received two contracts from the Board, neither of which indicated the increment was being withheld. In July 2009, petitioner finally became aware of the withheld increment. Petitioner was familiar with her job description (R-6) and the requirements of N.J.A.C. 6A:14.

Susan Karolkiewicz

Susan Karolkiewicz is employed by the Trenton Education Association as a full-time grievance chairperson. She met with petitioner and Morgan in December 2008, and again in March 2009. The subject of those meetings was case management and the status of IEP's developed by petitioner during her prior year at TCHS. The issues of secretary unavailability and IEP distribution were also discussed.

Karolkiewicz was concerned about the timing of the March 24, 2009, corrective action plan, and the April 7, 2009, notice of increment withholding. An employee should be given a ninety-day period to take corrective action, and that was not given to petitioner. As a result, Karolkiewicz prepared a level two grievance based on the procedural incorrectness of failing to provide formal observation or evaluation prior to acting on the corrective action plan.

Witnesses for Respondent Trenton Board of Education

Andrew J. Morgan

Andrew Morgan is currently employed at Morgan Associates as an interim principal. For thirteen months, beginning in June 2008, he worked for respondent as Director of Special Education and Related Services. His responsibility was to ensure that each student receive a fair and appropriate public education. He has served thirty-

nine years in the field of special education and is familiar with New Jersey code and Federal law provisions. At the conclusion of this thirteen month employment, his contract was not renewed by respondent.

Petitioner, as a case manager and member of the child study team, was responsible for complying with N.J.A.C. 6A:14. She was charged with completing IEP's in June, and implementing them in September. In the IEP, it is critical that the goals and objectives be stated. These goals and objectives are determined by the case manager and the teachers. Each IEP must be in place, and in the teacher's possession, on the first day of the school year. The principle and the child study team receive a copy of the IEP. Morgan would also receive copies of the IEP's, and if any problems existed, a meeting would be scheduled with the case manager.

During July 2008, Morgan met with assistant superintendent David Weathington, to prepare for the new school year and to ensure delivery of IEP's by August 15. Morgan began his duties by attempting to gather information on deficient IEP's. He requested that the secretaries prepare lists of outstanding IEP's. A review of petitioner's work revealed eighty-seven missing IEP's. Petitioner, a ten and a half month employee, was on vacation at the time, and so they could not meet until August 27, 2008. At this meeting, Morgan and petitioner reviewed a checklist concerning the IEP's. There were many issues of noncompliance, including the absence of goals and objectives, scheduling issues, and missing general and special education teacher signatures. Petitioner produced approximately thirty IEP's at that time. Petitioner was asked to review her files for the previous four years, as IEP's were missing, or had other issues. At a meeting subsequent to the August 27 meeting, petitioner raised the issue that some of the missing IEP's were not her files. She also argued that some of the missing IEP's were for students who had graduated, moved or left the district. When Morgan investigated these claims, he estimated that these claims could account for approximately ten of the 87 missing IEP's. Some of the missing files requested by Morgan were either never found, or were lost.

Morgan explained that upon a transfer of a child study team member, that member must ensure that previous files are complete and compliant, and ready to transfer to the new team member. In the event this was not done, the new team member had the right to refuse to inherit insufficient prior files.

There were significant substantive problems with the student files under the responsibility of petitioner. These deficiencies were not clerical in nature, and the provision of a secretary to a child study team was a courtesy that was not mandated under the law. Handwritten IEP's were acceptable.

In September 2008, Morgan met informally with petitioner to discuss the completion of her work and job transfer issues. In October 2008, Morgan requested a meeting with petitioner and her union representative, to discuss bringing petitioner's work into compliance. At the meeting, petitioner was explained the ramifications of federal law, and N.J.A.C. 6A:14, and that the district could be in jeopardy for the failure to comply with those authorities. Morgan also discussed the goals, objectives and signatures in the IEP, and the issue of having the IEP's typed. Although the TCHS child study team secretary would type the IEP's as part of their regular duties, they were not part of the legal process, and the preparation of the IEP's was ultimately the petitioner's responsibility. Petitioner was informed that the secretary was for support only and that the case manager must confirm the completion of the IEP.

On October 3, 2008, Morgan forwarded an official reprimand letter to petitioner. (R-1). On October 7, 2008, he forwarded a second letter to petitioner. (R-2). This was required because the original IEP was required to be in the file for the 2007-2008 school year, under state and Federal law. On October 24, 2008, another letter was forwarded regarding missing files and IEP's for 2008. (R-3). A fourth letter was forwarded on October 31, 2008, because of the continued existence of missing documents. (R-4).

Morgan was directed to look back four years for deficiencies in petitioner's work product. He discovered problems in her work during this time period, but he did not

raise the issues because old IEP's cannot be recreated or corrected. Morgan agreed that with the exception of complying with IEP requirements, petitioner's work was otherwise excellent. However, because of the seriousness of the noncompliance issues, it was Morgan's intent to proceed with tenure charges. He was talked out of proceeding with tenure charges by assistant superintendent David Weathington. Instead, the decision was made to withhold petitioner's increment. (R-5). In addition, an improvement plan for petitioner was put in place. The improvement plan was not related to the withheld increment, and Morgan testified that he was entitled to withhold the increment even without the improvement plan in place.

David Weathington

David Weathington is the Assistant Superintendent for Special Services for respondent. He has also been the Director of Special Education. He currently oversees special education, and has supervised petitioner in the past. He also supervised Morgan during the 2008-2009 school year.

During the 2006-2007 school year, respondent had IEP noncompliance issues, and was ordered to comply. The Department of Education investigated respondent during the 2008-2009 year, and part of that investigation involved IEP's prepared by the petitioner. Respondent had issues concerning notices in the IEP's, completion of the IEP's, and the quality of the IEP's. Weathington wanted to open the 2008-2009 school year without any problems. As a result, Weathington issued a directive that all IEP's had to be completed by June 30, 2008. This would allow for implementation on September 2008 for the following school year.

Weathington spoke to Morgan frequently regarding petitioner. Weathington advised Morgan to provide petitioner with notice of her deficiencies. After seeing a lack of improvement, Weathington felt that petitioner's salary increment should be withheld.

Petitioner also worked in Delaware Valley as an out-of-district placement. There were also issues of non-compliant IEP's raised in Delaware Valley concerning

petitioner's work there for the years 2006-2007 and 2007-2008. Her work in Delaware Valley for 2008-2009 was satisfactory. Weathington spoke to petitioner during the 2008-2009 school year regarding her performance. The notice to petitioner of April 28, 2009 was based upon the concurrent recommendation of Morgan and Weathington. (R-7.)

Kathleen Smallwood Johnson

Ms. Johnson has been employed by the Board since October 2007. In July 2009, she became the Board's Executive Director for Human Resources. She is responsible to notify employees of actions taken against them by the Board. The Board takes this action by sending a Letter with a tracking number for purposes of confirming the mailing. She was aware of the action taken against petitioner by the Board.

While not its author, Johnson was familiar with the Letter forwarded by the Board to petitioner with regard to petitioner's salary increment dated April 28, 2009. (R-7.) The author of the Letter, Patricia L. Lucas, was Johnson's predecessor. The Letter was forwarded by certified and regular mail, and the mailing information was located on the top of the Letter. On many occasions, the green card signed by the recipient is not received back by the Board. Nevertheless, the Board was able to confirm from the United States Postal Service that the Letter was delivered on May 1, 2009, in Burlington, New Jersey. (R-8.) The Postal Service confirmation did not indicate who received the Letter. While Johnson did not have specific personal knowledge with regard to the Letter, she did know that proof of delivery, in the form of the green card, was not available. Johnson acknowledged that the Letter did not contain a statement of reasons for the withholding of petitioner's salary increment.

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 additional **FACTS:**

Petitioner was familiar with her job description and the requirements of N.J.A.C. 6A:14. During the school year 2007-2008, and in years prior thereto, petitioner had noncompliance issues with her required IEP's. These noncompliance issues were a partial reason for the investigation of the school district by the Department of Education. As a result, Weathington issued a directive requiring that all IEP's be completed by June 30, 2008, for September implementation.

At approximately the same time, the district hired Andrew Morgan to attempt to resolve the IEP situation. Also at that same time, petitioner was given notice that she would be transferred from TCHS to the elementary school. Morgan began his duties by attempting to gather information on deficient IEP's. He requested the secretaries to prepare lists of outstanding IEP's. A review of petitioner's work revealed eighty-seven missing IEP's. Petitioner and Morgan met on August 27, 2008. They reviewed a checklist concerning the IEP's. There were many issues of noncompliance, including the absence of goals and objectives, scheduling issues, and missing general and special education teacher signatures. Petitioner produced approximately thirty IEP's at that time. Petitioner was asked to review her files for the previous four years, as IEP's were missing, or had other issues. Petitioner subsequently raised the issue that some of the missing IEP's were not her files. She also argued that some of the missing IEP's were for students who had graduated, moved or left the district. When Morgan investigated these claims, he estimated that these claims could account for approximately ten of the eighty-seven missing IEP's. Some of the missing files requested by Morgan were either never found, or were lost.

In September 2008, Morgan met informally with petitioner to discuss the completion of her work and the job transfer issues. In October 2008, Morgan requested a meeting with petitioner and her union representative, to discuss bringing petitioner's work into compliance. At the meeting, petitioner was explained the ramifications of federal law, and N.J.A.C. 6A:14, and she was advised that the district could be in jeopardy for noncompliance thereof. Morgan also discussed the goals, objectives and signatures in the IEP, and the issue of having the IEP's typed. Although the TCHS

child study team secretary would type the IEP's as part of their regular duties, they were not part of the legal process, and the preparation of the IEP's was ultimately the petitioner's responsibility. Petitioner was informed that the secretary was for support only, and that the case manager must confirm the completion of the IEP.

On October 3, 2008, Morgan forwarded an official reprimand letter to petitioner. On October 7, 2008, he forwarded a second letter to petitioner. This was required because the original IEP was required to be in the file for the '07-'08 school year, under state and Federal law. On October 24, 2008, another letter was forwarded regarding missing files and IEP's for 2008. A fourth letter was forwarded on October 31, 2008, because of the continued existence of missing documents.

With the exception of complying with IEP requirements, petitioner's work was otherwise excellent. Nevertheless, because of the problems with the IEP's, the decision was made to withhold petitioner's increment. In addition, an improvement plan for petitioner was put in place. However, that improvement plan was not related to the withheld increment.

In April 2009, petitioner received a "Rice" notice, delivered to her by a security guard, advising her that she could appear at the April 27, 2009, meeting of the Board to discuss the withholding of her increment for the 2009-2010 work year. On April 27, 2009, she addressed a letter to the Board advising why her increment should not be withheld. After petitioner appeared at the Board meeting, the Letter was subsequently forwarded by the Board advising petitioner of the withholding of her increment. The Letter did not recite the reasons for the withholding. Petitioner never received the letter until her attorney sent it to her. She subsequently received two contracts from the Board, neither of which indicated the increment was being withheld. In July 2009, she was finally made aware of the withheld increment.

LEGAL DISCUSSION AND ANALYSIS

The issue to be determined is whether the respondent's withholding of

petitioner's incremental salary increase based upon her performance for the school year 2008-2009 was arbitrary or capricious.

N.J.S.A. 18A:29-14, which provides for the withholding of a teacher's salary increment, states as follows:

> Any board of education may withhold for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the actions of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

Petitioner argues in her closing memorandum that respondent failed to send a written notification explaining the reasons for the salary withholding to petitioner or anyone on her behalf. Petitioner submits that under the dictates of the aforementioned statute, it is not necessary to get to the substantive question of increment withholding. She alleges that the statute sets forth very specific procedural requirements for any board of education to follow in properly withholding increments, and respondent failed to follow same. According to petitioner, because she never received any notification, respondent failed to satisfy the statutory requirements, and the withholding should be nullified and petitioner made whole. I disagree.

Respondent provided, along with their rebuttal to petitioner's summation, the letter from Patricia L. Lucas, Board Interim Assistant Superintendent, to Margaret C. Sidberry, dated April 28, 2009, advising petitioner of the Board's intention to withhold petitioner's entire increment for the 2009-2010 school year. The Letter was marked as

being sent by certified and regular mail, and was confirmed by the United States Postal Service as having been delivered. While I made no factual finding that the Letter was delivered to petitioner, on its face, this Letter is evidence that the required notice was given by the Board, and that is all that the statute mandates. Proof of service is not required. In addition, the failure by the Board to recite its reasons for withholding petitioner's increment in the Letter is not sufficient to invalidate the Board's action. Petitioner was aware of the reasons, eloquently stated her defenses thereto in her letter to the Board dated April 27, 2009, and she attended the Board meeting wherein her case was discussed.

In addition, while the statute does require notification from a board of education of the reasons for its action within ten days of its action, the statute does not set forth the consequences for the failure of the board of education to provide such notice. There is no provision set forth therein to allow for the withholding of the increment to be nullified in the event of a failure to provide notice.

While petitioner alleges she did not get formal notification of the action of the Board within ten days, petitioner was eventually made aware that her salary from the 2008-2009 school year to the 2009-2010 school year remained the same. In addition, petitioner received two contracts for the 2009-2010 school year in July 2009, wherein no notice of the withheld increment was included, but no increment was provided either. Petitioner agreed that she became aware of the withheld increment in July 2009. Petitioner then timely filed for a hearing, and a hearing de novo was held. Petitioner was not penalized as a result of the Board's alleged failure to send the ten day notification, nor did she suffer any adverse consequences therefrom. The de novo hearing held by this tribunal cured any procedural deficiencies that may have been brought about by the Board's alleged failure to provide the required ten day notice. As a result of all of the above, I **CONCLUDE** that the salary withholding should not be nullified on the basis of a procedural failure to satisfy the statutory requirements of N.J.S.A. 18A:29-14.

I must next consider the substantive arguments for and against the withholding of the increment. N.J.S.A. 18A:29-14 vests in local boards the authority to withhold increments of a teacher's salary when that teacher has not performed satisfactorily during the previous school year. Probst v. Board of Education of the Borough of Haddonfield, 127 N.J. 518 (1992).

In a matter such as this, the petitioner has the burden of showing that the denial of the salary increment was arbitrary or capricious. Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (App. Div. 1960). The decision to withhold an increment "does not require a showing of shortcomings sufficient to justify dismissal under the Tenure Act." Kopera, 1960-61 S.L.D. at 62. The only question for the Commissioner is whether the district "had a reasonable basis for its factual conclusion." Kopera, supra, at 295. Indeed, it has been observed that:

> [A school district has no duty] to prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-14.
>
> [Reilly v. Board of Ed. of the Twp. of Parsippany-Troy Hills, 1989 S.L.D. 1830, 1843, citing Colavita v. Hillsborough Township Bd. of Ed., 1983 S.L.D. (Nov. 3, 1983)].

A determination must be made as to (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. Kopera, supra, at 296-297.

A decision to withhold a salary increment "is therefore a matter of essential managerial prerogative which has been delegated by the legislature to the board." Reilly, supra, citing Board of Education of the Township of Bernards, Somerset County v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). See also

Probst, supra, at p. 527; Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) State v. State Supervisory Employees Association, 78 N.J. 54 (1978); Clifton Teachers Association, Inc. v. Clifton Board of Education, 136 N.J. Super. 336 (App. Div. 1975).

Based upon the facts adduced herein, I **CONCLUDE** that the respondent appropriately withheld petitioner's salary increment for the school year 2009-2010. The written job description for a school psychologist provides, as Performance Responsibilities, the following:

> In order to fulfill his/her professional responsibilities, the school psychologist shall:
>
> 6. Participate in the development of an individualized education program for students eligible for special education programs and related services consistent with N.J.A.C. 6A:14-3.7.
>
> 7. Serve as case manager for students eligible for special education programs and related services by:
>
> - Coordinating the development, monitoring and evaluation of the effectiveness of the IEP;
> - Facilitating communication between home and school;
> - Coordinating and facilitating transition planning and services for students with disabilities beginning at age 14.
>
> 11. Follow and adhere to federal, state, and District requirements on referral, identification, evaluation, eligibility determination, IEP development, and placement as set forth by N.J.A.C. 6A:14 and the District Administrative Manual on Standard Operating Procedures for Special Education.

> 15. Complete and submit in a timely fashion student record information as requested for local, state, and federal reports.

In addition, N.J.A.C. 6A:14-3.7 provides that:

> 1. At the beginning of each school year, the District board of education shall have in effect an IEP for every student who is receiving special education and related services from the District;
>
> 2. Every Student's IEP shall be accessible to each regular education teacher, special education teacher, related services provider, and other service provider who is responsible for its implementation;
>
> 4. The District board of education shall ensure that there is no delay in implementing a student's IEP . . .;

Petitioner's critical responsibility as case manager and psychologist was to ensure the timely completion of IEP's. According to the applicable regulations, IEP's for the upcoming school year should have been in effect at the beginning of the school year. This was necessary to insure their timely implementation by the commencement of the new school year. Many of the IEP's for which petitioner was responsible required some correction in the fall of 2008. Petitioner should have ensured their timely completion before she left for her summer vacation. If a secretarial shortage caused her an inability to complete the IEP's, they should have been completed by petitioner by hand. It is improper to blame a secretarial shortage, or to say that the IEP's were complete, but for the typing. The ultimate responsibility to complete the IEP's in a timely fashion belonged to petitioner, not a secretary. The use of a secretary was a privilege, not a right. Petitioner actually tacitly agreed to that principle when she testified that she "usually" gave the IEP's to her secretary for typing. She must accept personal responsibility for her failure to have the IEP's completed as directed, and as communicated to her. Petitioner's claim that the IEP's were complete but for the typing,

is disingenuous at best, and fails to persuade that the burden of proof has been met herein by petitioner.

Petitioner's claim that as she was assigned to a new child study team, and that her responsibilities were to her new students, must also fail. While petitioner certainly had an obligation to perform her duties as related to her new students, she also had an obligation to complete her duties for her old students, prior to moving on. As a professional, petitioner was required to leave her successor with completed files and completed IEP's, even if this required spending additional hours over and above her contracted responsibilities. Her job was not complete until the completed IEP's were in the students' files.

In addition to the above, there were discussions with petitioner on improving her deficient areas. Tenure charges were contemplated. Petitioner's history of IEP compliance issues was consistent over prior years. Petitioner had received correspondence from Morgan regarding her work product. Efforts had been previously made to assist petitioner.

It is the burden of petitioner to prove by a preponderance of the credible and competent evidence that respondent was arbitrary or capricious in withholding her salary increment. Kopera, supra. The concerns of respondent regarding petitioner's failure to produce fully completed IEP's in a timely manner justified the withholding of her salary increment. A salary increment is not a guaranteed right. A salary increase is a reward for expected service. The Board was entitled under the law to withhold Sidberry's increment for good cause. Failure to comply with the aforementioned legal requirements constitutes good cause. The Board made the decision to withhold the salary increment of petitioner based upon the recommendation of its highly qualified professionals. Based upon the foregoing, I **CONCLUDE** that petitioner has not met her burden of proving that the withholding of her salary increment was arbitrary or capricious.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition filed by petitioner be and is hereby **DISMISSED,** and that the action of respondent in denying the increment is **AFFIRMED.**

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

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

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

September 24, 2010
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: September 24, 2010

Date Mailed to Parties: September 24, 2010

/bdt

APPENDIX

Witnesses

For Petitioner:

Margaret Sidberry
Susan Karolkiewicz

For Respondent:

Andrew Morgan
David Weathington
Kathleen Smallwood Johnson

Exhibits

For Petitioner:

P-1 Letter from Trenton Public Schools to petitioner, dated April 7, 2009
P-2 Letter from petitioner to Trenton Board of Education, dated April 27, 2009
P-3 Memorandum from Margaret Sidberry to Andrew Morgan, dated October 17, 2008
P-4 Improvement Plan, dated February 26, 2009
P-5 Withholding of Increment form with supporting documentation, dated February 26, 2009

For Respondent:

R-1 Letter from Andrew Morgan to petitioner, dated October 3, 2008
R-2 Letter from Andrew Morgan to petitioner, dated October 7, 2008
R-3 Letter from Andrew Morgan to petitioner, dated October 24, 2008
R-4 Letter from Andrew Morgan to petitioner, dated October 31, 2008

R-5 Withholding of Increment form with supporting documentation, dated February 26, 2009

R-6 Job Description for School Psychologist in Trenton Public Schools, Department of Special Services

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, AND BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the determination of the New Jersey Department of Education, Office of School Funding (the Department) that Piscataway is the district with fiscal responsibility for educational services related to B.S. – a student who has been placed in a residential facility by the Department of Children and Families – for the 2007-2008 school year, pursuant to the State Facilities Education Act, *N.J.S.A.* 18A:7B-1 *et seq*. Petitioning Board contends that B.S.'s mother relocated to Dunellen on November 19, 2007, and accordingly his educational costs became the responsibility of the Dunellen Board of Education. Cross motions for summary decision were filed by the parties.

The ALJ found, *inter alia,* that: there are no genuine issues of material fact and the matter is ripe for summary decision; when children are placed residentially by the Department of Children and Families, local school districts remain financially responsible for their educational services; pursuant to *N.J.A.C.* 6A:23A-19.2, the present district of residence of a child in a residential facility means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16; B.S. was placed residentially on September 27, 2007, his mother resided in Piscataway on that date, and did not relocate to Dunellen until November 19, 2007. Accordingly, the ALJ concluded that the Department's determination that Piscataway was financially responsible for B.S. during the entire 2007-2008 school year was correct and consistent with the applicable law and regulations, and dismissed the petition.

Upon full and careful consideration, the Commissioner concurred with the ALJ's determinations, and adopted the Initial Decision as the final decision in this matter for the reasons clearly stated therein.

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

November 8, 2010

OAL DKT. NO. EDU 5063-10
AGENCY DKT. NO. 39-3/10

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, AND BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner and replies thereto of respondent Board of Education of the Borough of Dunellen – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.[1]

Petitioner's exceptions mirror the argument presented to the Administrative Law Judge (ALJ) below in its July 28, 2010 letter brief. As it is determined that this argument was fully considered and addressed in the ALJ's decision, it will not be revisited here.

Upon her considered review, the Commissioner concurs with the ALJ that the Department correctly determined that Piscataway was B.S.'s district of residence for the 2007-08

[1] Reply exceptions of the Department were filed well beyond their regulatory due date. As no timely request for an extension of time within which to file this submission was made, and no motion with supporting affidavit was filed, such reply exceptions were not considered here.

school year and, therefore, Piscataway is responsible for the educational costs associated with his residential placement at Woods Services that school year.

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly stated therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11|08|10

Date of Mailing: 11|08|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05063-10
AGENCY DKT. NO. 39-3/10

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, AND BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,

Respondents.

David B. Rubin, Esq., for petitioner

Bryant L. Horsley, Jr., Deputy Attorney General, for respondent New Jersey Department of Education (Paula T. Dow, Attorney General of New Jersey, attorney)

Marc H. Zitomer, Esq., for respondent Dunellen Board of Education (Schenck, Price, Smith and King, attorneys)

Record Closed: August 19, 2010 Decided: October 4, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

B.S. is a student who has been placed in a residential facility by the Department of Children and Families. Petitioner, the Piscataway Board of Education (Piscataway), challenges the determination of the New Jersey State Department of Education, Office of School Funding, (the Department) that Piscataway is the district with fiscal responsibility for B.S.'s educational services during the 2007–2008 school year pursuant to the State Facilities Education Act, N.J.S.A. 18A:7B-1, et seq. Piscataway contends that on November 19, 2007, B.S.'s mother relocated to Dunellen, New Jersey, and that accordingly, as of that date, his educational costs became the responsibility of the Dunellen Board of Education (Dunellen).

PROCEDURAL HISTORY

Piscataway filed its appeal before the Commissioner of Education on March 5, 2010. The Department filed an answer on March 16, 2010. Dunellen filed a motion to dismiss in lieu of an answer and the contested case was transmitted to the Office of Administrative Law on April 19, 2010. Cross-motions for summary decision were filed by the Department on July 6, 2010, and by Piscataway on July 29, 2010. Replies were filed on August 19, 2010, at which time the record closed.

FINDINGS OF FACT

The relevant facts are not in dispute, and I **FIND**:

1. On September 27, 2007, B.S. resided with his mother, A.J., at 61 R.[1] Drive, in Piscataway, New Jersey.

2. On September 27, 2007, B.S. was placed by the Department of Children and Families at Woods Services, located in Langhorne, Pennsylvania.

[1] The street addresses have been abbreviated to protect the student's privacy.

3. B.S. was included in Piscataway's October 2007 Application for State School Aid (ASSA) Report, and Piscataway received State aid based on the information contained in this report pursuant to N.J.S.A. 18A:7F-33.

4. On November 19, 2007, A.J. relocated to 203 P. Street, Dunellen, New Jersey.

5. Dunellen did not include B.S. in its October 2007 ASSA Report.

6. A.J. did not notify Piscataway of her change in domicile until November 2008, at which time she withdrew B.S. from the Piscataway schools.

7. On November 20, 2009, the Department issued a determination that Piscataway was the district responsible for the educational costs associated with B.S.'s residential placement during the 2007–2008 school year.

8. The Department further determined that Dunellen was the district responsible for the educational costs associated with B.S.'s residential placement during the 2008–2009 and 2009–2010 school years.

9. On December 21, 2009, Piscataway filed a letter with the Department contesting the residency determination issued on November 20, 2009.

10. On February 19, 2010, after reviewing its earlier determination, the Department again determined that Piscataway was the district financially responsible for B.S.'s educational services during the 2007–2008 school year. In her letter, the director of the Department's Office of School Funding, Yut'se Thomas, stated that "[t]he determinations made by our office are for an entire academic year. If the child's parent or guardian moved to another school district during that year, then the district originally made responsible for the child's educational costs must work with the new district to have the child registered in the new district. Otherwise the original determination remains in effect for the entire academic year."

11. Via affidavit submitted in support of the Department's motion for summary decision, Thomas again confirmed the Department's practice, stating that the Department "makes only one district of residency determination based on one point in time that remains in effect for the entire academic year."

CONCLUSIONS OF LAW

Piscataway and the Department seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is

so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.[2]

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Department and Dunellen are entitled to judgment as a matter of law.

When children are placed residentially by agencies such as the Department of Children and Families, local school districts remain financially responsible for their educational services. The State Facilities Education Act of 1979, N.J.S.A. 18A:7B-2(a), provides as follows:

> For each State-placed child who is resident in a district and in a State facility on the last school day prior to October 16 of the prebudget year, . . . the Commissioner of Education shall deduct from the State aid payable to that district an amount equal to the approved per pupil cost established pursuant to the provisions of section 24 of P.L.1996, c.138 (C.18A:7F-24) . . . .

The phrase "resident in a district" is defined by N.J.S.A. 18A:7B-12(b) as follows:

> The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

Regulations promulgated by the Commissioner further clarify which district retains fiscal responsibility for children such as B.S. These regulations recognize that a parent's residence may change, and, accordingly, N.J.A.C. 6A:23A-19.2 provides as follows:

---

[2] Dunellen has filed a motion to dismiss pursuant to N.J.A.C. 6A:3-1.10. It correctly asserts that it is within the Commissioner's authority to treat a motion to dismiss as encompassing not only the claim that the petition on its face fails to set forth a basis for relief but also that the petitioner has failed to provide factual support for the allegations in the petition. Sloan v. Klagholtz, 342 N.J. Super. 385, 394 (App. Div. 2001). Accordingly, it is appropriate to determine the issues raised by the motions filed by the parties under the standard established by N.J.A.C. 1.1-12.5.

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> > 1. The "present district of residence" of a child in a residential state facility defined in N.J.S.A. 18A:7F-45 and referred to in the first paragraph of N.J.S.A. 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
> >
> > 2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, approved private school for students with disabilities or out-of-State facility also referred to in the first paragraph of N.J.S.A. 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's most recent placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above.

The regulatory reference to the "last school day prior to October 16" is purposeful. Pursuant to N.J.S.A. 18A:7F-33, local school districts are required annually, "on or before October 20," to "file with the commissioner a report . . . containing all data necessary to effectuate the aid provisions of P.L.2007, c.260 (C. 18A:7F-43 et al.), which shall include . . . the number of pupils enrolled by grade . . . on the last school day prior to October 16." State aid is based, in part, on student enrollment figures. Hence, the regulations that implement the State Facilities Education Act seek to correlate the "district of residence" assignment of financial responsibility with an accurate determination of where a student is included, each academic year, for State-aid reporting purposes.

The Department's determination regarding "district of residency" is entitled to a presumption of correctness. Bd. of Educ. of S. River v. Dep't of Educ., EDU 10117-98, Initial Decision (November 1, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>. It is well established that when a local school board contests a district-of-residence determination made by the Department, the local board bears the burden of proving that

the determination was in error. Bd. of Educ. of Bradley Beach v. Dep't of Educ., EDU 4975-99, Comm'r (July 3, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>.

I **CONCLUDE** that Piscataway has not met its burden of proving erroneous agency action. The Department's determination that Piscataway was financially responsible for B.S. during the 2007–2008 year was correct and consistent with the applicable law and regulations. It is uncontroverted that on September 27, 2007, the date on which B.S. was placed residentially, his mother resided in Piscataway. In accordance with N.J.S.A. 18A:7B-12(b) and N.J.A.C. 6A:23A-19.2, Piscataway was responsible for B.S.'s educational costs because Piscataway was the district where his mother resided "as of the date of [his] most recent placement by the State agency." N.J.A.C. 6A:23A-19.2(a)(2). It is further uncontroverted that A.J. did not leave Piscataway until November 19, 2007, a date subsequent to October 15, and subsequent to the submission of Piscataway's ASSA Report that year. Accordingly, Piscataway was responsible for B.S.'s educational costs during the entire 2007–2008 year, but likewise included him on its roster for State-aid purposes. The Department correctly ended Piscataway's responsibility for B.S. after the 2007–2008 school year, and assigned responsibility to Dunellen. As of October 15, 2008, A.J. resided in Dunellen, which thus was "the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16." N.J.A.C. 6A:23A-19.2(a)(1).

Piscataway unsuccessfully argues that its responsibility for B.S. should have shifted mid-year, on the actual date of his mother's relocation to Dunellen. It argues that a determination regarding which district is responsible for B.S. must start with the concept that children are entitled to a free public education in the school district in which they are domiciled. Their domicile follows that of their parents, and educational responsibility shifts to a new district immediately upon a change in the residence of the parents. N.J.S.A. 18A:38-1; Roxbury Twp. Bd. of Educ. v. W. Milford Bd. of Educ., 283 N.J. Super. 505, 522 (App. Div. 1995).[3] But this argument ignores that fact that assigning educational responsibility based on domicile is itself a creature of statute and regulation.

[3] Dunellen correctly urges that the State Facilities Education Act, N.J.S.A. 18A:7B-1, was not addressed by the Roxbury court.

While N.J.S.A. 18A:38-1 governs the education of typical children, a separate statutory enactment, N.J.S.A. 18A:7B-1 et seq., specifically governs the education of children who have been placed residentially by State agencies. The State Facilities Education Act, and the regulations that interpret it, make it clear that for this latter group of children, a determination of residence is made only once annually. Piscataway's argument that the plain language of N.J.S.A. 18A:7B-1 et seq. and N.J.A.C. 6A:23A-19.2 does not mandate a once-annual residency determination is unpersuasive. These enactments clearly and unequivocally set a point of time, the date of placement, as determinative for the initial residency determination, and go on to provide that the parent's domicile as of the last school day prior to October 16 will be determinative "[i]n subsequent school years." N.J.A.C. 6A:23A-19.2(a)(2).

Piscataway's view that its responsibility for B.S. should end on the day his mother actually moved is likewise inconsistent with the statutory scheme for awarding State aid, which is based on a once-annual report of student enrollment data. No other approach would be practical or workable, as, indeed, in every district there are children who leave and those who enter during a given school year. As it must, N.J.S.A. 18A:7F-33 fixes a point in time upon which to assess enrollments, and that point in time is the last school day prior to October 16. Consistent with that approach, N.J.A.C. 6A:23A-19.2 fixes the same point in time, the last school day prior to October 16, for making a residency determination from which a grant of State aid will flow.

Piscataway asserts that the Department's reliance on N.J.S.A. 18A:7F-33 is misplaced. It urges that when a typical child moves, there also is an unfair allocation of State aid, because educational responsibility changes, but the annual State aid allocation for that child does not. This argument has some surface appeal. But the disparity in approach for residentially placed students is grounded in the realization that educational costs at residential schools are often extraordinary and unanticipated, whereas the ebb and flow of typical children is part of the fabric of running a school. Furthermore, and importantly, typical children actually attend district schools, and share the resources, staff and supplies of their school, all of which is supported, in part, by State aid. Conversely, residentially placed students do not actually attend the school,

nor does the district directly fund their education. Rather, their educations are funded by a deduction in State aid, a deduction that is specific to that student.

Piscataway urges that it had no notice of A.J.'s relocation until November 2008. Piscataway cites to Thomas' statement in her February 19, 2010, letter that where a child's family relocates, "the district originally made responsible for the child's educational costs must work with the new district to have the child registered in the new district." Piscataway argues that it was unable to avail itself of this opportunity due to its lack of knowledge that A.J. had moved to Dunellen. Thomas was perhaps alluding to informal efforts to reallocate financial responsibilities for a child placed by a State agency. The likelihood that those efforts would have amicably resulted in a different cost allocation is highly speculative at best. Moreover, this comment by Thomas must be read in its entire context, and, indeed, she is unequivocal that determinations made by her office "are for an entire academic year."

In summary, I **CONCLUDE** that the Department properly allocated educational responsibility for B.S. to Piscataway for the entirety of the 2007–2008 school year.

ORDER

Based on the foregoing, I **ORDER** that the appeal filed by Piscataway 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.

October 4,2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: October 4, 2010

Date Mailed to Parties: OCT 5 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

#466-10

OAL DKT. NO. EDU 8015-10
AGENCY DKT. NO. 96-5/10

D.R. on behalf of minor child, D.T., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

Review of the record of this matter, the Initial Decision and the proposed "Settlement Agreement and Release" (Agreement) failed to reveal a copy of a Board resolution approving the Agreement and authorizing Sharon Dey, Board President, to sign the Agreement on its behalf. Nor is the Agreement signed by the Board's attorney, who is the Board's duly authorized representative in litigation.

Consequently, the Commissioner cannot approve the within settlement and hereby remands this matter to the OAL for revision of the Agreement to either be executed by the Board attorney or to include as an exhibit the Board resolution approving the Agreement and authorizing Sharon Dey to execute it. 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/08/10
Date of Mailing: 11/09/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8015-10

AGENCY DKT. NO. 96-5/10

D.R. ON BEHALF OF D.T.,

Petitioner,

v.

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

Respondent.

D. R., petitioner, pro se

Nicholas J. Dotoli, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Zitomer, attorneys)

Record Closed: September 16, 2010 Decided: September 20, 2010

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 2, 2010, 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.

SEPTEMBER 20, 2010
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: SEP 28 2010

Date Mailed to Parties: SEP 29 2010

/cad

SSE C

Schwartz Simon
Edelstein & Celso LLC
ATTORNEYS AT LAW

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September 16, 2010

VIA FAX & LAWYERS SERVICE

Nicholas J. Dotoli
ndotoli@sseclaw.com

Hon. Ronald W. Reba, ALJ
Office of Administrative Law
9 Quakerbridge Plaza, P.O. Box 049
Mercerville, New Jersey 08625-0049

RE: D.R. o/b/o D.T. v. Jackson Township Board of Education
Agency Docket No.: 96-5/10
OAL Docket No.: EDU 08015-2010 S

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2010 SEP 20 A 11:23

Dear Judge Reba:

This firm represented the Jackson Township Board of Education as of September 15, 2010. Enclosed, please find Petitioner's signed settlement and release which has been executed by the Jackson Board of Education.

By way of copy, I would ask that the District's Board Secretary/Business Administrator share this correspondence with superseding counsel if you should require any further clarification.

Very truly yours,

Schwartz Simon
Edelstein & Celso LLC

Nicholas J. Dotoli, Esq.

NJD/
Enc:
c: Deshia Rodriguez, Pro Se
Michelle Richardson, Bd. Scre/Bus. Admin.

2010 SEP 20 A 11:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Hon. Ronald W. Reba, ALJ
Office of Administrative Law
9 Quakerbridge Plaza, P.O. Box 049
Mercerville, New Jersey 08625-0049

Re: Withdrawal Request

RE: D.R. o/b/o D.T. v. Jackson Township Board of Education
Agency Docket No.: 96-5/10

Dear Judge Reba:

With this letter, I am formally withdrawing the above-captioned Petition in the above referenced matter as I have reached a settlement with the Jackson Township Board of Education.

Sincerely,

Deshia Rodriguez

Deshia Rodriguez

c: Nicholas J. Dotoli, Esq.

SCHWARTZ SIMON EDELSTEIN
CELSO & ZITOMER LLC
44 Whippany Road, Suite 210
Morristown, New Jersey 07962
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for Respondent, Jackson
Township Board of Education.

2010 SEP 20 A 11:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

D.R. o/b/o D.T.,

Petitioner,

vs.

JACKSON TOWNSHIP
BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY REF. NO.: 96-5/10

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, a residency determination concerning pupil D.T. was reviewed by the Jackson Township Administration on April 29, 2010; and

WHEREAS, on that date the administration determined that D.T. was ineligible to attend Jackson Memorial High School pursuant to the Affidavit Pupil Law; and

WHEREAS, D.R. filed a Petition of Appeal contesting the Board's residency determination, Agency Reference Number 96-5/10 on May 16, 2010; and

WHEREAS, the Board filed a Counterclaim for back tuition on July 1, 2010; and

WHEREAS, the parties have agreed to resolve this dispute without the need for litigation;

NOW, THEREFORE, it is hereby agreed by and between the parties as follows:

1. Deshia Rodriguez, Petitioner, agrees to withdraw this matter, with prejudice, and also agrees that no further action will be taken to seek the same relief; and

2. The Board agrees to withdraw its counterclaim for tuition, with prejudice.

3. Deshia Rodriguez, in consideration of the Jackson Township Board of Education's settlement and release, agrees to reimburse the Board a sum of $100 (one hundred dollars) for the period of time that D.T. attended the Jackson Public Schools while ineligible pursuant to N.J.S.A. 18A:38-1(b); and

4. The Jackson Township Board of Education agrees to accept payment of this settlement over a ten month period at a rate of $10.00 (ten dollars) per month beginning on September 1, 2010 and concluding on June 1, 2010; and

5. This Agreement represents the entire Agreement between the parties and will not be modified, in whole or in part, except by a subsequent mutual written and signed Agreement; and

6. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and that each party has consulted with legal counsel or representation of their choice; and

7. It is agreed that neither party is a prevailing party for any purpose and that each party will be responsible for bearing their own attorneys fees and costs; and

8. Deshia Rodriguez acknowledges that this Agreement constitutes a full and final settlement as to all issues and she agrees, in consideration for the terms hereof, to release the Jackson Township Board of Education, collectively and individually, and its agents, servants and employees from any and all claims which were or could have been raised to date; and

9. This Agreement shall be governed by the Laws of the State of New Jersey; and

10. This Agreement is subject to the approval of the Jackson Township Board of Education at its next regularly scheduled meeting.

11. The Jackson Township Board of Education authorizes Ms. Sharon Dey to execute this settlement and release on behalf of the Board.

Date: 8/21/2010

Deshia Rodriguez, Individually and o/b/o D.T.

JACKSON TOWNSHIP BOARD OF EDUCATION

Date: 8/21/2010

By: Sharon E. Dey
Ms. Sharon Dey
Board President

STATE OF NEW JERSEY)
SS:
COUNTY OF OCEAN)

I CERTIFY that on August 21, 2010, Deshia Rodriguez, individually and o/b/o D.T., personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

Attorney or Notary Public

[illegible]
Notary Public
State of New Jersey
My Commission Expires Apr 14, 2015

#488-10

OAL DKT. NO. EDU 11502-04
AGENCY DKT NO. 363-10/04

IN THE MATTER OF THE TENURE	:	
HEARING OF LOUIS MELILLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent and the Board of Education (Board), and the respondent's reply.

This case involves tenure charges brought by the Board against the respondent Louis Melillo, a tenured custodian in the Elizabeth City School District. The Board charged the respondent with six counts of unbecoming conduct in which it alleged that the respondent made sexual advances, sexual remarks and inappropriate sexual contact with students during the summer program. The Administrative Law Judge ("ALJ") dismissed charges four, five and six following the presentation of the Board's case. In her Initial Decision the ALJ found that the Board did not prove by a preponderance of the credible evidence that respondent engaged in conduct unbecoming a custodian by making sexually explicit remarks and behaving in an inappropriate manner with the summer student maintenance workers, and therefore dismissed charges one, two and three.

The Board submitted exceptions to support the contention that the ALJ erroneously found that the Board did not prove charges one, two and three against the respondent. Initially, the Board contends that there were glaring procedural errors made by the

ALJ that warrant either the reversal of the ALJ's recommendation or in the alternative a remand to the OAL for a fair, unbiased and impartial hearing. For example, the Board contends that: the ALJ failed to issue an order on the Board's Motion for Ameliorative Intervention; the ALJ failed to provide a ruling on the admissibility of three of respondent's exhibits; and that the ALJ read the deposition transcript of Jay Mills, a witness for respondent who ultimately testified at the hearing.

The Board also provided numerous examples in which it takes exception to the ALJ's summary of witness testimony. The Board maintains that the testimony of the Board witnesses was generally consistent concerning the pivotal conduct demonstrated by the respondent. Given the history of the case, which included a criminal trial, and a division of Youth and Family Services' investigation, coupled with the fact that 5 years had passed from the time of the incidents till the tenure hearing, and the age of the students at the time of the incidents, the Board suggests that it is not surprising that not all of the statements are entirely consistent with regard to date, time and precise description. The Board also asserts in its exceptions that the respondent's witnesses were not credible.[1]

In his exceptions, the respondent urges the adoption of the Initial Decision, asserting that the Board failed to sustain its burden of proving that the respondent behaved in a manner demonstrating conduct unbecoming a custodian. Respondent also takes exception to the ALJ's failure to address the remedy issues raised by the Respondent in his post-hearing submission. The respondent's exceptions substantially reiterate the substance of his post-hearing

[1] The Board also requests that the Commissioner overturn the ALJ's February 9, 2009 Order awarding sanctions in the amount of $4,725.00 against the Board. The Board originally filed a request for Interlocutory Review with the Director of the OAL seeking to have the order of sanctions overturned. It should be noted that in the February 23, 2009 Order denying the Board's request for Interlocutory Review, ALJ Laura Sanders, Director of the OAL, stated "[t]he parties may seek review of this issue at the conclusion of the hearing by filing exceptions pertaining to this matter with me as Director of the Office of Administrative Law." The Commissioner does not have jurisdiction to assess or deny sanctions.

submission where he details with great particularity his entitlements relating to his required back pay, salary increments and accrued benefits.

In reply to the Board's exceptions, the respondent contends that the procedural arguments made by the Board in its exceptions do not serve as a legitimate legal basis to reverse the ALJ's recommended dismissal of the tenure charges. The respondent points out that many of the procedural arguments made by the Board are not properly before the Commissioner or were generally incorrect. In reply, the respondent also provides a counter to the Board's exceptions, and again advances his position detailed in its post-hearing submission urging the adoption of the Initial Decision.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between June 21, 2007 and March 11, 2010, the Commissioner concurs with the ALJ that the Board has not established that respondent is guilty of unbecoming conduct. The Commissioner finds the Board's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and evidence in concluding that the record did not support the Board's charges. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

In this case, all of the facts related to the alleged unbecoming conduct were in dispute; as such, witness testimony and ultimate credibility is the only means available to make a

determination as to the veracity of the charges. Based on her overall assessment of the minor alleged victim witnesses, the ALJ found that the minors "were less-than truthful and were motivated by their own self-interest and immaturity." Notwithstanding the Board's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility.

The Commissioner also finds that the current record does not allow the Commissioner to make the requisite factual determinations with respect to the appropriate back pay and benefits to be afforded to the respondent in light of the Board's failure to prove the tenure charges. Despite the fact that the respondent raised the issues regarding his entitlement to full back pay and emoluments in his post-hearing submissions, and the Board addressed same in its post hearing brief, the ALJ left the resolution of these issues unaddressed.

The Initial Decision of the OAL is adopted as to the ALJ's finding that the Board did not prove by a preponderance of the credible evidence that the respondent engaged in conduct unbecoming a custodian. Accordingly, the tenure charges are hereby dismissed. This matter, however, is remanded to the OAL for such proceedings as are necessary to fully resolve the parties' disputes concerning back pay and emoluments.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/04/10

Date of Mailing: 11/12/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11502-04
AGENCY DKT. NO. 363-10/04

IN THE MATTER OF THE TENURE HEARING OF LOUIS MELILLO, CITY OF ELIZABETH BOARD OF EDUCATION, UNION CITY.

Karen A. Murray, Esq., Labor Counsel, City of Elizabeth Board of Education, for petitioner

Sheldon H. Pincus, Esq., (Bucceri and Pincus, attorneys) for respondent Louis Melillo

Record Closed: August 17, 2010 Decided: September 20, 2010

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE

On September 15, 2004, tenure charges of conduct unbecoming of a public employee were filed against the respondent Louis Melillo. Respondent is employed by the Board of Education of the City of Elizabeth (petitioner) as a tenured school custodian. Petitioner alleges that respondent made sexual advances, sexual remarks and inappropriate sexual contact with minors employed by the petitioner in a Summer Program.

PROCEDURAL HISTORY

On October 14, 2004, petitioner determined by a majority of its full membership that there was probable cause of the charges, sufficient as to warrant a dismissal of respondent pursuant to N.J.S.A. 18A:6-11. On November 4, 2004, the Director of Controversies and Disputes determined that the charges were sufficient, and if true would warrant respondent's dismissal. The matter was referred to the Office of Administrative Law pursuant to N.J.S.A. 18A:6-16 for a hearing. The matter was filed with the Office of Administrative Law on November 19, 2004.

On or about December 3, 2004, the Union County Grand Jury returned a four-count indictment against respondent, charging him with two counts of aggravated criminal-sexual contact and two counts of endangering the welfare of minor(s). On or about August 3, 2005, respondent filed a motion to stay the hearings on the tenure charges, including discovery, until disposition of the criminal charges. A stay was granted for a period of six months or until further Order.

On September 28, 2005, a trial without jury took place in Superior Court, Union County wherein all of the counts of the indictment against the respondent were dismissed. The respondent was acquitted. On January 20, 2006, an Order of Expungement for all information relating to the criminal charges in the indictment was signed. On February 1, 2006, the matter resumed proceedings at the Office of Administrative Law.

The Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU), via the Office of the Attorney General filed a petition stating forth the same or similar charges as in the tenure case pending at the Offices of Administrative Law (OAL). The matter bears OAL docket number HSV 013150-2007. On or about February 13, 2007, the Attorney General of New Jersey moved to consolidate the DCF's action with the tenure action pending at the OAL. On May 8, 2007, an Order consolidating the two cases was signed. An Amended Order issued on June 7, 2007, further ordered that the DCF case had predominant interest pursuant to N.J.A.C. 1:1-

17.5. On June 7, 2007, in a letter DCF advised this Court that it had modified its finding of substantiated abuse against the respondent to "not substantiated." As a result of such a modification respondent's name was removed from DCF's Central Registry and is not listed as a perpetrator of abuse with respect to the incidents surrounding the tenure charges. The DCF case against the respondent was withdrawn by DCF. The case then proceeded at the OAL on the tenure charges.

In the interim, numerous motions were filed by counsel for both parties pertaining to discovery; all of those matters were resolved either by court order, mutual consent of the parties or directives from this Court. The matter proceeded to plenary hearings.

On March 17, 2009, after petitioner rested, respondent moved to dismiss all of the charges filed against respondent. Upon conclusion of the oral arguments put forth by both attorneys Charges Four, Five, and Six were dismissed.

Hearings were held on various dates from February 1, 2006, until March 11, 2010. On March 18, 2010, in a conference call dates for the filing of post-hearing briefs were set. The record closed on August 17, 2010.

ISSUES

1. Charge One, is respondent guilty of conduct unbecoming a custodian by making sexually-explicit remarks and engaging in inappropriate contact with a minor-female employee E.W. by:

a) informing E.W. that he had "something else that was big"

b) grasping his genitals in the presence of E.W.

c) by telling E.W. stories about strippers

d) inquiring as to why there was writing on E.W.'s buttocks

e) lifting up his shirt in the presence of E.W. such conduct causing E.W. to become upset and creating a hostile environment for her.

2. Charge Two, is respondent guilty of conduct unbecoming a custodian by making sexually-explicit remarks and engaging in inappropriate contact with a minor-female employee (S.R.) by:

a) inquiring of S.R. as to why there was writing on her buttocks

b) bumping into S.R. from behind

c) lifting his shirt in front of S.R.

d) discussing strip clubs in front of S.R.

e) stating in front of S.R. that he "had something else that was big"

f) staring at S.R.'s buttocks such conduct causing S.R. to become upset and creating a hostile environment for her.

3. Charge Three, is respondent guilty of conduct unbecoming a custodian by making sexually-explicit remarks to a minor-male employee, T.M. by:

a) informing T.M. that his niece was a Go Go dancer and that he should come to his house to see her dance

b) telling T.M. he would bring him condoms

c) stating in T.M.'s presence that he "had something else that was big" such conduct causing T.M. to become upset and creating a hostile environment for him.

SUMMARY OF THE TESTIMONY

Dennis J. Kelly

Dennis J. Kelly is employed by the Elizabeth Board of Education and has been working for the Board for twenty-three years. He started as a security guard, then became a supervisor of custodians, and at the time of his testimony he was a coordinator of custodians. As coordinator of custodians he oversees 275 custodians in all Board of Education buildings. In 2003-2004 there were about forty school buildings within Elizabeth; each building had a head custodian.

Kelly stated that Melillo was the head custodian for School 17, also known as Roosevelt Middle School, covering grades 6, 7 and 8. He has known Melillo for about twelve years. School 17 had five custodians, one head custodian (Melillo) and one fireman. All custodians wear a uniform consisting of a tan shirt and brown pants. In the summer because of the heat—due to most schools not being air conditioned—the custodians wear T-shirts. School 17 is not air conditioned. The head custodian's office at School 17 is located on the first floor. The office has a desk, chairs, and a bulletin board. According to Kelly, that particular office has two doors, one door is the main entrance and another door that opens out into the boiler room.

Kelly said that in the summer of 2004 there was a work program whereby students would perform light custodian work in the school buildings. The program began just after the Fourth of July and ended sometime in mid to late August. The students were selected through an application process. The students were paid $4.75 to $5.00 per hour. The students worked Monday through Thursday. The students ranged from fourteen to eighteen years of age. The students were supervised by the head school custodians.

Kelly further stated that each individual head custodian had to approve the students' attendance at the job and supervise the students' work.

Kelly testified that two girls and two parents came to his office and complained about Melillo. He said the girls were summer-work students. He said the girls relayed to him that Melillo rubbed up against them, was rubbing his crotch in front of them,

offered to take them to a Go Go bar and that he would bring them condoms. He said that the girls also told him Melillo had a Playboy magazine and pornographic materials.[1]

Kelly testified that S.R. told him that when she was at the slop sink Melillo came from behind her and rubbed up against her.

Kelly said he reported what the students and parents told him to the District's business administrator, who told him to call the Division of Youth and Family Services and the police.

Kelly also said he called Melillo and told him what was being said by the student workers. He said he told Melillo to report to the warehouse.

Kelly further testified that the next day the parents returned to his office with written statements from S.R. and E.W. He also received statements from custodians Sandra Llerena and Maria Esteves. He said he also received a statement from one of the boys that was working with the girls.[2]

Under cross-examination Kelly testified that the summer students' attendance was kept on time cards. Each student/worker was responsible for completing his/her particular time card on a daily basis. He said it was Melillo's duty to sign off on the students' time cards. Melillo had to verify that each student was present and worked the time that he or she put on the time cards.

Kelly said that prior to the students and parents complaining to him about Melillo, he had received one or two calls from Melillo telling him about problems he (Melillo) was experiencing with student workers coming in late and not working the time they were supposed to. Kelly testified that he told Melillo to mark on the students' time cards the actual time they worked.

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[1] The girls were later identified as S.R. and E.W.
[2] T.M. is the boy that was later identified.

Kelly further testified that time cards are first approved by the head custodian; then his secretary totals up the hours; she then gives him the cards. He then takes the cards, reviews the hours worked and sends his final approval to the Board's payroll department for payment.

Kelly testified that he had no recollection as to when the students said Melillo touched or rubbed up against them. Kelley was not sure if the students told him when Melillo did the acts they were complaining about. Kelly had no recollection of telling the police when the incidents occurred.

Kelly stated that the students told him that they had confided in Sandra Llerena.

Kelly was shown the time cards for the student workers. (Exhibits R-29 through R-33.) Kelly noted that the time card for male-student T.M. was altered or corrected either with White Out or over-writing for work days of July 9 and 13 2004, as well as the total hours worked. (Exhibit R-30.) Kelly testified that he did not know why the time cards had such markings and that he received the time cards in that condition. He said time cards are completed by the individual worker and approved by the head custodian. He does not make any entries or corrections.

Kelly was shown the time card for G.W. Kelly testified that the corrections or alterations for the entries dated July 7, 9, 12, and 13, along with a correction on the total hours worked were there when he received the card.[3] (Exhibit R-31.)

Kelly was shown time card for M.D. Kelly testified that the corrections or alterations for entries dated July 6, 7, 8, and 13, along with a White Out on the total hours worked were not done by him or anyone in his office.[4] (Exhibit R-32.)

Kelly was shown the time card for E.W. Kelly testified that the corrections or alterations for entries dated July 6, 7, 8, 12, were not done by him or anyone in his office. (Exhibit R-33.)

[3] G.W. is one of the male-student workers.
[4] M.D. is one of the male-student workers.

Kelly testified that at the time he initialed the time cards he did not note nor did he look for anything peculiar with respect to the students or Melillo. He said at the time he simply approved the cards and sent them on to payroll.

Kelly said that the school principal told him that the security guard overheard the students say they were going to get Melillo. (Exhibit R-44, p. 3.)

Sandra Llerena

Sandra Llerena is employed by the Elizabeth Board of Education and has been since 1998. She is a custodian. She was a custodian in School 17 the summer of 2004. Her custodian duties were performed on the first floor and her summer hours were from 7:30 a.m. to 4:00 pm. She reported to work every day at the head custodian's office that was located at the back of the first floor. Her head custodian and supervisor was Melillo.

Llerena testified that every day all custodians go to the head custodian's office to get their assignments for the day. She said all custodians are in and out of that office every day, all day. She said that it is at that office where they get supplies, have their breaks and eat lunch. They also go to that office at the end of the day to check out and turn in their keys.

She said the summer of 2004 was the first summer she worked at School 17. She stated that summer she worked with students S.R., E.W., and T.M., two girls and one boy. She said she worked Monday through Friday but the students only worked until Thursday. She said the students left at 2:00 p.m. She said in-total she worked with the students three days.

Llerena stated that during the summer of 2004 when she took her vacation and returned to work on July 13, the students were working there. She said the first day she returned three boys and two girls were in the office. She said all custodians wear a

uniform and that they have a regular school-year uniform and a summer uniform. She said student workers did not wear uniforms.

Llerena testified that Melillo was her supervisor. She did not have a good relationship with him. She said Melillo always complained about something she did. Melillo was always unhappy with her work. She said she complained about Melillo to her co-workers. Llerena said that Melillo always had her move the heavy garbage bags even though the men were there and available. She said Melillo grabbed her wrist showing her where he wanted her to clean.

Llerena said that Melillo would always touch his private parts. He would have his shirt open touching his abdominal area; he would put his feet up on the desk. She said she saw this every day - all of the time. She stated that the other custodians would be present and commented on Melillo's actions. She stated sometimes students were present also.

Llerena testified that on the day she returned from vacation, July 13, S.R. and E.W. came to her and told her about Melillo. She said that S.R. told her that she did not like the way Melillo looked at her. S.R. also told her that one day she wore a pair of jeans that had writing on the butt and a sweater and that Melillo told her to take her sweater off. Llerena said S.R. told her she was not comfortable being alone with Melillo.

Llerena stated that E.W. told her Melillo rubbed himself against her and that he came from behind her. Llerena said E.W. said the incident occurred when she (E.W.) was trying to open a door and Melillo was very close to her. Llerena said E.W. told her this on the second day of her return from vacation.

Llerena further testified that T.M. told her Melillo offered him condoms and a porn magazine. And, that Melillo offered to take him to see a stripper. She said T.M. told her these things also on her second day of her return from vacation. Llerena said E.W. and S.R. were present when T.M. told her.

Llerena said that co-custodian Maria Esteves, student-workers T.M. and E.W. were also present when S.R. relayed the information to her. Llerena said she told the kids to tell their parents.

Llerena said she spoke to the other custodians about what was happening to the student workers.

Llerena said she saw porn magazines in Melillo's office after the incidents.

Llerena said S.R. or E.W. told her they saw Melillo touching himself.

Llerena testified that she, Maria Esteves, another custodian named Eddie and three students looked for pornographic magazines in Melillo's office but they did not find any. She said Eddie looked in the dumpster outside and he found the magazines in there. She said Eddie put the magazines back in Melillo's desk drawer. She said it was after they put the magazine in Melillo's drawer that Kelly came in to the office.

Llerena further stated that the day they found the magazines was Melillo's last day.

Under cross-examination Llerena admitted that she prepared a statement or a letter that is marked Exhibit # 47. Llerena stated that she wrote that letter for Kelly after he (Kelly) received the complaints from the student workers and their parents.

Llerena testified that Melillo always took issue with the quality of her work as a custodian and her absences. She said that she knew that Melillo had reported these things to Kelly.

Llerena stated that Kelly spoke to her about her work and Melillo's complaints about her. (Exhibit R-24.)

Llerena admitted that she filed a criminal-sexual-contact complaint against a co-worker. She also filed a complaint with the Elizabeth Board of Education against the same co-worker alleging sexual harassment. She dropped both complaints.

Llerena stated she never went off the school premises for lunch with the students. She said she did not remember going to lunch at Burger King with S.R. or E.W.

Llerena said she saw Melillo rubbing his penis. She said she would see Melillo do this all of the time. She testified that on occasion she saw Melillo rub himself when the students were in the office, he did this when all were gathered in the office getting their assignments. Llerena could not define who all were.

Llerena said T.M. told her Melillo showed him a pornographic magazine. And, that T.M. told her he saw a pornographic magazine in Melillo's desk drawer.

Llerena testified under cross-examination that she saw Eddie take a magazine from Melillo's desk drawer and put it in the dumpster, which is why Eddie knew where the magazine was. She stated she saw Eddie put the magazine back in Melillo's drawer.

Llerena reported that she worked with the students for a total of three days.

Llerena said Melillo always made her uncomfortable so she tried to avoid going into his office. She said every time she went into his office Melillo would have his feet on his desk and was rubbing himself. She said she never said anything to him; they did not communicate other than her receiving her assignments. She never complained about this to her union representative, principal, or anyone of authority. She said she discussed it with other male and female custodians.

During re-cross examination she testified that she did not see any pornographic magazines in the drawer nor did she go and look for magazines. She said she first saw the magazines when Mr. Kelly had the magazines that Eddie gave to him.

Maria Esteves

Maria Esteves is employed as a school custodian with the Elizabeth Board of Education. At the time of her testimony she had been with the Board nine years, six of those years were spent at School # 17. Her normal assignment during the school year was to maintain the second floor but in the summer she worked all over and where assigned. Her summer hours were 8:00 a.m. to 4:00 p.m. - lunch was from 12:00 p.m. to 1:00 p.m. She worked the entire month of July in 2004.

Esteves said she worked with students S.R., T.M., M.D., E.W., and G.W.

Esteves stated that the routine in the morning was that upon arrival they would all go to Melillo's office to get their assignments for the day. She testified that she was uncomfortable with Melillo because he would always "adjust himself," so she avoided him. She said he would do it frequently. She never said anything to Melillo nor did she file a complaint with anyone. She said she never discussed the topic with Llerena.

Esteves testified that she asked E.W. why she wore such a heavy sweater and E.W. said because she was uncomfortable around Melillo.

Esteves stated that the other male custodians told her about porn magazines but she never saw them.

Esteves said she was allowed to leave the building for lunch and she usually went to her husband's auto body shop in Elizabeth. She never saw the students at lunch and she never ate with them.

Exhibit R-46 was shown to Esteves and she acknowledged writing it. In the statement, written on July 20, 2004, Esteves writes that lately Melillo frequently adjusts himself and she finds it uncomfortable. The statement also reports the conversation she had with one of the girls regarding her wearing a heavy sweater. (See R-46.)

Under cross-examination Esteves stated that she thought these particular students were trouble; they would run up and down the hallways; they were all over the place.

Esteves said she never saw these students after 2:00 p.m. She testified that she kept her distance.

She said she never heard Melillo ask S.R. to take her sweater off.

She said Melillo was always very respectful to her.

Under cross-examination she stated that in the beginning she felt uncomfortable when Melillo adjusted himself but after awhile noticing that Melillo did it in front and around everyone, she let it go. She said she figured it was not directed at her.

Esteves further testified that she did not see Melillo pulling, rubbing, or stroking his penis. She never discussed Melillo doing such things with Llerena.

Charles Smith

Charles Smith is employed by the Elizabeth Board of Education as the Affirmative Action and Recruitment Officer. He has been with the Board for two years at the time of his testimony. He reports to the assistant superintendant of Human Resources. One of his job duties is to investigate complaints of sexual harassment and discrimination.

Smith stated that on July 26, 2004, he received a packet of information regarding Melillo. He said he was given police reports and several written statements from students and their parents. He said prior to receipt of the package he had no knowledge of Melillo or the alleged incidents. He also had no prior dealings with these particular students or their parents.

Smith said when he began investigating the matter Kelly gave him pornographic magazines. Smith identified exhibit marked P-21 as the magazines he received from Kelly.

Under cross-examination Smith stated he could not remember when Kelly gave him the magazines.

Y.R.

Y.R. is the mother of S.R. and T.M. She stated that in the summer of 2004 S.R. and T.M. worked for the Elizabeth Board of Education at School # 17. She said the school is within walking distance of their home. This was the first summer they worked for the Board.

Y.R. testified that S.R. called her at work one day just before lunch. She said S.R. told her it was important and that she was to meet her at Kelly's office at the warehouse building.

Y.R. said she met M.W., the mother of E.W. and G.W. and the other kids at Kelly's office. She said she heard the girls tell Kelly that Melillo would touch himself and they described the slop-sink incident. She said they met with Kelly a "good while." She was shown R-51, which is a typed statement of S.R. She said S.R. wrote it out long hand and she typed it for her. She later took the statement to Kelly.

Y.R. said R-49 is her handwritten statement on behalf of T.M. because his handwriting is illegible.

Under cross-examination Y.R. said that until she received the call from S.R. she had never heard anything about Melillo or what was happening at School #17. S.R. never told her Melillo was bothering her. She said she heard the group talking about what happened just before going in to see Kelly.

Y.R. testified that S.R. told her the incident at the slop sink happened twice and that is what she testified to at the criminal trial. She said she later said S.R. told her it happened only once.

M.W.

M.W. is the mother of E.W. and G.W. M.W. was employed by the Elizabeth Board of Education as a multi-purpose aide for thirteen years. At the time of her testimony she had been terminated because her position was no longer available. M.W. stated that she did not know Melillo prior to the events of July 2004.

M.W. stated that G.W. had worked the student-custodian summer program before but it was E.W.'s first time. M.W. stated that she was not working that summer so most of the time E.W. and G. W. came home for lunch and she was there.

M.W. testified that E.W. called her one afternoon and told her that she did not like her boss, that he does perverted things like making her clean up under him and that he grabs himself. M.W. said she told her daughter to leave the job immediately. She said E.W. and S.R. came home. She said E.W. was upset and said how Melillo grabbed her around the waist. M.W. said S.R. asked to use her phone to call her mother. M.W. stated that she then called the Elizabeth Board of Education. They then walked to Kelly's office.

M.W. said the boys were still at work and did not go to Kelly's office.

M.W. said that E.W. came home early one time and that was a couple of days before she received the phone call. She said that day E.W. came home between 1:00 p.m. and 1:30 p.m. M.W. said E.W. was angry but she did not say why she was so angry.

M.W. said that E.W. told her that Melillo talked about his nieces being Go Go dancers and that he had condoms in his drawer and he took them out and showed them to her. M.W. said E.W. told her how Melillo would lean back on his chair and put his

feet up on the desk and read pornographic magazines. M.W. said that E.W. complained how when she was cleaning Melillo's office he would grab himself in his private area. M.W. stated that E.W. told her how Melillo touched her when she was on the stairs.

Under cross-examination, M.W. stated that T.M. told her the day after they met with Kelly that he was going to bust Melillo.

M.W. said that S.R. told her Melillo had condoms in his drawer and that she saw Melillo had pornographic books.

The Testimony of the Summer Student Workers

S.R.

S.R. at the time of her testimony was a senior at in high school in Elizabeth, New Jersey. She said she had an after-school job. She lived with her mother and siblings in Elizabeth. She had just graduated eighth grade when she worked as a summer-student custodian at School 17. She worked with T.M., her brother, M.D., and E.W., and G.W., who are also siblings. She said she was the youngest grade wise. S.R. said her work hours were 8:00 a.m. to 4:00 p.m., with a half-hour for lunch. She worked Monday through Thursday. Her job duties were to help clean the school.

S.R. said that when she first arrived at the school she would report to Melillo at his office along with the other employees. She received her assignments from Melillo every day. She testified that there was a sign-in sheet in a binder where she would sign in and out. She said most often she would go home for lunch. She said she did not know Melillo prior to working at School 17. She knew E.W., but only to say hello or good-bye. They became friends after working together at the school.

S.R. said the adult custodians were Eddie, Juan, Maria and Sandy. Jay Mills was the security guard in the building and he was there too. S.R. stated that Maria was there the first week they worked but that Sandy was not.

S.R. testified that Melillo talked to the boys about condoms. She said Melillo told her his nieces were strippers and that he was up all night with his strippers. She said that during those conversations G.W., T.M., M.D., E.W., and she were present. She testified that Melillo offered to pay the boys $100 to see his nieces strip.

S.R. related that one time E.W. was looking at a calendar on the wall in the back of Melillo's desk chair and Melillo rolled the chair back bumping into E.W. She said E.W. said "your back is big" and that Melillo responded, "I have something else that is big."

S.R. stated that she noticed Melillo looking at her butt. She said at the time she was wearing jeans with writing on it. She said she wore a sweater over her butt and that Melillo asked her why. She said she told him so he could not look at her butt.

S.R. testified that another time she wore her hair in a fan and that Melillo asked to see her hair with his hands. She said she told him you see with your eyes not your hands.

S.R. testified that she made it her business not to be alone in the room with Melillo because he would do things. She said that Melillo would grab his crotch while sitting at the desk with his feet up. She also said that she made it her business not to look at Melillo. She said no one else was present in the office when he did this other than herself and E.W. S.R. said she told T.M., M.D., and G.W., the boys. She also said that she told Maria everything that was going on there.

S.R. testified that once when she was at the second-floor slop-sink closet filling a bucket with water and as she was backing out Melillo came up behind her and he rubbed up against her. She said he told her to "chill" and he smiled. She said she left and told her brother, T.M. She said she also told everybody what happened because she was shocked. She further testified that she told her mother after telling Sandy.

S.R. said Melillo never showed her any pornographic magazines nor did he discuss such things with her.

S.R. said Melillo showed her his chest. She said this occurred when she and E.W. were cleaning together and Melillo came to check on them. She said at that time Melillo did a stretch and a yawn and he put his right hand on his chest and lifted his shirt up to his face so she saw his hairy chest.

S.R further testified that Melillo sent her home early because the boys were fooling around and he could not find them. She said she got docked pay because of it.[5]

S.R. testified that she, E.W., T.M., M.D., and Sandra Llerena went into a classroom, used the phone, and called her mother and told her what was going on with Melillo. She stated that then they all met her mother and E.W.'s mother and they went to Kelly's office.

S.R. was shown Exhibit R-51, which is her statement advising Kelly of the incidents.

Under cross-examination S.R. testified that she went to Burger King one day for lunch and that was the day she got docked in pay.

S.R. again testified that G.W., T.M., E.W., M.D., and Sandra Llerena were in a classroom together when she called her mother. She said she lied to Melillo saying she had to use the bathroom and instead called her mother. S.R. said the day she called her mother was the day she was sent home early. She also said the day she called her mother was not the day she went to Burger King nor was it the day she was sent home. S.R. said the day she went to Burger King was the day she was told to leave early because Melillo could not find the boys.

[5] The boys are the male-student maintenance workers, T.M., M.D. and G.W.

When S.R. was shown R-51, she stated that she did not write down everything that happened and that she had forgotten some things. S.R. acknowledged that in her initial statement she did not mention anything about Melillo touching himself.

S.R. was cross-examined on her testimony at the Melillo's criminal trial. S.R. stated at the criminal trial that she had a fan in her hand and that Melillo questioned her about the fan in her hand not that she had her hair in a fan. S.R. said that it bothered her that Melillo said something about her hair.

S.R. testified that the day she was sent home early was the day Melillo stretched and lifted his shirt. She said she was mad that day because she was losing money,

S.R. stated that she was never alone with Melillo and that the only time she was alone with him was when the hair-fan incident. She said E.W. was with her most of the time. She said the boys were never in the office when she saw Melillo.

S.R. also stated during her cross-examination that sometimes when she and E.W. had to go to Melillo's office they went with someone else, most of the time it was M.D.

S.R. testified that she would go to Melillo's office a couple of times a day and she would see him playing with himself. She said she saw Melillo touching himself the first week she started to work there.

When S.R. was asked why she did not tell her mother about Melillo from the beginning: she answered that it "all added up."

S.R. testified that the incident when Melillo backed up into E.W. happened as E.W. was standing in the back of his chair and he said "I have something else that is big." She said when this occurred T.M. and M.D. were also in the room.

S.R. said that the slop-sink incident most likely happened the first week because she did not work that much the second week. She also stated that the slop-sink

incident happened after the "something big" incident and comment. S.R. was shown P-22, which indicates that the slop-sink incident happened on July 7, 2004.

S.R. was shown P-56, which is E.W.'s statement. P-56 notes that the "something big" comment occurred on July 9, 2004, which was a Friday. S.R. was then shown the transcript of her mother's testimony at the criminal trial wherein her mother testified that S.R. told her the slop-sink incident happened twice.

S.R. said she and E.W. always wore a long T-shirt or sweater to cover their butts.

S.R. said she never saw Melillo touch E.W. at the slop sink.

T.M.

T.M. testified that he graduated from Elizabeth High School in 2005. He is currently incarcerated at the A.C. Wagner Youth Correctional Facility serving a ten-year sentence for robbery.

T.M. stated that during the summer of 2004 he was a junior in high school. He worked at School 17 with S.R., his sister, E.W., M.D., and G.W. They all worked preparing the building for school: painting and mopping. He said he reported to Melillo. He said he did not know Melillo before. He said he lived one block away from the school and walked home for lunch.

T.M. did not remember if Melillo was Caucasian or African American. He did remember that Melillo was big, muscular, and bald.[6]

T.M. testified that Melillo talked to him about condoms.

T.M. said Melillo asked him why he was late one morning and from there the conversation turned into Melillo's nieces being strippers at a strip club. T.M. said Melillo

[6] On the day T.M. testified Melillo was not present in court.

asked him if he had a girlfriend; if he has had sex; and if he used condoms. T.M. said he heard Melillo ask S.R. if she had a boyfriend. T.M. stated that he heard E.W. ask Melillo why he was so big and muscular and Melillo responded with that is not the only thing he has big.

T.M. said S.R. told him about when Melillo backed up and bumped into her. T.M. said he told Melillo to stop talking to his sister like that.

T.M. said it was Sandra Llerena who told E.W. to tell her mother about Melillo's remarks.

T.M. said he saw Melillo touch himself in the crotch area with his feet on the desk. He said Melillo's hand was over his clothing.

T.M. testified that he never complained to anyone. He told E.W. and then he told his mother.

T.M. said he saw a pornographic magazine in the bottom drawer in Melillo's desk. He was in the cabinet because his time cards were kept there. T.M. said Eddie, another janitor, was there with him and Eddie also saw the magazine.

T.M. said that on the same day he and the others met with Mr. Kelly he went back to the school to get the magazine and it was gone. T.M. stated that he left early that day.

T.M. said he gave a statement to Kelly marked R-49. He acknowledged that this statement was in his mother's handwriting but that they were his statements.

T.M. does not remember if he testified in the criminal case against Melillo.

Under cross-examination T.M. testified that his work hours were 8:00 a.m. to 3:00 p.m. He acknowledged that Exhibit R-30 was his time card. T.M. said he went to Burger King for lunch two times while working at School 17 and he went with the other

kids E.W., M.D., S.R., and G.W. He said he was generally assigned to work with the other boys and other male janitors. He was never assigned to work with the girls.

T.M. did not recall leaving work early or at 2:30 p.m. on July 13, 2004. He does not recall ever being sent home early because Melillo said he was doing something he should not have been doing. The only time T.M. recalls being sent home early was when Melillo said there was no more work to do.

T.M. said he opened Melillo's cabinet or desk drawer to take the "Hustler" magazine out. He stated that Melillo never took the magazine out to show him. T.M. testified that he took the magazine from Melillo's desk to look at it.

T.M. said that his sister (S.R.) told him about Melillo backing his chair into her; he said he never saw it happen. He said he never saw Melillo get physical with E.W.

E.W.

E.W. was nineteen years old at the time she testified. She is a freshman at Morgan State University. E.W. lives with her mother, M.W., in Elizabeth. Her brother is G.W. E.W. stated that in the summer of 2004 she worked in a janitorial program cleaning school buildings for the Elizabeth Board of Education. She was assigned to work at School 17. E.W. said she had attended that school; it was her middle school. She said that while a student there she never saw Melillo.

She said S.R., G.W., her brother, M.D. and T.M. all worked with her. The other adult custodians that she worked with were Juan "Ramirez" or "Rodriguez," Sandra and another lady whose name she did not recall. She said Melillo was the boss. She said when reported to work in the morning she did so at Melillo's office. In Melillo's office she would sign in on her time card. She said Melillo's office was on the first floor.

E.W. said she worked with S.R. She said she worked two-full weeks at School 17 before being transferred to School 22. She said she was moved to School 22 because of the incidents with Melillo.

E.W. said that one time Melillo asked her to clean under his desk.

E.W. said that Melillo was sitting in his swivel chair at his desk as she cleaned his office. She said while she was cleaning Melillo was moving his hands up and down near his groin area. She said when she finished cleaning she left. E.W. could not remember when that happened.

E.W. said that one time she asked Melillo when was pay day. Melillo handed her a calendar and then he pulled it back in a playful manner. She said she told Melillo he had a big back and that Melillo responded "that is not all I have big."

E.W. said she never saw Melillo touch S.R.

E.W. testified that at another time she was taking a screwdriver to T.M. and as she was going up the stairs Melillo was coming down the stairs along her path. Melillo then moved his arm so she could pass. E.W. testified that she did not remember if Melillo's arm touched any part of her body.

E.W. further stated that she told her mother about the incident on the stairs but she could not remember when. She said she told S.R. and Maria Esteves. She said Maria told her to do nothing. She stated that she told Sandra Llerena and Sandra told her that something similar had happened to her and she should tell her mother.

E.W. stated that Melillo never said anything to her about her body.

E.W. testified that she called her mother from one of the phones in a classroom. She said her mother told her to leave the job. She said she went home and when she got home she went to Kelly's office.

E.W. did not recall an incident at the slop sink.

E.W. stated that she was busy all of the time. She was never sent home because there was no work. She never heard of anyone being sent home because there was no work.

E.W. testified that she and the other students were all in the room when they saw Melillo write on their time cards the time they worked. She said no one complained about the hours marked.

E.W. stated that sometimes they went home for lunch and only once they went to Burger King. She said G.W. came to work after lunch because he was going to summer school.

E.W. recalled that she got sent home early on July 12, 2004. She was sent home at 2:00 p.m. because the boys were playing or touching stuff that they had no business touching or playing with. She stated that the boys were in the girls' locker room. She said she was sent home because the boys got in trouble.

E.W. testified that on July 13, she and the other students sat outside and had a discussion because they were sent home early on the 12. E.W. stated that they talked about putting a tape recorder in a McDonald's bag and record Melillo. She stated that the five of them met and discussed Melillo and how unhappy they were with him. It was T.M. who came up with the idea of recording Melillo. E.W. stated that it was T.M.'s idea to set Melillo up. E.W. said that T.M. came in with the recorder but he did not turn it on because he got scared. She stated that T.M. brought the recorder in on the 14 of July. She said this was a couple of days before she told her mother about Melillo.

E.W. testified that Sandra Llerena never had lunch with them. She stated that she went to lunch with all of the other students so Llerena never ate with the other students.

E.W. testified that in the two weeks that she worked there Melillo never touched her in a manner that she found offensive. E.W. stated that she was inaccurate when she spoke to Detective Ray of the Elizabeth Police. E.W. stated that she never saw

Melillo lift his shirt or any part of his clothing nor did he ever remove any clothing. E.W. said that the only time she saw Melillo touch himself was when she was alone in his office cleaning and no one else was there. E.W. said she never saw Melillo rub or touch himself in front of S.R.

E.W. said she told her mother about Melillo because Sandra Llerena told her to.

E.W testified that Sandra Llerena was not in the class room when she called her mother. E.W. does not remember if S.R. was with her when she called her mother.

Jose Chua, M.D.

Dr. Chua at the time of his testimony was Melillo's treating physician. Dr. Chua maintains a private practice in the City of Elizabeth. He stated that he has been Melillo's treating physician since 1990.

Dr. Chua testified that in June of 2004 Melillo reported to him that he had a rash. Dr. Chua stated that he referred Melillo to Dr. Margulan for the rashes. Dr. Chua stated that he observed Melillo to have a rash in the arm-pit and groin areas. Dr. Chua stated that the rash was aggravated by heat and sweat. He said he saw Melillo for this rash in August of 2001 as well as in January 1994 and October 2004. The last time he saw Melillo for this rash was on June 16, 2005.

Dr. Chua said that it is common for this type of rash to include an irresistible itch and that he said "you scratch almost involuntarily."

Jay Mills

Jay Mills is a resident of Elizabeth and an employee of the Elizabeth Board of Education as a school security guard. At the time, Mills testified he had been on the job for fifteen years. He had been stationed at School 17 for the last ten years. His duties included keeping the peace and order in the school and directing the internal and external traffic of the school. His summer work hours were 8:00 a.m. to 4:00 p.m. Mills

said he knew Melillo as a co-worker as head custodian of the school. He said he did not socialize with Melillo outside of work. He stated he never found Melillo to be discourteous and/or not nice.

Mills testified that he was aware of the 2004 school summer-help program whereby students were hired to help clean the school. Mills recalled E.W., T.M., G.W., M.D., and S.R. as students that worked at School 17 the summer of 2004. He stated he was not involved with the students or their work assignments.

Mills stated that the kids were discipline problems. T.M. and S.R. were students that had attended School 17. Mills said that T.M. would swear and he had heard T.M. swear in front of the principal and his mother. He knew that T.M.'s mother was Y.R. He said he had seen Y.R. numerous times at the school.

Mills testified that he would often go to the Dunkin Donuts about a block from School 17 to eat lunch. He said he saw E.W., S.R., T.M., M.D., and G.W. at this Dunkin Donuts many times. He said on one particular occasion he heard the five students talking. He testified that he heard one say "let's get even" with Melillo. He said he heard one of them say "let's say he touched us/me" or something like that. Mills testified that he heard talk about the girls using their pussy.

Mills said he was inside Dunkin Donuts at a table and the students were at a table next to him. He said that when he returned to school he told School Principal Nadine Yanger what he heard. He stated that he did not discuss it with Melillo.

Mills stated that at times these students could be very disrespectful. Mills said they had the attitude that they were never wrong. He reiterated that S.R.'s mother was always at school. He said M.W. worked with his sister.

Mills was shown Exhibit R-62. Mills said he did not write that statement that it was not his handwriting. He did not identify the signature as his. He said a Mr. Glassman wrote it and then showed him a portion of it. Mills said he never read it

completely. Mills said he recalls meeting Charles Smith and signing a statement marked Exhibit R-63.

Mills stated that he did not have many dealings with Melillo.

Mills said that he recalled Sandra Llerena, a custodian. He said he never heard Llerena complain about Melillo.

Mills opined that Melillo took pride in his work and was professional at all times.

Under cross-examination Mills stated that he was unsure what kid said what during the conversation he overheard at Dunkin Donuts. He did remember hearing that one of the boys said "you are a girl say he [Melillo] felt you up." Mills said the kids used words like "mint" and "wax" as to what they were going to do to Melillo. Mills said he referred to the kids as the "wolf pack" because they all hung out together. He said he heard on August 12 through the grapevine that Melillo was suspended.

Louis Melillo

Louis Melillo testified on his own behalf. Melillo is employed by the Elizabeth Board of Education as a head custodian at School 17. He said he started with the Board in November 1994 as a substitute custodian he worked his way up through the custodian ladder until being made a head custodian. Dennis Kelly was his supervisor.

Melillo stated that in July 2004 there were eight custodians in School 17. He said during the regular-school year the custodians had a different schedule from the summer schedule. He set up each custodian's summer schedule and would tell them when to come and go. In the summer all custodians ate lunch at the same time—12:00 p.m. to 12:30 pm.

Melillo stated the in July 2004 School 17 had the summer-work program and summer school in session at the same time. He said summer school was from 8:00

a.m. to 12:00 p.m. He said the work program started after July 4. He said that year five students were assigned to him. Those students were E.W., M.D., S.R., G.W., and T.M.

Melillo testified that he met all five students and he explained their duties and the work area. He said he told them they would be lifting and moving furniture, stripping floors, clean outside grounds, weeding, and unpacking deliveries. Melillo testified that the first day it went well, the second day he said they started fooling around. He said all five of them did. Melillo stated that the first few days all five worked together; after that he put the girls with female custodians and the boys with the male custodians. He said he left it to the permanent custodial staff to tell the students what to do. He said he did not know any of the students. He said they told him they lived across the street from the school in a complex.

Melillo said that Principal Nadine Yanger told him that these students were former students at School 17 and that they were all discipline problems. Melillo said that Yanger told him to be careful.

Melillo said he reviewed with each student the procedure for signing in and out and he showed them the book in his office. He said he told them they had to sign out for lunch and in when they returned. He said the book was in his office to the left of his desk on top of an end table. He said time cards were also used. He said he would complete the time cards for each student. He confirmed that both a book and time cards were used. The kids kept their own time cards. The students' work hours were 8:00 a.m. to 4:30 p.m. Melillo said the kids told him they were to work five days a week but he later found out they were to work four days a week. He said the kids started to work on Tuesday, July 6 because the Fourth of July fell on Sunday and the holiday was observed Monday July 5. Melillo said that first week they worked on Friday. He said the following week, the week of July 12, he learned students were not to work Fridays. He said Kelly told him to leave the students' time cards for July 9.

Melillo was shown R-29, S.R.'s time card. He testified that the dates on the card were written by him, and all of the writing was his. He said the total hours worked for

the week, circled, was not his. The hours on this card were totaled and circled by Dennis Kelly.

Melillo testified that he told Kelly he had problems with the kids. He said he told Kelly they were not working and they were going through teachers' desks. Melillo said he told Kelly this on Monday July 12, which was the second week the kids were working. Melillo said that was also when Kelly told him the kids were not to work Fridays. Melillo said the only kid that did not give him problems was G.W. G.W. was attending summer school and he reported to work at 1:00 p.m. and worked until 4:00 p.m.

Melillo said he sent all of the kids home on Tuesday, July 13 because they were not cooperating and not doing as they were told. They were running all around the building. He said he sent them all home except G.W. Melillo stated G.W. was where he was told to be and doing what he was told to do. He said he docked the students and called Kelly and told him what he did.

Melillo testified that he learned he was suspended on July 15 when he received a call from Kelly. He said he met with Kelly and Kelly told him of the allegations against him.

Melillo said that he never told E.W. he had something big. As to the incident with him allegedly backing into E.W., Melillo testified on that day E.W. wanted to know when was pay day and he moved his chair because she was behind him looking at the calendar. Melillo denied making any comments about her butt. Melillo denied ever grabbing his groin area in front of E.W. Melillo denied talking about strippers. Melillo said that his nieces attended School 17, but he never told E.W. about them.

Melillo stated that he may have lifted his shirt to wipe the sweat off his face.

Melillo testified that he recalled bumping into S.R. while going into a slop sink carrying a bucket and that S.R. was also carrying a bucket and she was backing out as

he was walking in. Melillo said the two collided. Melillo said they collided but it was sideways, she was turning as he was going in.

Melillo also said that T.M. never told him to stop "playing" with his sister.

Melillo testified that he always had problems with Sandra Llerena's work product. He said Llerena's work was inadequate. Melillo admitted to writing R-23, R-24, and R-25, which were all complaints he reported about Llerena.

Melillo further testified that in the summer they clean using ladders and he gave Llerena tall bookcases to clean. Melillo said Llerena was using a chair to reach the top of a shelf instead of a ladder. He saw her and he assisted her by holding her hand as she came down to give her some support.

Melillo said he suffers from Hodgkins Lymphoma so he sweats a lot and gets heat rashes, especially in the summer.

Under cross-examination Melillo testified that Principal Yanger told him about the kids, telling him to be careful because "these kids were rough." Melillo said she told him one morning in the first week. He said Yanger told him all five of them had attended School 17 but he did not remember any of them.

Melillo stated that on the third day of the kids working the problems started. He said they would not do as they were told, he caught them watching TV in the classrooms instead of cleaning them. Melillo said on Friday July 9 he caught them going through teachers' desks and again watching TV. Melillo said because summer school was going on as well that the kids would interrupt the teachers and students in the classroom. Melillo testified that the mornings would start out ok but by mid-morning and into the afternoon the trouble started. Melillo said at times he had to go looking for one or the other. He testified that he called Kelly and told him. He said Kelly told him he would be by on Monday the 12 of July to clear up with the kids what they were to do.

Melillo stated that he had no problems with Maria Esteves. He said he did not know why she said he made her feel uncomfortable. He said he never had an incident with Esteves. Melillo stated that he did not complain about any other custodian because they were all doing their work.

Melillo testified that the principal, Ms. Yanger, complained about Llerena's job performance and he complained to Kelly. Melillo said after he received the complaint about Llerena he called a meeting among Llerena, Yanger, Kelly and himself. Melillo said after that meeting Kelly asked him to give Llerena one more chance, that is, giving her an opportunity to improve. Melillo said he gave Llerena that chance. Melillo said Yanger wanted Llerena transferred. Llerena was never transferred. Melillo thinks Llerena is vindictive because he wrote her up.

With respect to the time cards, Melillo stated he used White Out on the time cards. He said he whited-out the time cards when he realized that the kids had not worked the hours they said they did. And, that he had sent them home early.

Melillo said Kelly called him twice on July 15, the first call was about 9:00 a.m. and Kelly wanted to know how things were going with the kids. The second call was after lunch and that is when Kelly told him about the allegations.

Melillo said the kids and his staff could go in and out of his office anytime during the day.

DISCUSSION AND FINDINGS OF FACT

Melillo contends that the charges against him should be dismissed because they are a product of a scheme or plan fabricated by the students to get him fired because they were caught derelict in their work duties, were sent home for not doing their work and their pay was reduced. Melillo contended throughout the hearings that the kids were determined to get him in trouble. Hence according to Melillo, none of the acts in the charges are true and they did not happen as alleged.

The petitioner, the Elizabeth Board of Education, asserts that Melillo should be dismissed from his position as head custodian in its school system because of his unbecoming conduct.

In the present case the facts are all contested. And, where the 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, 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 has been defined as testimony which 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. Tayler, 38 N.J. Super. 6, 24 (App. Div. 1955). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses and the fact finder is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950).

The burden of proof is on the Elizabeth Board of Education. The Board must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy this 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. 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). Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

There is no mechanical formula for determining the truth, to the extent it can be discerned, and many factors may be considered and weighed. These include the

demeanor of the witnesses and the manner of testifying. Corroboration, knowledge, and common experience also play a role in assessing credibility. Dawson v. R.W. Vogel, CRT 4501-00, Initial Decision (Oct. 23, 2001), adopted as modified, Dir., Div. of Civil Rights (Aug. 28, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>.

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 In re Cowan, 224 N.J. Super. 737 (App. Div.); Hemsey v. Bd. of Tr., Police and Firemen's Retirement Sys., 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).

Based on my common sense, intuition and experience, and overall assessment of the minor victim witnesses, it is my opinion that these minors were less-than truthful and were motivated by their own self-interest and immaturity. The clearest example of this is the minors' admission that they wanted to set Melillo up because they did not like the way he treated them. T.M., S.R., and E.W. admitted that they wanted to tape Melillo; set out to do so by hiding a tape recorder in a McDonald's bag; and then placed it in Melillo's office. T.M. also admitting that Melillo never showed him any pornographic magazines but that he went into Melillo's drawer to get such magazines. Why else would the kids do this but to set Melillo up and get him into trouble.

On the other hand, there is one statement that all of the witnesses say and they appear to be in agreement on, and that is that Melillo either touched or rubbed himself quite often in the presence of others. This testimony is further buttressed by Melillo's doctor, Dr. Chua.

Having had the opportunity to listen to the testimony, review the documentary evidence and observe the witnesses I **FIND** the following:

Charge One

Melillo is **not guilty** of saying to E.W. that he "had something else that was big." E.W.'s testimony along with the documentary evidence as shown in Exhibits R-41, R-50, R-56, and her testimony at the criminal trial are inconsistent. S.R., who testified that she was in Melillo's office when this comment was allegedly made to E.W., gave a different description of the incident and who said what.

Melillo is **not guilty** of grasping his genitals in the presence of E.W. Grasping is defined as "to make the motion of seizing or to seize eagerly, to clasp or embrace as with fingers or arms."[7] The hearing produced no evidence that Melillo was grasping his genitals as the word "grasping" is defined.

Melillo is **not guilty** of telling E.W. stories about strippers. I **FIND** E.W.'s statements at the hearing, her prior-written statements and her testimony at the criminal trial are all inconsistent with respect to Melillo's discussion of strippers with her. Her statements are not corroborated by any of the other students as what was said, when and where.

Melillo **did not** inquire of E.W. as to why there was writing on her buttocks. The hearing record is devoid of any evidence with respect to this allegation and E.W.

Melillo is **not guilty** of lifting his shirt up in the presence of E.W. E.W. testified that she never saw Melillo raise his shirt or any part of his clothing exposing his chest.

[7] Definition obtained from Webster's 9th Collegiate Dictionary.

Charge Two

Melillo did inquire of S.R. as to why there was writing on her buttocks. However, Melillo should not be penalized for such an inquiry because S.R. acknowledged that when Melillo made the inquiry she was wearing jeans with writing on the buttocks.

Melillo is **guilty** of bumping into S.R. from behind. However, because S.R.'s testimony at this hearing, her prior-written statements and her testimony at the criminal trial are inconsistent as to whether or not Melillo's body came into physical contact with her; and S.R. describing the incident as an accident. I **FIND** that the incident did not cause a hostile environment nor do I characterize it as unbecoming conduct.

Melillo is **not guilty** of grasping his genitals in the presence of S.R. for the reasons previously stated herein.

Melillo is **guilty** of lifting his shirt in front of S.R. Both S.R. and Melillo admitted that there was a shirt-lifting incident. However, I **FIND** the shirt-lifting occurred as testified to by S.R. and Melillo when he stretched. This incident was perhaps ill-mannered but not sufficient as to require his dismissal.

Melillo is **not guilty** of discussing strip clubs in front of S.R. S.R's testimony is too inconsistent to be credible.

Melillo is **not guilty** of stating in S.R.'s presence that he "had something else that was big." S.R.'s testimony is too inconsistent to be credible.

Melillo is **not guilty** of staring at S.R.'s buttocks. The record at the hearing is void of any evidence showing that Melillo stared at S.R.'s buttocks.

Charge Three

Melillo is **not guilty** of telling T.M. that his niece was a go-go dancer and that he should come to his house to see her dance.

Melillo is **not guilty** of telling T.M. he would bring him condoms.

Melillo is **not guilty** of saying in the presence of T.M. that he "had something else that was big."

I **FIND** T.M. incredible. T.M. was asked on direct examination if he could describe Melillo. T.M. described Melillo as a "big guy, built, bald head, muscular." He was then asked if Melillo was Caucasian or African American. T.M. answered, "I don't know, I'm not-I don't know."[8] How can I believe any of T.M.'s recollections of the incidents that allegedly occurred if he cannot remember if Melillo, his boss, is Caucasian or African American? It is quite evident that Melillo is Caucasian.

T.M.'s testimony does not hang together with that of his sister S.R., nor with that of E.W. I **FIND** T.M.'s testimony unreliable.

Having had the opportunity to listen to the testimony, review the documentary evidence and observe the minor victim witnesses, I **FIND** them not to be persuasive they were inconsistent and not credible. All of the victim-witnesses' various written statements to the Elizabeth Board of Education internal investigations, the Division of Youth and Family Services, and the Elizabeth Police Department varied from each other and varied from their testimony before this tribunal.

Melillo is accused of conduct unbecoming a custodian by making sexually explicit remarks and engaging in inappropriate contact with minor female and male employees. I **DO NOT FIND** such conduct or remarks to be sexually explicit. Sexually explicit conduct is defined in 18 U.S.C.A. § 2256 as actual or simulated:

> a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral whether between persons of the same or opposite sex;
> b) bestiality,

[8] (See tr., direct examination of T.M., p. 38 ll. 20 through 25, p. 39 ll. 1 and 2 (January 16, 2009).)

c) masturbation,

d) sadistic or masochistic abuse (for the purpose of sexual stimulation),

e) or lascivious exhibition of the genitals or pubic area of any person.

None of the witnesses testified to any of the above acts.

Based upon a careful review of the record, I **FIND** insufficient credible and legally competent evidence to support a conclusion that Melillo behaved in an unbecoming manner sufficient so as to warrant his dismissal from the Elizabeth Board of Education.

I **CONCLUDE** that the Elizabeth Board of Education did not sustain it is burden of proving by a preponderance of the credible evidence, that Melillo behaved in conduct unbecoming a custodian making sexually explicit remarks, and engaged in inappropriate conduct with student-summer-maintenance workers in July of 2004.

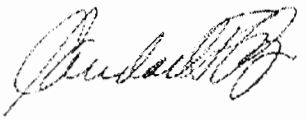
ORDER

It is hereby **ORDERED** that the charges of conduct unbecoming a custodian by making sexually explicit remarks and engaging in inappropriate conduct by Louis Melillo against E.W., S.R., and T.M. are hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, 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 20, 2010
DATE

CARIDAD F. RIGO, ALJ

Date Received by Agency: September 20, 2010

Date Mailed to Parties:

lr

APPENDIX

WITNESSES

For Petitioner:

Dennis J. Kelly
Sandra Llerena
Maria Esteves
Charles Smith
S.R.
Y.R.
T.M.
E.W.
M.W.

For Respondent:

Dr. Jose Chua
Jay Mills
Louis Melillo

EXHIBITS

For Petitioner:

P-1: Certificate of Determination
P-2: Board Resolution - Certification of Tenure Charges
P-3: Melillo's Salary from 1997-1998 through 2004-2005.
P-4: Elizabeth Education Association, CBA 2004-2005 and 2005-2008
P-5: Elizabeth Education Association, CBA 2006-2009
P-6: Job Description: Head Custodian, Elementary Schools
P-7: Job Description: Head Custodian, Middle; Community; and, High Schools
P-8: July 29, 2004 letter from Superintendent Dunn to Melillo advising him of his suspension with pay during the pendency of tenure charges

P-9: November 18, 2005 letter and resolution from Aida Garcia to Melillo advising him of his suspension with pay during the pendency of tenure charge

P-10: August 4, 2005 letter from Acting Superintendent, Pablo Muñoz to Melillo advising of his increment withholding and for 2005-2006 year

P-11: July 10, 2006 letter from Aida Garcia to Melillo advising of increment withholding for 2006-2007 year

P-13: July 23, 2004 statement of Sandra Llerena to DYFS investigator Baker

P-14: July 23, 2004 Statement of Sandra Llerena to Police Detective Rey

P-15: July 23, 2004 Statement of Maria Esteves to DYFS investigator Baker

P-16: July 27, 2004 statement of E.W. to C. Smith

P-17: July 27, 2004 statement of S.R. to C. Smith

P-18: July 27, 2004 statement of T.M. to C. Smith

P-19: August 12, 2004 statement of M.D. to C. Smith

P-20: August 12, 2004 statement of J. Mills to C. Smith

P-22: July 21, 2004 statement of S.R. to Police Detective Rey

For Respondent:

R-4 Indictment No. 04-12-014311

R-5 Statement of Melillo dated October 20, 2004 (admitted over Petitioner's objection)

R-6 Judgment of Acquittal

R-11 Letter from Munoz to Melillo dated August 4, 2005

R-13 Grievance dated July 25, 2006 (exhibit was withdrawn by respondent)

R-16 Memo from Yoland Walton to L. Cuoto, dated September 15, 1997

R-17 Performance Appraisal January 26, 1999

R-18 Letter from Dora Cayado to Luis Cuoto, dated April 7, 2000

R-23 Letter from Melillo "To Whom it May Concern," dated December 3, 2003

R-24 Letter from Melillo "To Whom it May Concern," dated February 2004

R-25 Letter from Melillo "To Whom it May Concern," dated April 2004

R-29 Time card S.R.

R-30 Time card T.M.

R-31 Time card G.W.

R-32 Time card M.D.

R-33 Report of Dr. Fishkin

R-34 Report of Dr. Chua

R-38 Order of Expungement, dated January 20, 2006

R-39 Order to Open Expunged Records dated February 7, 2007

R-40 Letter from D.A.G. Eglentowicz to Judge Rigo, dated June 7, 2007

R-41 Trial transcript, State v Melillo, dated September 27, 2005

R-42 DYFS Reporting/Documentation Form

R-43 Police Report, dated July 15, 2004

R-44 Dennis Kelly statement to Elizabeth Police, dated, July 16, 2004

R-45 DYFS Interview Notes for Kelly dated, July 23, 2004

R-46 Maria Estevez statement

R-47 Sandra Llerena statement

R-48 G.W. statement to Kelly

R-49 T.M. statement to Kelly dated, July 16, 2004

R-50 E.W. statement to Kelly dated, July 16, 2004

R-51 S.R. statement to Kelly dated, July 16, 2004

R-52 Smith interview notes for Estevez – July 29, 2004

R-53 Smith memo to Aida Garcia, dated August 18, 2004

R-54 S.R. statement to DYFS, dated July 21, 2004

R-55 Smith interview notes for S.R., dated July 27, 2004

R-56 E.W. statement to Elizabeth Police, dated July 21, 2004

R-57 T.M. statement to Elizabeth Police, dated July 21, 2004

R-58 T.M. statement to DYFS, dated July 21, 2004

R-59 Smith interview notes for T.M., dated July 27, 2004

R-60 E.W. statement to DYFS, dated July 21, 2004

R-62 Exhibit Mills-1 from Mills Deposition

R-63 Exhibit Mills-2 from Mills Deposition

R-64 June 27, 2007, Resolution re: Withholding of July 2008 Increment

R-67 Custodian Salary Guides 2006-2007 to 2008-2009

R-69 Custodian Salary Guides 2008/2009 to 2011/2012

R-70 Letter from Rojas to Custodians dated February 14, 2000

R-71 Letter Dunn and Fajardo to Staff dated February 22, 2000

#489-10

D.L.G. and B.B.-G., on behalf of minor child, O.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners challenged the decision of respondent Board to expel their son in the aftermath of a January 9, 2009 incident at the high school in which a fellow student was allegedly assaulted by O.G. and members of his family. The attack included strikes inflicted upon the student with a baseball bat. Petitioners sought reversal of the expulsion decision, reinstatement of O.G. as a student at Millburn High School, and reimbursement for costs of litigation and attorney fees. The Board sought dismissal of the petition in its entirety.

The ALJ found, *inter alia*, that: the testimony of O.G. was not credible as it differed dramatically from all of the other numerous accounts of the incident, which was consistently described by witnesses as a vicious attack upon a fellow student by O.G. and members of his family, using a baseball bat; the Board was not arbitrary, capricious or unreasonable in finding that O.G. was involved in the altercation, and that he was subject to discipline; O.G. was provided with the requisite due process before the Board imposed discipline stemming from the incident; the action of the Board in imposing an expulsion, however, was contrary to the requirements of *N.J.A.C.* 6A:16-7.5(a)(1) which requires a long-term suspension and a second subsequent infraction warranting suspension or expulsion before educational services may be discontinued. Accordingly, the ALJ concluded that O.G. must be permitted to return to school and his record amended to reflect a long-term suspension, and ordered the Board to permit O.G. to return to Millburn High School.

Upon a full and independent review, the Commissioner concurred with the ALJ's findings, and adopted the Initial Decision with the following modification. *N.J.S.A.* 18A:37-5 and *N.J.A.C.* 6A:16-7.3(c) provide the Board the authority, at the completion of a long term suspension, to either reinstate the student or to continue the suspension. Based on the nature and severity of the circumstances surrounding the attack in this case, the Commissioner found that the Board shall determine whether O.G.'s suspension should continue or whether he should return to the general education program, and – if the suspension is determined to continue – to identify and effectuate O.G.'s placement in an appropriate alternative education program pursuant to *N.J.A.C.* 6A:16-9.

This synopsis is not part of 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 12, 2010

OAL DKT. NO. EDU 07239-09
AGENCY DKT. NO. 107-5/09

D.L.G. and B.B.-G., on behalf of minor child, O.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN ESSEX 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 filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the Millburn Township Board of Education ("Board"). This case involves a student, O.G., who was expelled by the Board based upon an incident on school grounds wherein O.G. and his older brother attacked another student in an altercation which involved the use of a baseball bat. O.G.'s father was also on the scene and involved in the altercation. The Administrative Law Judge (ALJ) found that the Board was not arbitrary, capricious or unreasonable in finding that O.G. was involved in the altercation, and that he should be subject to discipline. The ALJ, however, found that the Board could not expel O.G. as a result of the incident because O.G. has never served a long-term suspension based on a prior incident as required by *N.J.A.C.* 6A:16-7.5(a)(1).

The Board takes exception to the ALJ's determination that O.G. could not be expelled for his conduct during the altercation. In its exceptions, the Board argues that the ALJ misapplied the Commissioner's interpretation of *N.J.A.C.* 6A:16-7.5(a)(1) in *M.R. v. Board of*

Trustees of the Hoboken Charter School, Commissioner Decision No. 89-10, decided March 22, 2010. The Board contends that since O.G. was suspended for longer than ten days prior to the Board's decision to expel him, the Board complied with the applicable statutory and regulatory provisions. The Board maintains that the plain meaning of *N.J.A.C.* 6A:16-7.5(a)(1) should be applied, arguing that there is nothing in the regulation that requires a student, prior to being expelled, to have first served a long-term suspension for an earlier infraction.

The petitioners take exception to the ALJ's finding that the Board did not in an act arbitrary and capricious manner, or in violation of O.G.'s due process rights. In their exceptions, the petitioners argue that O.G. and his counsel were deprived of a sufficient opportunity to prepare for and participate in the hearing before the Board. The petitioners contend that the Board violated O.G.'s due process rights by denying his counsel's request for an adjournment of the hearing to allow counsel additional time to prepare, and because at the time O.G. would not testify because of a pending criminal investigation.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearings conducted at the OAL on April 21, June 7 and June 17, 2010, the Commissioner concurs with the ALJ that O.G. was provided with the requisite due process before the Board determined to impose discipline stemming from the altercation. The Commissioner also finds that the Board was not authorized to expel O.G. because he has never served a long-term suspension for a prior incident. *N.J.A.C.* 6A:16-7.5(a)(1). There is no question that O.G.'s conduct was sufficiently serious to warrant suspension or expulsion, but it is undisputed that O.G. has never served a long term suspension for any other incident.

The Commissioner further agrees with the ALJ that the Board's argument related to *N.J.A.C.* 6A:16-7.5(a)(1) is unpersuasive. O.G.'s suspension for more than ten days for this

incident prior to the action by the Board to expel him simply does not equate to the serving of a prior long-term suspension. In *M.R., supra,* the Commissioner found that, under *N.J.A.C.* 6A:16-7.5, expulsion – i.e., discontinuance of educational services – can only take place after a student has "engaged a second time in conduct warranting possible suspension or expulsion, after having first served a duly imposed long-term suspension for an earlier infraction."[1]

Although expulsion was not the appropriate discipline in the absence of the required suspension for a prior incident, the regulations provide the Board with the authority, at the completion of a long-term suspension, to either reinstate the student or to continue the suspension. *N.J.S.A.* 18A:37-5; *N.J.A.C.* 6A:16-7.3(c). Based on the nature and severity of the circumstances surrounding the attack in this case, the Commissioner finds that the Board shall determine whether O.G.'s suspension should continue or whether O.G. should return to the general education program. Pursuant to *N.J.A.C.* 6A:16-7.3(c), this determination must be made based on the following criteria:

> i. The nature and severity of the offense;
> ii. The district board of education removal decision;
> iii. The results of any relevant testing, assessments or evaluations of the student; and
> iv. The recommendation of the chief school administrator, principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C.* 6A:16-7.3(c)1.i.-iv.]

Therefore, at the next scheduled Board meeting the Board is directed to evaluate the factors enumerated in *N.J.A.C.* 6A:16-7.3(c)1.i.-iv, and determine whether O.G. should return to the general education program or whether O.G.'s long-term suspension should

[1] See also *N.J.A.C.* 6A:16-7.3(a)5.iv., which requires written notification to the parents of a suspended student that further engagement by the student in conduct warranting expulsion shall amount to a knowing and voluntary waiver of the student's right to a free public education.

continue.[2] If it is determined that O.G's long-term suspension should be continued, the Board must identify and effectuate O.G.'s placement in an appropriate alternative education program pursuant to *N.J.A.C.* 6A:16-9. The Board is also reminded that it must also continue to follow the applicable regulatory provisions concerning the process for determining whether the suspension should continue and/or when O.G should return to the general education program, i.e., *N.J.A.C.* 6A:16-7.3(d)-(f).

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/12/10
Date of Mailing: 11/15/10

[2] If there are currently no Board meetings scheduled within 30 days after the date of this decision, the Board is directed to schedule a special meeting to determine whether O.G.'s suspension should continue.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07239-09
AGENCY DKT. NO. 107-5/09

D.L.G. AND B.B-G. ON BEHALF OF O.G.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,
Respondent.

Harry Jay Levin, Esq., for petitioners (Levin Cyphers, attorneys)

Anthony P. Sciarrillo, Esq., for respondent (Lindabury, McCormick, Estabrook and Cooper, attorneys)

Record Closed: September 1, 2010 Decided: September 22, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioners are the parents of O.G., a student at Millburn High School. They are challenging the decision of the Millburn Board of Education (the Board) to expel him in the aftermath of a January 9, 2009, incident at the high school in which a fellow high school student was allegedly assaulted by O.G. and members of his family.

PROCEDURAL HISTORY

Petitioners filed their appeal before the Commissioner of Education on May 29, 2009. The Board filed an answer and the contested case was transmitted to the Office of Administrative Law (OAL) on June 18, 2009.

At the time of the filing of their petition, petitioners were represented by Darren Del Sardo, Esq. The case was initially scheduled for hearing on August 31, 2009, and October 6, 2009. The parties appeared and engaged in promising and extensive, but ultimately unsuccessful, settlement discussions. I indicated that I expected to proceed with formal testimony on the next scheduled date, November 18, 2009. However, Mr. Del Sardo appeared that day, and sought leave to withdraw as counsel. After a lengthy discussion, on the record, I granted his application. Mr. Del Sardo represented that he could not reach an accord with O.G.'s parents on trial strategy or other matters essential to an appropriate presentation of his case on O.G.'s behalf. It appeared to me that the attorney-client relationship was irreparably damaged, and that Mr. Del Sardo would have been unable to properly represent O.G.'s interests.[1]

The hearing was scheduled to continue on December 7, 2009, however I advised petitioners that I would entertain an adjournment request made by newly retained counsel. I heard nothing further, and on December 7, 2009, two attorneys, Gerald Graves, Esq., and Maury Winkler, Esq., appeared on petitioners' behalf and asked for an adjournment. I scheduled new dates which were convenient for the schedules of all counsel. Ten days prior to the next hearing date, January 22, 2010, Mr. Graves and Mr. Winkler advised me that they were withdrawing from the case. Petitioners appeared unrepresented on January 22, 2010, and sought a further adjournment, representing to me that they were encountering difficulty retaining a new attorney. With much hesitation, but in the interest of ensuring that petitioners were given every opportunity to adequately present their case, I rescheduled the hearing for March 11, 2010.

[1] This conclusion is in no way intended to be construed as a comment on Mr. Del Sardo's professionalism or competency.

Petitioners' present counsel, Mr. Levin, appeared, but again sought an adjournment, having been retained only days earlier. After a lengthy discussion, I granted his request.

On March 18, 2010, petitioners filed a motion seeking to vacate O.G.'s expulsion, citing alleged procedural errors in the hearing process before the Board. Opposition to the motion was filed on April 9, 2010. I advised counsel on April 21, 2010, that I would reserve decision on petitioners' motion until the conclusion of the hearing. Hearings were conducted on April 21, 2010, June 7, 2010, and June 17, 2010. On May 27, 2010, the Board filed a motion to quash a subpoena issued by petitioners for the testimony of Board member Samuel Levy. I granted the Board's motion via letter order dated June 7, 2010.

Post-hearing submissions were filed on August 6, 2010. While in the process of reviewing the parties' submissions, I became aware of the recent Commissioner's decision in M.R. v. Board of Trustees of the Hoboken Charter School, EDU 09662-09, Final Decision (March 22, 2010) <http://lawlibrary.rutgers.edu/oal/search.html>. I conferred with counsel and held the record open to permit them an opportunity to address this holding and its relevancy to the present matter. Supplemental briefs were timely filed by both counsel, and the record closed on September 1, 2010.

FINDINGS OF FACT

Stipulated Facts

The parties stipulated to the following facts, and I **FIND**:

1. O.G. was a full-time student attending Millburn High School during the 2008–2009 school year.

2. O.G. was suspended from Millburn High School for a period of nine days beginning January 12, 2009, pending a Board of Education hearing.

3. A letter dated January 13, 2009, was sent from Richard L. Brodow, superintendent of schools, to D.L.G., father of O.G., advising that his recommendation to the Board of Education was that O.G. be expelled from Millburn High School, or, in the alternative, that O.G. be placed on a one-year suspension.

4. At a special meeting held on February 11, 2009, a hearing was conducted regarding the expulsion of O.G. from the Millburn Township School District.

5. A decision of the Millburn Township Board of Education in the disciplinary hearing of O.G. was issued on March 4, 2009, upholding the superintendent's recommendation and expelling O.G. from the Millburn Township School District.

The Procedural History Before the Board

The following facts are uncontroverted, and I **FIND**:

A board-level hearing was initially scheduled for January 21, 2009, but was adjourned at the request of O.G.'s parents to allow them sufficient time to secure counsel. The hearing was rescheduled for February 2, 2009, but on January 30, 2009, the family requested another adjournment. Apparently, they had retained an attorney who realized that he had a conflict of interest and withdrew his representation. Their request again was granted, and the hearing was rescheduled for February 11, 2009, at which time O.G. and his parents appeared, represented by Darren Del Sardo, Esq., who indicated that he had been retained only the week before.

Del Sardo advised that criminal charges were pending against O.G., arising out of the same incident. O.G. intended to assert his Fifth Amendment right against self-incrimination and thus would be unable to testify that night. Accordingly, Del Sardo urged that the hearing again be adjourned at least until he had received discovery from the prosecutor. The Board attorney recommended that no adjournment be granted, citing the thirty-day requirement for the scheduling of a hearing found at N.J.A.C. 6A:16-7, and the fact that the hearing had already been twice adjourned.

The president of the Board, Samuel Levy, presided over the proceeding that evening. After some colloquy with Del Sardo regarding whether the matter could be adjourned in light of the regulatory thirty-day requirement, and whether Del Sardo was obligated to seek a formal stay of the board-level hearing, Levy asked Del Sardo the following question:

> Would [O.G.] and his family be willing to waive any civil lawsuit against the district or the Board of Education in concert with this request?
>
> [J-3 at 15.]

Del Sardo requested an opportunity to confer with his clients, which was granted. After a brief recess he advised the Board that a postponement of the hearing was "certainly not enough to waive any civil suit that may be brought against the Board of Education or the district." (J-3 at 15–16.) Del Sardo did not express any concern that Levy's comment was somehow inappropriate, rather, he clearly viewed it as a settlement overture, because he continued by stating, "I would be happy to talk about some resolution with your attorney that may encompass that, but that one component would not be enough to get this family to waive a potential civil suit." (J-3 at 26.) Levy reacted to Del Sardo's reply by stating "fair enough," and indicating that the Board did not wish to discuss settlement further that evening.

The adjournment request was denied, and the hearing proceeded. Although neither O.G. nor any member of his family testified, three witnesses were called by O.G., and Del Sardo cross-examined the seven witnesses presented by administration. The parties agreed to waive the five-day limit for the issuance of a decision to afford them an opportunity to continue to explore settlement. N.J.A.C. 6A:16-7.3. Those efforts proved unsuccessful. A resolution formalizing its decision was passed by the Board on March 9, 2009. (R-5.) O.G. was placed on homebound instruction pending an appeal before the Commissioner of Education. He has remained on homebound instruction to date.

The Record Below

The parties stipulated to the admissibility of several joint exhibits, including the transcript of the proceedings before the Board. (J-3.) I **FIND** that the Board had the following facts before it when it rendered its decision:

A.S., then a student at Millburn High School, testified that as he exited school on January 9, 2009, he observed O.G. and his brother, L.G., cursing and pointing "into [J.F.'s] face." J.F. was a friend, so A.S. asked O.G. and L.G. to leave J.F. alone. According to A.S., L.G. stated, "I'll shoot you in the face," and O.G. added, "yeah, let's shoot him." The parties exchanged angry words. O.G. and L.G. returned to their car and retrieved a baseball bat. A.S. responded to them, "are you serious, you're going to hit me with a baseball bat, like really?" The record is unclear which brother replied, but according to A.S. one stated, "you are going to meet the other end of this bat." (J-3 at 19.)

A.S. related that L.G. hit him in the leg with the bat, and O.G. grabbed him from behind when he tried to wrestle the bat away from L.G. A.S. was able to throw O.G. on the ground, and A.S. began to hit him, but he soon felt O.G.'s father, D.L.G., holding him down and pushing him onto the sidewalk. A.S. testified that he never saw O.G. actually wielding the bat, but through much of the attack could not see who was hitting him because of his position on the ground. Someone hit A.S. in the head with the bat. A.S. sustained cuts on both legs, a bump on his face, and a bruise where he had been struck initially by the bat. He was transported to the hospital by ambulance. A.S. suffered from headaches for several days in the aftermath of the incident, and limped for about a week.

J.F. corroborated that O.G. and L.G. confronted him that day as he exited school, and that A.S. came to his defense. He likewise confirmed that O.G. stated that he was going to get a gun, and that he and his brother went to their car and returned to the scene with a baseball bat. J.F. witnessed "a swing to [A.S.]'s legs." J.F. observed A.S. surrounded by the members of the G. family, unable to get up. J.F. ran back into the school for help.

Peter Costanzo was parked that afternoon outside the school, waiting to pick up his son. Costanzo observed what appeared to be a contentious exchange between three boys. Two walked away toward the parking lot, and it appeared uncontroverted that these two young men were O.G. and L.G. Several seconds later he heard a commotion, and "saw someone being pummeled with a baseball bat." (J-3 at 61.) He described the victim as being down on the ground. Costanzo ran toward the altercation, and repeated "give me the bat." He was convinced that someone would be seriously injured. Costanzo described the assault as follows:

> It was so quick and so instantaneous and so violent and ferocious that I can't say I did see anything. All I know is I went into the altercation and pulled the bat away. . . I didn't see the swinging of the bat by any one person. I saw the victim being pummeled and I saw the bat being swung.
>
> [J-3 at 66.]

Costanzo informed the Board that he wrestled the bat away from O.G. and L.G. When asked if both O.G. and L.G. were holding the bat, Costanzo replied that, "[i]t was clear to me they were acting in concert." (J-3 at 66.)

J.S. exited the school that day with A.S. and observed J.F. talking with O.G. and L.G. J.S. confirmed that it was not a friendly conversation, and that A.S. interceded in J.F.'s defense. Tensions escalated and O.G. stated that he was going to "shoot" A.S. O.G. and L.G. ran to their car and retrieved a baseball bat. J.S. testified that he observed the following:

> A. [L.G.] told [O.G.] to hold [A.S.]. So he took his shoulders and [L.G.] hit [A.S.] in the leg with the bat.
>
> Q. So [O.G.] was holding [A.S.]'s shoulders?
>
> A. Yes, while [L.G.] came around the back and hit him with the bat. Then a fight broke out. As soon as the fight broke out, Mr. [G.] came from his car and held [A.S.] and punched him with his two sons. All three of them were completely assaulting him, and nothing could be done.

> Nothing could be done because it was three people beating up one person.
>
> [J-3 at 74.]

On cross-examination, J.S. remained adamant that he observed O.G. hold A.S. at his brother's direction, and that he did so prior to A.S. being struck with the bat by L.G. Counsel for O.G. pointed out that a statement completed by A.S. after the incident recounted that O.G. held him down after the bat was wielded by L.G. J.S. replied, "I was looking at what was going on and [A.] was experiencing it. I had a better perspective to see it." (J-3 at 88.) J.S. testified that he observed O.G. punch A.S. "numerous times." (J-3 at 85.) While he was certain that A.S. was struck by the bat repeatedly, J.S. could not tell who was wielding the bat once the fight broke out. He admitted that the incident happened very quickly, and that he was unclear about some details, including whether D.L.G. struck A.S. or merely held him while his sons hit him.

Two additional student witnesses did not recall the events in a manner that was entirely consistent with J.S.'s testimony. M.P. observed O.G. and L.G. confront A.S. verbally, and she heard L.G. state that he was going to get a gun and shoot A.S. L.G. went to his car, retrieved a bat and struck A.S. with it. She did not observe A.S. being held by O.G. She did observe what she described as a rumble involving all three boys, and stated that D.L.G. "jumped in." O.G. was throwing numerous punches, and both O.G. and L.G. struck A.S. while D.L.G. held him down. M.P. claimed to have witnessed the entire incident, but only saw A.S. being struck one time with the bat. M.P. testified that she did not see O.G. wielding the bat.

The incident was also witnessed by A.C., who had exited the building once the altercation was already underway. She observed D.L.G. holding A.S. down, and O.G. punching him in the head numerous times. She likewise did not observe the bat being used as a weapon, or O.G. holding A.S. so that his brother could strike him with the bat.

The testimony reflected that the events that afternoon happened quickly, were unprecedented at Millburn High School, and were shocking to the witnesses. With four individuals scuffling and fighting, the witnesses plainly had difficulty ascertaining certain

details of what occurred. But the significant facts were clearly presented to the Board. On the afternoon of January 9, 2009, as school was being dismissed at Millburn High School, words were exchanged between A.S., O.G. and O.G.'s older brother, L.G.[2] O.G. and L.G. walked away, retrieved a baseball bat from their car, and L.G. struck A.S. with the bat. A fight ensued, with O.G. and L.G. actively participating. It is not clear if O.G. wielded the bat, but it is clear that A.S. was struck by it several times. It is quite clear that O.G. attacked A.S. in concert with his brother, and threw punches. A.S. was on the ground, and although he may have tried to throw some punches himself, he was clearly outmatched. The odds became even more uneven when, moments later, O.G.'s father, D.L.G., joined in the fracas. Ultimately, an adult bystander, Peter Costanzo, wrestled the bat away from O.G. and L.G. and together with other bystanders assisted in breaking up the altercation. A.S. was taken into the school, and the police and paramedics were summoned. The paramedics were sufficiently concerned about the injuries sustained by A.S. that they transported him to the hospital via ambulance.[3]

None of the remaining witnesses who appeared at the board-level hearing were present when the January 9, 2009, incident took place. Michele Pitts is the vice principal at Millburn High School. On January 9, 2009, she was in her office when J.F. ran in to inform her that A.S. was "being beaten up." (J-3 at 105.) Pitts ran outside, and alerted her secretary to contact the police. By the time she arrived at the scene, A.S. was being carried into the building. She saw "a lot of blood" and the students present informed her that the G. family had beaten up a student. She approached the G. family car as it started to move. She motioned to it to stop, but it did not. Pitts was grazed by the car. Apparently, however, the G. family did not leave school property, as they were still in the lot forty-five minutes later when the paramedics had readied A.S. for transport.

Pitts described a horrifying scenario. Paramedics had to cut off A.S.'s jeans to address his injuries. She recalled that "there were a lot of upset hysterical kids crying and screaming, saying you had to see it, it was awful." (J-3 at 107.) Pitts witnessed the

[2] L.G. is a graduate of Millburn High School.
[3] One witness stated that O.G. struck another adult bystander who tried to intervene, a Mr. Miller. No other witness corroborated this, and Mr. Miller did not testify.

G. family observing the events, and she related to the Board that she saw D.L.G. laughing as A.S. was transported by the paramedics. At one point, L.G. began to yell at the students gathered around, "so everybody got excited all over again." (J-3 at 108.)

Pitts informed the Board why she supported the decision to expel O.G.:

> The event was so outrageously violent, and in my experience in this school and every other school, I have never witnessed anything like there [sic]. . . . In fact, for the last month we've done nothing but try to do damage control. We're getting reports from the guidance counselors that students who weren't even there but heard of it, especially ninth graders, have been traumatized and are seeking counseling.
>
> [J-3 at 110.]

Pitts felt that the school community needed to heal, as there was much upset and fear. She distinguished the incident from a fight between two students, and characterized it as an assault because O.G. was assisted by two adult family members. Although she admitted that, in her experience, no prior fight between students had led to a recommendation for long-term suspension or expulsion, in her mind this was different. In compelling testimony she stated:

> I think one of the saddest things I've heard out of all of this that keeps coming back to me is that the students all said that they felt relieved when Mr. [G.] got out of the vehicle because they thought Mr. [G.] was going up to stop this attack, and Mr. [G.] proceeded to grab [A.] from behind so that his two sons could continue to hit him. I had a lot of trouble wrapping my head around that, and about 40, 50 students made that comment to me. I didn't see it, but it was reported by the students. So they felt, oh, good, aid is on the way, a parent is here to help.
>
> [J-3 at 118.]

Cross-examination by counsel for O.G. attempted to highlight the discrepancies in the varying recollections of the events, but more importantly, elicited testimony

regarding an atmosphere of harassment and discrimination at Millburn High School. Counsel questioned Pitts at some length regarding altercations the prior day, January 8, 2009, between O.G. and several other students. Dr. Pitts had interceded and mediated the dispute between O.G. and his fellow students.

This continued to be the thrust of O.G.'s presentation when he offered his first witness, D.M., also a student at the high school, and a friend and fellow member of the African-American Club. D.M. was not present on January 9, 2009. While he stated that he heard that students had "ganged up" on O.G. that day, he admitted that he had received this information from students who, like him, had not actually witnessed the events that afternoon. D.M. did return to the school when he learned of the incident, arriving when the police were already on the scene. He testified that people were screaming at him, "you're dead, your friend and his brother are fucking psycho, we're going to kill you guys, you guys are fucking wiggers and wangsters." (J-3 at 149.)

D.M. stated that racial slurs are common at the high school and that O.G. is often called "nigger" by his classmates. D.M. described the events of January 8, 2009. When D.M. arrived at his eighth-period class O.G. informed him that he had been verbally assaulted by other students. D.M. testified that he then heard J.F., A.S. and R.C. referring to O.G. as "nigger pussy," and A.S. telling him "he was going to kick his black ass." D.M. testified that he found this quite upsetting, and that this incident was part of a pattern of harassment against O.G. When the exchange became heated, a teacher broke it up. D.M. testified that he informed a member of administration, Dr. Keenan, about the incident. D.M. stated that he had never spoken to A.S. before, and that he was not one of the students who typically harassed O.G.

Earlier in the day, according to D.M., O.G. had been harassed by two other students, R.M. and B.C., who pushed him violently in the hallway. O.G. and D.M. confronted the two other students, and a physical altercation ensued. The matter was brought to Pitts' attention, who interviewed the students involved but imposed no discipline. Pitts informed the Board that she had found the evidence to be contradictory. She stated that there was a dispute regarding whether the word "nigger" was used, although the students admitted to using the word "pussy." A teacher who interceded

advised Pitts that he heard no racial epithets. As a result of the January 8, 2009, incidents, O.G. did not feel up to going to wrestling practice, and Pitts assisted him by helping locate the coach so that he could be informed about O.G.'s absence, and be excused.

Michael Artigliere is O.G.'s wrestling coach and attested to O.G.'s character. He described O.G. as an "upstanding citizen on the wrestling team," who is always courteous and polite. (J-3 at page 151.) Artigliere testified that there was a wrestling practice scheduled for January 9, 2009. He received a phone call that day from D.L.G. who inquired when Artigliere would be at the high school. While D.L.G. did not directly state that he wished to speak with Artigliere, he gave Artigliere the impression that he wished to do so. When Artigliere arrived at the high school, he looked for D.L.G. but could not find him. This testimony was offered to explain D.L.G.'s presence at the school that afternoon.

The final witness called by O.G. was William Miron, principal of Millburn High School. Miron testified that he was aware of one prior incident involving a physical altercation between O.G. and another student. That incident resulted in a suspension for the other student and detentions for O.G., because, according to Miron, although O.G. did not strike the other student it clearly was not an assault or a one-sided altercation. Generally, Miron described O.G. as polite and respectful. Miron informed the Board that he was aware of the incident on January 8, 2009, aware of O.G.'s contention that he was bullied by other students, and that this bullying included racial slurs and epithets. Miron urged that Pitts, who has a background in guidance, was working to mediate the dispute between O.G. and the other students. But, in troubling testimony, Miron stated:

> The day before, Mr. Keenan, the other Vice-President [sic], had a conversation with [O.] sometime after the conflict resolution meeting and appealed to [O.] that if there are problems, please report it to us, let the administration know about things so we can take care of it. His response on that was, and I don't have an exact quote, but his response was something to the effect of Mr. Keenan I understand what you're saying about reporting it to you; however, that's not

> what my father wants me to do or expects me to do. That's a very big concern for us at this stage.
>
> [J-3 at 165–66.]

Questioning from counsel for O.G. implied that Miron sought to punish O.G. for his father's actions. But Miron stated that what truly worried him was that O.G. would continue not to follow the administration's directives. Rather, he would continue to be incited to violence by his father.

Miron testified at length regarding the effect this incident had on the Millburn High School community. A.S. had never been previously linked to difficulties with O.G. and his family, and it was perceived that the only mistake he made that January day was interfering in the altercation between O.G., L.G. and J.F. As a result, other students were frightened, because the attack felt random, and left them feeling that "anything is possible." That day, Miron noted, "[i]t was almost like watching a television show or a news broadcast of Columbine where you had kids that were truly in tears. They were just in shock of what was going on." (J-3 at 168.)

The Testimony at the OAL Hearing

At the hearing at the OAL, O.G. testified on his own behalf, and called Dr. Pitts, Dr. Brodow and Dr. Miron as witnesses. O.G.'s testimony offered insight into what the Board might have heard had it granted his adjournment request, and O.G. had chosen to testify. Having had the opportunity to hear O.G.'s version of the events, I **FIND**, as the Board did, that O.G. and L.G. instigated a physical altercation, and assaulted A.S. with a baseball bat and their fists. D.L.G. did nothing to stop the altercation, and, in fact, participated in the assault.

O.G. spoke at some length about the atmosphere of harassment and discrimination at Millburn High School, and this testimony was quite similar in tenor and scope to the testimony provided by his friend at the board-level hearing. O.G. stressed that the problem was not remedied by Pitts' mediation and that, indeed, threatening and

harassing conduct by the other students involved in the January 8, 2009, incidents was ongoing, with seniors giving him "mean stares" the next day.[4]

O.G. called his father from school on January 9, 2009, to advise that other students continued to harass him, and O.G. testified that D.L.G. indicated that he would be at the school that afternoon anyway, as he intended to meet with the wrestling coach. O.G. informed his father that he had heard that the other students "were going to bring weapons to try to jump [him] after school." O.G. spoke with his brother during the same telephone conversation, and L.G. indicated that he intended to come to school as well that afternoon, to watch O.G. wrestle.

O.G. explained why a baseball bat was in the family car in January, when it was not baseball season. According to O.G., the bat was part of a sports-memorabilia collection that he intended to display at the high school. He brought in various pieces of memorabilia to share with me at the hearing, including a contract from the Negro Leagues, photographs of Muhammad Ali, and a boxing glove signed by Ali. The baseball bat was not owned by a famous athlete, and in that respect it differed from the rest of the items collected by O.G. The bat had been used by O.G. when he played little league, an activity in which he was no longer engaged. But O.G. was sentimental about his involvement in little league baseball, and testified that before he lost interest in the sport he was quite talented at it, and thus wanted to include his own bat in the sports-memorabilia display.

The most critical testimony offered at the hearing before me was O.G.'s description of the events of January 9, 2009. His version was strikingly at odds with that of the witnesses at the Board hearing. O.G. testified that he exited the school, dropped his bag off in the family car, and proceeded to return to the building with his brother, who intended to watch him wrestle. He stated that J.F. attempted to incite a confrontation by insulting L.G. L.G. replied that he just wanted to watch O.G. wrestle, and according to O.G., they attempted to walk quickly into the building and avoid an

[4] O.G. reiterated that the atmosphere of harassment existed even in the prior school year, and he related the incident in the locker room that resulted in a physical altercation. The other student was suspended as a result, and O.G. was given detention. This history had been shared with the Board at its hearing.

altercation. But A.S., who was also at the scene, had seven friends blocking their path. A.S. then called L.G. over to the side to talk. According to O.G., the group of students blocking the door had now grown to ten students. A.S. began to threaten L.G., stating, "I'll knock your fucking head off." The conversation became increasingly heated and A.S. began to use racial slurs. Other students, including J.S., joined in the tirade, barraging O.G. and L.G. with obscenities and racial epithets.

O.G. related that L.G. said, "I am getting out of here," and he tried to extricate himself from the situation by running back to the car. O.G. followed, but ten to twelve students were chasing them. When they got into the car, their father advised that he did not want to be trapped there, and directed that O.G. obtain the assistance of the traffic officer by running into the side door of the building. O.G. attempted to do so together with L.G., but he could not enter the building. He testified as follows:

> They were all screaming, "we're going to get you, nigger," they were all screaming, and also remember at this point it was dismissal time, so in front of us there were the 10 students, but to the other side of us there were about 100 students that had been dismissed from school and you have to understand that they were all—they were all just trying to make a ring screaming at us so that we had the mob and the dismissal kids screaming at us at well.

O.G. testified that the crowd pushed him back, so that he could not enter the building, and that it was only then that he noticed that L.G. had the bat in his hand. According to O.G., L.G. yelled at the crowd to "get back," but at that point A.S. lunged at L.G. and punched him. L.G. struck him with the bat in reaction, and A.S. grabbed him around the waist and "[took] him down." According to O.G. the mob then attacked him and his brother. O.G. testified that A.S. punched him three times in the head, and hit L.G. in the face with the bat.

O.G. testified that his father appeared about thirty seconds later, and a student punched his father in the face. He stated that he and his brother were being attacked by twelve students, and "[L.] was getting stomped." The crowd began to attack his father as well. A grown man interceded, Mr. Miller. When Miller grabbed his father,

O.G. punched him. The brawl dispersed, and A.S. was pulled into the school building by friends. O.G. and his family attempted to go to the hospital because L.G. thought he had broken his hand. But school personnel were banging on the car as they attempted to leave. According to O.G., the students in the crowd continued to yell epithets at him, and the administration did nothing to stop them.

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as probable under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, 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). In making a credibility determination, it is appropriate to consider contradictory testimony, or testimony impeaching the witness's truth and veracity. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witness, I did not deem O.G.'s testimony to be credible.

His version of the events did not differ in nuanced ways from that of the other witnesses. Rather, his version was dramatically different, and described an incomprehensibly frightening scene with crowds of students threatening and assaulting him and his family. He does not describe events that took place quietly or privately, and yet not a single person stepped up at the Board hearing to relate a version of the events even remotely consistent with O.G.'s description. Nor is O.G.'s version of the events consistent with the injuries sustained by A.S., who clearly suffered the brunt of the attack and required a trip to the hospital. Although O.G. stated that he and his brother were attacked, and L.G. was struck in the face by the bat, there was no evidence of injuries sustained by either O.G. or L.G. that would be consistent with an attack by an angry mob.

Other aspects of O.G.'s story likewise do not "hang together." I am surprised that a treasured baseball bat, one that O.G. testified was part of a memorabilia collection

that included gloves signed by a boxing icon such as Muhammad Ali, would be used as a weapon when doing so obviously could have damaged it. There was no wrestling meet that afternoon, and friends and family do not typically attend practices. This combined with O.G.'s admission that he told his father that other students were threatening his physical safety leads to the conclusion that L.G. and D.L.G. were not at the school that afternoon to watch wrestling or confer with the wrestling coach. The Board would assert that they were there to incite violence. There is insufficient evidence to prove that their violence was premeditated, but at a minimum, I **FIND** that they were at the school to offer protection to O.G., and that their desire to protect him went terribly wrong.

Richard Brodow, then the superintendent of schools, testified before me regarding his rationale for expulsion. While he indicated that his letter to O.G.'s parents stated that he recommended either expulsion or a long-term suspension, expulsion was the penalty he had always felt was appropriate under the circumstances. (J-2.) Brodow did not witness the incident, but he corroborated Pitts' observation that L.G. was at the scene afterward, screaming and cursing at the bystanders. He stated that his recommendation was based on the fact that a bat was used as a weapon, and the absence of any proof that O.G. himself held the bat was of no consequence to him, as it was clear that O.G. participated in the assault. Brodow expressed extreme concern that O.G. has refused to accept any responsibility for the events of January 9, 2009.

Dr. Pitts testified regarding her investigation of the events of the prior day, January 8, 2009. Her testimony was consistent with that offered at the board-level hearing. She reiterated her support for the expulsion recommendation, stating that the incident created a "toxic" school environment from which the school community was just starting to heal. Dr. Miron likewise reiterated his testimony at the board-level hearing.

CONCLUSIONS OF LAW

Local boards of education are charged with protecting the health and welfare of the students entrusted to their care, and with ensuring that a thorough and efficient education is provided every day to every student in an environment that is safe, orderly

and free from disruption. N.J.S.A. 18A:37-2 establishes the authority of local boards to impose discipline, and provides that "[a]ny pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, . . . shall be liable to punishment and to suspension or expulsion from school."

Disciplined students retain extensive due-process rights. Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); N.J.S.A. 18A:37-2.4; N.J.A.C. 6A:16-7.3. Where a long-term suspension or an expulsion is recommended by the administration, the student is entitled to a board-level hearing, and the ultimate determination whether to impose the recommended discipline rests in the discretion of the board. An appeal of the board's decision may be made to the Commissioner of Education. N.J.S.A. 18A:37-2.4(c).

It is well established that the Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>, citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Accordingly, the petitioners carry a weighty burden. They must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>.

I **CONCLUDE** that petitioners have not met their burden of proving arbitrary, capricious or unreasonable action by the Board. At the hearing conducted on February 11, 2009, the Board heard highly disturbing testimony regarding an assault that sent one student to the hospital, and where a baseball bat was wielded as a deadly weapon. The attack was described by an adult witness as "violent and ferocious," and happened so quickly and was so shocking to bystanders that it is unsurprising that the various witnesses who testified at the board-level hearing offered descriptions of the events that differed as to some small details. But the several students and the adult witness who described the events that afternoon consistently described the most salient detail, that is, that O.G. and the members of his family viciously attacked a fellow Millburn High School student using a baseball bat. O.G. urges that he did not wield the bat, assist his brother in striking A.S. with it, or, indeed, ever hold the bat in his hands. While there was testimony that the bat was wrestled away from both O.G. and L.G., O.G.'s defense, even if true, is unavailing. The witnesses to the assault all testified that O.G. fully participated in the attack on A.S. Not a single witness, other than O.G., asserted that A.S. provoked his attackers.[5]

The determination of the Board to impose an expulsion was reasonable under the facts it heard that evening. The Board made its decision based on the needs of its unique school community. An assault of this nature and gravity was unprecedented in Millburn. This was clear from the reaction of the student community, which by several accounts was distraught in a manner reminiscent of Columbine. Days were devoted to counseling. The school environment was described by one administrator as "toxic." It took some time to regain the ability to turn the attention of the administration full time once again to its primary task, educating the student body.

Nor do I concur with petitioners that the hearing conducted on February 11, 2009, was procedurally flawed. The hearing required by law is described at N.J.A.C. 6A:16-7.3, and must include the opportunity for the student to confront and cross-examine witnesses and "present his or her own defense and produce oral testimony or

[5] Were it clear that O.G. wielded the bat, N.J.S.A. 18A:37-2.2 would have provided additional authority for the Board's action here. The record reflects that O.G. and L.G. attempted to cause bodily injury to A.S., per N.J.S.A. 2C:12-1, and that the bat was being used as a "bludgeon," per N.J.S.A. 2C:39-1(r).

written supporting affidavits," N.J.A.C. 6A:16-7.3(a)(10)(ii). The transcript of the record below confirms that O.G. appeared that evening represented by counsel, who presented witnesses on his behalf and cross-examined the witnesses who testified on behalf of the administration.

O.G.'s argument that his procedural rights were violated because the adjournment was denied is without merit. While a defendant in a civil matter has the absolute right against self-incrimination, he has no absolute right to a stay of a civil matter pending the outcome of criminal proceedings against him. National Freight, Inc. v. Ostroff, 133 N.J. Super. 554 (Law Div. 1975); Bd. of Educ. of S. Plainfield v. Wood, EDU 8447-98, Initial Decision (July 11, 2000), aff'd, Comm'r (August 18, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>. There is no constitutional barrier that precludes requiring O.G. to choose whether to testify in the administrative proceeding or invoke the Fifth Amendment, even though providing testimony may have aided the ongoing criminal investigation. State v. Kobrin Sec., 221 N.J. Super. 169, 174 (App. Div. 1987), rev'd on other grounds, 111 N.J. 307 (1988). The Board below sat as a quasi-judicial body, and had the discretion to grant or deny the request before it. The Board was required to consider the equities, and balance the nature and substantiality of the injustices claimed on either side. Ibid. A stay should not be granted "unless no hardship, prejudice or inconvenience would result to the one against whom the stay is sought." Insurance Co. of N. Am. v. Allied Crude Vegetable Oil, 89 N.J. Super. 518, 541 (Ch. Div. 1965).

The record before me offers no evidence that the Board improperly exercised its discretion when it insisted that the hearing move forward on February 11, 2009, and I **CONCLUDE** that its refusal to grant an adjournment did not deny due process to O.G. The hearing had been twice adjourned before, witnesses were present and were prepared to testify, counsel had been retained by the Board and was present, and the members of the Board had gathered together that evening. As school district administrators compellingly testified, the district ached for closure to an incident that had taken the attention of the school community away from its essential mission, and had caused Millburn High School students to fear coming to school.

Consistent with the notion that disciplinary matters are best resolved expeditiously, the regulation requiring that a hearing be conducted within thirty days speaks in the imperative, and states that "[a] formal hearing . . . shall . . . [t]ake place no later than 30 calendar days following the day the student is suspended." N.J.A.C. 6A:16-7.3(a)(10)(iii) (emphasis supplied). Conversely, denying an adjournment caused no harm to O.G., for indeed, it has been held that a civil defendant may assert his Fifth Amendment right or tell the truth, and "'[t]he truth is always the truth, and telling the truth will not hurt anyone except in so far as he ought to be hurt.'" National Freight, supra, 133 N.J. Super. at 559 (quoting In re Vince, 2 N.J. 443, 457 (1949)). The equities thus weighed heavily in favor of moving forward that evening.

I reserved on a motion filed by O.G. seeking to rescind his expulsion because the Board failed to grant the requested adjournment. I advised counsel that I felt the testimony at hearing might inform my ultimate decision on the issues raised by the motion. It did so. At the hearing before me, O.G. offered a version of the events that lacked credibility, and in no way caused me to question the reasonableness of the Board's decision below. His description of the racially charged atmosphere at Millburn High School was most concerning, but was a part of the record before the Board through the testimony of his friend, D.M. O.G.'s concerns were being investigated by the administration and those efforts should be ongoing. However, no words or epithets could possibly justify the violence that took place that January afternoon, nor did the Board abuse its discretion by determining that discipline was appropriate under the circumstances, even in the face of O.G.'s complaints about his treatment at the high school. There are appropriate ways to address O.G.'s very serious and disheartening allegations, but a baseball bat is not among them.

Petitioners urge that the Board president acted improperly in attempting to condition the adjournment that evening on a waiver of a subsequent civil suit. I might not have approached the adjournment request in quite the same way, but again, I may not substitute my judgment for his. His comment did not render the ultimate decision by the Board arbitrary, capricious or unreasonable. The Board president was clearly attempting to engage in settlement discussions, and counsel for petitioners made it

plain by returning with a counteroffer that he took the president's comments in just that way.

However, the actions of the Board in imposing an expulsion ran afoul of the requirements of N.J.A.C. 6A:16-7.5(a)(1), as interpreted by the recent decision in M.R. v. Board of Trustees of the Hoboken Charter School, supra, EDU 09662-09, Final Decision (March 22, 2010) <http://lawlibrary.rutgers.edu/oal/search.html>. For this reason, I **CONCLUDE** that O.G. must be permitted to return to school. The regulation states that "[a] district board of education may expel, that is discontinue the educational services or discontinue payment of educational services for, a general education student . . . only after the district . . . has provided . . . [t]he procedural due process rights set forth at N.J.A.C. 6A:16-7.3 and 7.4, subsequent to a long-term suspension." N.J.A.C. 6A:16-7.5(a)(1). In Hoboken, the Commissioner determined that the regulation requires that an expulsion can take place only after a student has "engaged a second time in conduct warranting possible suspension or expulsion, after having first served a duly imposed long-term suspension for an earlier infraction." Hoboken, supra, EDU 09662-09, Final Decision (March 22, 2010) <http://lawlibrary.rutgers.edu/oal/search.html> (emphasis supplied).

As in Hoboken, O.G. does not have a prior disciplinary record that includes a long-term suspension for an earlier offense. The Board argues, unpersuasively, that Hoboken is distinguishable on its facts. It notes that O.G. had been suspended for more than ten days prior to the action to expel him. He thus had served a prior "long-term suspension" as required by N.J.A.C. 6A:16-7.5, whereas the student in Hoboken was initially suspended for only ten days. The Board urges that it has provided homebound instruction for O.G. and that such instruction commenced within five days, as required where a long-term suspension is imposed. N.J.A.C. 6A:16-7.3.

These factual differences notwithstanding, it remains uncontroverted that there was no earlier infraction for which O.G. served a long-term suspension as required by the Hoboken ruling. The Board correctly argues that the relevant Administrative Code provision nowhere explicitly states that expulsion can be considered only for a second serious infraction. But the Commissioner clearly has interpreted his regulation to so

require. An agency's interpretation of its own rule is owed considerable deference since the agency that drafted and promulgated the rule should best know its meaning. Passaic Educ. Ass'n v. Passaic City Bd. of Educ., EDU 12133-99, Initial Decision (May 27, 2001) <http://lawlibrary.rutgers.edu/oal/search.html> (citing In re Revision in Rates Filed by Plainfield-Union Water Co., 57 N.J. Super. 158 (App. Div. 1959)). It is the intent with which the rule or regulation was adopted that is controlling, and the Commissioner has spoken as to that intent. Dennery v. Bd. of Educ., 131 N.J. 626, 637 (1993).

Accordingly, in light of my determination that the actions of the Board were otherwise reasonable, I **CONCLUDE** that O.G.'s student record should be amended to reflect a long-term suspension. I further **CONCLUDE** that he should be permitted to return to Millburn High School.

ORDER

Based on the foregoing, the Board is **ORDERED** to amend O.G.'s student records to reflect a long-term suspension. The Board is further **ORDERED** to permit him to return to Millburn High School.

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

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

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

September 22, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

Witnesses

For Petitioners:

O.G.
Richard Brodow
Michele Pitts
William Miron

For Respondent:

None

Exhibits

Joint Exhibits:

J-1 Notice of Suspension
J-2 Letter from Brodow to D.L.G., dated January 12, 2009
J-3 Expulsion hearing transcript
J-4 Decision of the Millburn Board of Education, dated March 4, 2009
J-5 Extract from the minutes of the March 9, 2009, meeting of the Millburn Board of Education

Petitioners' Exhibits:

P-1 Photograph of Millburn High School
P-2 Photograph of Millburn High School
P-3 Photograph of Millburn High School
P-4 Photograph of Millburn High School

Respondent's Exhibits:

None

#493-10

JAY BERMAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY.	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF JAY BERMAN, SCHOOL DISTRICT OF THE BOROUGH OF FORT LEE, BERGEN COUNTY.	:	

SYNOPSIS

The petitioning Board certified tenure charges of unbecoming conduct, violation of policy and procedure, insubordination, gross negligence and other just cause for dismissal against tenured principal Jay Berman, and also withheld his salary increment for the 2009-2010 school year based on the conduct alleged in the tenure charges. The bulk of the charges against Berman stem from an unauthorized grade changing practice that was implemented by one of the guidance counselors at Fort Lee High School. Respondent denied the charges as alleged.

The ALJ found that: there is no evidence that Berman had any knowledge of the illegal grade changing practice in the guidance department of the high school, as the supervisor of guidance had authority over the guidance counselors, and did not report to the principal; the petitioning Board bears the burden of proving the tenure charges brought against respondent by a preponderance of the competent and credible evidence; and because the tenure charges were not proven, the Board's action in withholding Berman's increment was arbitrary and capricious. Accordingly, the ALJ ordered that all tenure charges brought against respondent be dismissed, and that Berman be paid all back pay and benefits due to him.

Upon a comprehensive and independent review of the record, the Commissioner concurred with the ALJ that the Board had not established that the respondent is guilty of the tenure charges, but found that the ALJ erroneously determined that the Board's failure to prove the tenure charges likewise meant that its decision to withhold the respondent's increment was arbitrary and capricious. The Commissioner found that the decision to withhold an increment does not require a showing sufficient to justify suspension or the revocation of a teacher's tenure, and – once the Board discovered the grade changing scandal – it was reasonable to withhold respondent's increment. Accordingly, the Commissioner dismissed the tenure charges, but affirmed the withholding of respondent's increment.

This synopsis is not part of 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 15, 2010

OAL DKT. NOS. EDU 13226-09, EDU 13559-09 (CONSOLIDATED)
AGENCY DKT. NOS. 271-10/09, 321-11/09

JAY BERMAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY.	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF JAY BERMAN, SCHOOL DISTRICT OF THE BOROUGH OF FORT LEE, BERGEN COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board and the respondent's reply exceptions.

The petitioning school district brought charges against tenured principal Jay Berman alleging unbecoming conduct, violation of policy and procedure, insubordination, gross negligence and other just cause for dismissal under *N.J.S.A.* 18A:6-10 et seq. The Board included various conduct violations in the tenure charges, but the bulk of the charges stem from an unauthorized grade changing practice that was implemented by one of the High School guidance counselors. The Board also withheld respondent's increment for the 2009-2010 school year based upon the conduct alleged in the tenure charges, and the respondent's appeal of such

was consolidated with the tenure case. In her Initial Decision, the Administrative Law Judge (ALJ) found that the Board did not prove the tenure charges by a preponderance of the credible evidence, and therefore dismissed the tenure charges. The ALJ also found that since the Board did not prove the tenure charges, the withholding of the respondent's increment was arbitrary and capricious.

The Board submitted exceptions to support the contention that the ALJ erroneously found that the Board did not prove the tenure charges against the respondent. The Board contends that a building principal has a supervisory responsibility over all aspects of the High School from administration to instruction to maintenance, and as such respondent was ultimately responsible for the grade changing that was occurring in the guidance department. The Board alleges that respondent was disassociated from the guidance department, so much so that the criminal activity was taking place for years without his knowledge. In its exceptions, the Board argues that without any evidence in the record, the ALJ wrongfully created excuses for the respondent's failure to supervise the guidance department, and the ALJ gave undue credence to respondent's testimony with respect to his involvement with the guidance department notwithstanding the fact that it conflicted with other testimony. The Board also contends that the ALJ erred by not finding that respondent's lack of activity with the guidance department was gross negligence.

In addition to the grade changing scandal, the Board argues there were several other deficiencies that the Board uncovered with respect to the respondent's failure to adequately supervise the High School. For example, graded courses and special education courses were not properly counted towards GPA's; the respondent failed to oversee and ensure the safety of the student records and his signature stamp; and the respondent improperly authorized the removal

of four students from 11th to 10th grade in order to avoid having to take the High School Proficiency Assessment exam. The Board argues that it was the respondent's modus operandi to claim he was relying on subordinates to complete certain tasks but he never instituted any safeguards or confirmed that protocols were being followed. As a result, the Board argues that it proved there was just cause for respondent's dismissal.

With respect to the increment withholding, the Board argues that the ALJ erred in simply overturning the increment withholding because she determined that the Board had not met the standard required to prove tenure charges. The Board stresses that the standard for tenure charges is a preponderance of the evidence, which is a far higher standard than that which must be applied for an increment withholding. The Board contends that it was the respondent's burden to disprove the facts that led to the decision to withhold his increment, and that the ALJ's misapplication of the increment withholding standard was legal error. Finally, the Board maintains that ample testimony was presented at the hearing that indicated the respondent's repeated failure to comply with the standard for principals as required by the District, and it was reasonable to hold the respondent accountable for the wrongdoing and criminal malfeasance occurring at the High School.

In reply to the Board's exceptions, the respondent urges the adoption of the Initial Decision asserting that the ALJ's factual and legal determinations should be left undisturbed. The respondent argues that since the increment withholding was based on the same set of facts as the tenure charges, once it was determined that the tenure charges were not proven, the increment withholding was unreasonable. The respondent notes that the increment withholding action was taken by the Board before the tenure charges were instituted and it was predicated exclusively on the grade changing scandal, and not the other alleged conduct that was

included by the Board in the tenure charges. In support of his argument that the increment withholding was arbitrary and capricious, the respondent emphasizes the ALJ's finding that there was not a shred of evidence presented to support that respondent had changed grades or had been aware it was happening.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between March 8 and May 13, 2010, the Commissioner concurs with the ALJ – for the reasons discussed on pages 24-39 of the Initial Decision – that the Board has not established that respondent is guilty of the tenure charges. The Commissioner finds the Board's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and evidence in concluding that the record did not support the Board's charges. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. Insofar as her opinion on this issue is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *N.J.S.A.* 52:14B-10C; *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).

Although there were other conduct violations that the Board alleged in the tenure charges, the bulk of the charges stemmed from the grade changing scandal that had been happening in the guidance department for at least six years.[1] The Commissioner is in accord with the ALJ's finding that there was no evidence that the respondent was aware of the grade changing that had been occurring in the guidance department or in any way condoned such

[1] All of the alleged conduct violations and the ALJ's findings are fully detailed in the Initial Decision.

conduct. The Board maintains that even if the respondent was not aware of the doctoring of transcripts and report cards, as the building principal he should have discovered the wrongdoings. Based on the evidence presented, the Commissioner agrees with the ALJ that it remains unclear as to what authority the respondent had over the guidance department, and that was a factor in determining whether respondent should have been more cognizant of the activities in the guidance office. There was a Director of the Guidance Department who was responsible for the day-to-day operations of the department; performed all of the staff evaluations; and was the direct supervisor of the guidance counselor who was responsible for doctoring the student transcripts and report cards. Further, the respondent did not formally supervise the Director of the Guidance Department, who instead reported directly to the Assistant Superintendent.[2] As a result, the notion that the respondent should have known what was transpiring within the guidance office does not rise to gross negligence or unbecoming conduct so as to justify the suspension of the respondent or the revocation of his tenure in the absence of any proof that he was involved in the misconduct.

With respect to the withholding of the respondent's increment, the Commissioner finds that the Board's decision to withhold the increment was reasonable based upon the Board's overall disapproval of respondent's level of oversight as a high school principal, and the unacceptable conduct that was occurring in the guidance department. Pursuant to *N.J.S.A.* 18A:29-14, a local board of education may withhold an employee's salary increment for inefficiency or other good cause. *Probst v. Board of Educ. of the Borough of Haddonfield*, 127 *N.J.* 518 (1992). The recommendation and decision to withhold an employee's increment is "a matter of essential managerial prerogative which has been delegated by the legislature to the

[2] Notably, the Director of the Guidance Department was not subject to any discipline as a result of the grading changing incidents.

board." *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n.*, 79 *N.J.* 311, 321 (1979). A board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. Board of Educ. of West Orange*, 60 *N.J. Super.* 288, 294 (App. Div. 1960) (citations omitted).

In evaluating whether the increment withholding is reasonable, 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. *Kopera*, *supra*, at 296-297. Further, when a school employee challenges a salary increment withholding, he bears the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. *Kopera*, *supra*, at 297.

The ALJ erroneously determined that the Board's failure to prove the tenure charges likewise meant that its decision to withhold the respondent's increment was arbitrary and capricious. The ALJ's analysis ignored the critical distinction between the respective burdens of proof. The decision to withhold an increment does not require a showing sufficient to justify suspension or the revocation of a teacher's tenure. "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 (citations omitted).

The underlying facts related to the grade changing scandal are undisputed. While the respondent was the principal of the High School, illegal activity was occurring in the guidance department for several years which included unauthorized grade changes on student

transcripts and report cards that were submitted to colleges. Therefore, the remaining question is whether the Board's decision to withhold the respondent's increment was reasonable based on what was happening in the guidance office. Unlike with the tenure charges, the Board did not have the burden of proving the increment withholding was reasonable, but rather it was the respondent's burden of proving that the Board's action was unreasonable.

Once the Board discovered the grade changing scandal, the Commissioner finds that it was reasonable for the Board to withhold the respondent's increment. Although it is not expected that the respondent review each and every transcript that is sent to the colleges, there is a level of accountability that must attach to the fact that it was respondent's signature stamp that was used to certify the transcripts. Moreover this was not an isolated incident in which the guidance counselor altered one transcript; this was a pattern of conduct that was on-going for approximately six years. The building principal has the overall responsibility of ensuring that the high school is running properly, and that the Board policies and procedures are being satisfactorily implemented. As discussed *supra*, there was no evidence that the respondent was aware of or condoned this behavior, or that he was in fact the direct supervisor of the wayward guidance counselor, but that does not mean the respondent should be totally absolved of any responsibility whatsoever. It was reasonable for the Board to assess a degree of accountability to the respondent in the form of an increment withholding, which is not a matter of right but rather "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 Initial Decision is modified in that the Board's decision to withhold respondent's increment is affirmed. The Initial Decision of the OAL is adopted as to the ALJ's

finding that the Board did not prove the tenure charges by a preponderance of the credible evidence. Accordingly, the tenure charges are hereby dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/15/10

Date of Mailing: 11/16/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13226-09
AGENCY DKT. NO. 271-10/09

JAY BERMAN,
Petitioner,
v.
BOROUGH OF FORT LEE BOARD OF EDUCATION,
Respondent.

IN THE MATTER OF THE TENURE HEARING OF JAY BERMAN, SCHOOL DISTRICT OF THE BOROUGH OF FORT LEE, BERGEN COUNTY.

OAL DKT. NO. EDU 13559-09
AGENCY DKT. NO. 321-11/09

CONSOLIDATED

Matthew J. Giacobbe, Esq., **and Yaacov Brisman,** Esq., for Borough of Fort Lee Board of Education (Scarinci & Hollenbeck, attorneys)

Robert M. Schwartz, Esq., for Jay Berman

Record Closed: July 7, 2010 Decided: August 16, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 1, 2009, Jay Berman filed a Petition of Appeal of the Fort Lee Board of Education's determination to withhold his adjustment increment for the 2009–2010 school year. On October 16, 2009, the Fort Lee School District filed its Answer. The Department of Education forwarded the matter to the Office of Administrative Law (OAL), where it was filed on November 13, 2009, under OAL Dkt. No. EDU 13226-09.

On October 14, 2009, the superintendent of the Fort Lee Board of Education filed Tenure Charges against Mr. Berman with the Board. On November 2, 2009, Mr. Berman filed a Statement of Position in opposition to the Tenure Charges. On November 12, 2009, the Fort Lee Board of Education filed a Statement of Charges under the Tenured Employees Hearing Act with the Department of Education. The statement alleged conduct unbecoming and misbehavior; violation of policy and procedure; gross negligence; insubordination; and other just cause.[1] Mr. Berman filed his answer on November 18, 2009, denying all charges. On November 12, 2009, the Department of Education certified the tenure charges, and the matter was forwarded to the OAL, where it was filed on November 30, 2009, under OAL Dkt. No. EDU 13559-09.

A prehearing conference was held on December 11, 2009, and an Order was issued on December 16, 2009, encompassing both matters. Discovery was to be completed by February 1, 2010. A settlement conference was held on February 8, 2010, but the matter failed to resolve. The case was scheduled for a hearing on March 8, 9, 10, and 11, 2010. The March 10 date was adjourned at Mr. Berman's lawyer's

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[1] Along with the charges relating to the changing of grades and deciles, the District charged that the maintenance of student records did not comply with "agreed upon procedures" and/or policy; certain courses were "purposefully omitted from the student's GPA calculation"; Mr. Berman purposefully excluded the grades received in special education classes from the GPAs of students in special education programs; this impaired the opportunities of the most vulnerable students and infringed upon their rights; he forwarded transcripts containing erroneous GPAs to colleges, thus violating Board policy; attendance records for the week of June 16–20 were "misrepresented," Mr. Berman permitted the staff to "stamp his signature on transcripts, thereby granting his approval or permission to forward altered transcripts containing false GPAs"; Mr. Berman "failed to adequately maintain student records" as required by his "employment contract, board policy, and the law"; Mr. Berman approved having four students moved from eleventh grade to tenth grade in violation of their rights; Mr. Berman had not required certain staff members to leave during fire drills as required by State law; and his conduct and actions with regard to the management of the high school were grossly negligent and "an abdication of responsibility."

request due to a funeral obligation. The matter was continued on March 16, and April 5, 6, 8, 29, and 30, 2010, and concluded on May 13, 2010. Simultaneous summation briefs were scheduled to be submitted on June 21, and reply briefs on July 1, 2010. However, the parties requested an extension of time until June 30 for the summation briefs and agreed to waive any reply briefs. Prior to the June 30 date the parties again asked for an extension, which was granted until July 6, 2010.

ISSUES

1. Do the allegations set forth in the tenure charges rise to the level of conduct unbecoming and misbehavior; violation of policy and procedure; gross negligence; insubordination; and other just cause? If the charges do rise to that level, what relief is the Board entitled to receive?

2. Is Mr. Berman entitled to his increment for the 2009–2010 school year?

FACTUAL DISCUSSION

Jay Berman first became employed by the Fort Lee school system in December 2001 as principal of Fort Lee High School. Prior to that date he had been the principal of John Dewey High School in Brooklyn, New York, from 1994 to 2001. Before that time he was an assistant principal at Midwood High School in Brooklyn for eight years, and a teacher of biology from 1968. During the period of time that he was principal of Fort Lee High School, he served under six different superintendents of schools.

Dr. Raymond Bandlow and Dr. Frank Romano were appointed as superintendent and assistant superintendent, respectively, of the Fort Lee School District prior to the beginning of the 2008–2009 school year. When he first was appointed, Dr. Bandlow did not meet with Mr. Berman individually, but rather had a meeting with all of the supervisory staff together. Dr. Romano asked Mr. Berman and his two vice principals to put together a document setting out their goals for the year. Mr. Romano was not satisfied with the original document and asked Mr. Berman and his vice principals to do

it over. While he claimed that the new document was somewhat better, but not up to his standards, he did not ask Mr. Berman to revise it again. Prior to Mr. Berman's removal, neither Dr. Romano nor Dr. Bandlow did any type of written evaluation of Mr. Berman in which Mr. Berman was advised that they were not satisfied with his performance as the principal of the high school.

On or about February 4, 2009, Judith Meller, a guidance counselor for many years at Fort Lee High School, approached Lawrence Wolff, the recently appointed director of the Guidance Department, and asked him for permission to change grades on a certain student's transcript, because it would be detrimental to the student's chances of getting into college if the grade remained unchanged. The student had received a "B" and a "D" in a course. Ms. Meller said that since the grades averaged to a "C," she could put a "C" on the transcript, which would be less detrimental than a "D." Ms. Meller represented that "they had been doing this for a while." Mr. Wolff told her that she was not permitted to do this and that it was "illegal to alter grades on [transcripts] and that [the high school] would not be doing that." The following day Ms. Meller approached Mr. Berman, without telling him that she had spoken to Mr. Wolff, and asked him for permission to "average" the grades of the student. Mr. Berman responded that he did not think that you could do that, and he took her to Mr. Wolff's office. Mr. Berman told Ms. Meller to repeat the question to Mr. Wolff. Mr. Wolff responded that it was "illegal" and she could not do that. Mr. Berman then said, "Well, there's your answer Judy. You can't do that." There was no further discussion between Ms. Meller and Mr. Berman or Mr. Wolff regarding the issue. Despite the directives of Mr. Wolff and Mr. Berman, Ms. Meller proceeded to "average" the grades of the student.

On February 6, 2009, Mr. Wolff sent an e-mail to the guidance counselors, with a copy to Dr. Romano, stating that grades were not to be altered or changed. Mr. Berman was not copied on the e-mail. When asked why he did not send the e-mail to Mr. Berman, Mr. Wolff stated that he did not think of it.

Although Mr. Wolff and Mr. Berman had indicated to Ms. Meller in early February 2009 that she could not make the grade change, Ms. Meller went to Marcia Leon, a secretary in the Guidance Department, on or about February 13, 2009, and asked her to

make the grade change. Ms. Leon did not report this grade-change request to either Mr. Wolff or Mr. Berman. Mr. Wolff did not discover that the grade change had been made until, as part of his investigation, he discovered the transcript of the student whose grade had been changed contrary to Mr. Wolff's instructions to Ms. Meller.

Sometime after his conversation with Ms. Meller, Mr. Wolff contacted his immediate supervisor, Dr. Romano, and reported the content of the conversation he had with Ms. Meller. Dr. Romano told him not to discuss the conversation with anyone and to begin an investigation regarding incidents of alteration of grades, etc. Mr. Wolff interviewed the three secretaries in the Guidance Department: Rosa Pettigrew, Marcia Leon and Yvette Stamoulis.

Ms. Meller had been appointed a number of years before to be the guidance counselor for the students who were in the top 20 percent of the class at the high school.

Ms. Pettigrew is the secretary who is responsible for data entry. Any change of grades in the school's computer system had to be approved by a teacher and entered into the system by Ms. Pettigrew. The Genesis system is the computer system used by the high school to register students' grades, calculate students' decile rank, record student attendance and do other student record-keeping. In or about 2004 the Genesis system replaced the system previously used by the high school.

Over a period of about six years, Ms. Meller had asked Ms. Pettigrew, several times each year, to change a student's grade on the student's report card or transcript after the record had been printed out. Ms. Pettigrew would do this by using whiteout (correction fluid) on the hard copies that were sent to the colleges. The grades were not actually changed in the computer system. Ms. Meller told Ms. Pettigrew that the student was going to college and the bad grade would keep the student from getting into a good school. Ms. Meller characterized her request as "grade recalculation," which meant taking a first-marking-period grade, which might have been higher, and averaging it with a second-marking-period grade, which might have been lower, thus coming up with a higher grade for the second semester.

At the end of the first school year during which Ms. Meller had made the request, Ms. Pettigrew approached Leslie Appelbaum, who was director of Guidance at the time, and asked her if it was all right to do what Ms. Meller was requesting. Ms. Appelbaum said that Ms. Meller was requesting a "grade recalculation," and that was not a problem. Since Ms. Appelbaum had been at the school for a long time, Ms. Pettigrew did not question it further, and never asked Ms. Brennan, who replaced Ms. Appelbaum, if she could continue the practice. After Ms. Appelbaum became a vice principal, Ms. Pettigrew again asked Ms. Appelbaum if they were still doing grade recalculation, and Ms. Appelbaum said yes.

Ms. Pettigrew never discussed Ms. Meller's request for the grade "averaging" with Mr. Berman, and she did not believe that he knew about the practice.

During a four-year period, from the middle of 2004, Ms. Meller instructed Ms. Leon to cut-and-paste report cards to cover up a poor marking period of a student's grades, or to only send the grades from the marking periods that had good grades to the colleges to which the student was applying. Ms. Meller also asked Ms. Leon to change the decile (the student's rank) by using whiteout and then typing in a new decile to raise the student's standing on the transcripts. (Ms. Leon could not remember the number of times that Ms. Meller had asked her to alter the decile of a student.) Ms. Leon would then send the altered transcripts out to the colleges that the students had applied to attend.

Ms. Leon believed that she never asked Ms. Meller if this request was legal. She assumed that since Ms. Meller had been at the school for many years, the practice was allowable. Ms. Leon never received a similar request from any other guidance counselor. She never talked to Mr. Berman about the practice and she did not believe that Mr. Berman knew about it. Ms. Leon was "pretty certain" that Ms. Appelbaum knew about Ms. Meller's practice.

According to Ms. Leon, Ms. Brennan (a prior director of Guidance) and Ms. Appelbaum did not review transcripts prior to their being sent out. Prior to the

investigation by Mr. Wolff, she never gave him the transcripts to review before they were sent out to colleges.

Yvette Stamoulis was a secretary in the Guidance Department at Fort Lee High School. Beginning in October 2008, Ms. Meller asked her to change the decile for various students. Ms. Stamoulis would use whiteout on the decile on the transcript and put in the number that Ms. Meller "thought was closer to what she calculated was the proper student's rank." This decile was invariably higher than the one generated by Genesis. The first time that Ms. Meller asked her to make the change, she spoke with Ms. Pettigrew and Ms. Leon. They said that the changing of the decile number had been done before. Ms. Leon did not discuss the situation with anyone else and she did not believe that Mr. Berman knew of the practice.

Ms. Meller also asked Ms. Stamoulis to alter the transcripts (use whiteout on the original grades) of several students. These grades would be on documents that went to the colleges that the students had applied to attend. When questioned, Ms. Meller stated that she was doing this because she did not want the colleges to see poor grades, which would prevent students from getting into the schools of their choice. Ms. Stamoulis put Mr. Berman's stamp on these altered transcripts. Ms. Stamoulis did not believe that Mr. Berman knew about these alterations.

Officer Michelle Morgenstern from the Fort Lee Police Department conducted a police investigation regarding the charges of grade changing. The investigation found no evidence that Mr. Berman knew anything about the grade changing as it occurred. Those findings were communicated to the superintendent of schools.

As part of his investigation, Mr. Wolff went through the college-application folders from Ms. Meller's students that were kept in a separate file drawer in the Guidance office. He found three transcripts that had grade changes, i.e., one had whiteout covering two grades in the senior year, and two others had similar alterations with whiteout. These changes were done by Ms. Stamoulis. He also found decile changes on certain transcripts.

Mr. Wolff issued a report on February 24, 2009, based on his interviews and his review of certain of Ms. Meller's files. This report was not shared with Mr. Berman. When asked why the report was not shared with Mr. Berman, Dr. Romano stated that he saw no reason to tell Mr. Berman. He said that the director of Guidance is equal to and not subordinate to the principal of the high school.

Following the issuance of the report, on February 24, 2009, Mr. Wolff, Dr. Bandlow and Dr. Romano had a meeting with Ms. Meller and two New Jersey Education Association (NJEA) representatives regarding the altering of the grade and going against the instructions of Mr. Wolff. The meeting did not cover other matters that were discovered later. Mr. Berman was not invited to, nor was he present at, that meeting.

On February 26, 2009, Dr. Bandlow and Dr. Romano visited the high school to deliver a letter of reprimand and recommendation to withhold the increment of Ms. Meller, based on her changing a grade in defiance of her superior's order not to do so. There was a meeting with Mr. Berman, assistant principal Elizabeth Moreland and Mr. Wolff, who were each given a copy of the letter. Mr. Berman expressed shock that Ms. Meller had disobeyed orders and that this practice had been going on in the high school. Mr. Berman stated that the letter did not go far enough, and that Ms. Meller and the secretaries should be fired. Dr. Bandlow said that the secretaries were just following orders from their superior. At this point, Dr. Bandlow dismissed Mr. Wolff and Ms. Moreland from the room and asked for Mr. Berman's resignation. Dr. Bandlow did not respond to Mr. Berman's query as to how he could have known about Ms. Meller's behavior if he had never been informed. Mr. Berman told Dr. Bandlow that he was not resigning, because he hadn't done anything wrong. Dr. Bandlow then advised Mr. Berman to get a lawyer.

At the time that Dr. Bandlow asked for Mr. Berman's resignation, Ms. Meller was still actively employed at Fort Lee High School. She was not fired until on or about March 6, 2009.

The following week, on March 3, 2009, Mr. Berman was summoned to the superintendent's office and told that he was suspended; that he should turn in his keys; and that he could not participate in any of the high school's activities.

After Mr. Wolff reported his findings to Dr. Romano, Cheryl Balletto, the Fort Lee Board of Education business manager and board secretary, was asked to conduct an audit during the first week of March 2009. She was told to compare the grades generated from Genesis with the grades that were sent to the colleges for current twelfth-grade students. The methodology she used consisted of her generating mid-year report cards and comparing them to what was in the students' files. According to the report that she gave to the superintendent, she found visible whiteouts on transcripts that were in student files of Ms. Meller. Deciles were changed, and information sent to colleges did not reflect the most current transcript available. Mid-year reports did not include second-semester grades, even though those grades had been generated on March 3, 2009.

Ms. Balletto's report also noted that GPAs on the generated transcripts were different than those in the student files, due to the fact that special education courses and other classes were not included in the GPA calculation. In addition, one semester report card would "include Class A and the second semester report card is replaced with Class B. Students in honors classes who receive a low grade are changed to a regular class with a higher grade. . . . Unapproved courses are listed on transcripts/report cards."

Following Ms. Balletto's investigation, the District hired Ferraioli, Wielkotz, Cerullo & Cuva, PA, certified public accountants. They issued an "Agreed Upon Procedures Report in Connection with a Compliance Review of Students Records." Sean Ferguson conducted the review. The report stated that all 2007–2008 final transcripts were shredded;[2] that over 50 percent of senior year and weighted GPAs recorded on the transcripts did not agree with the GPAs shown in the Genesis

[2] Mr. Ferguson said that he was told that all of the 2007–2008 transcripts were shredded, but he did not recall who told him this, who did the shredding, and when. He was not told that transcripts might be located in students' files housed in the Guidance office.

Education System; that only one of the individual grade GPAs did not agree, but all of the weighted GPAs on the transcripts tested did not agree with the weighted GPAs shown in the Genesis Education System; and that over 85 percent of all grade-scale adjustments tested did not have the proper grade-change approval slip. Certain grade-change approval slips could not be located in the students' permanent files; a program of studies, listing course offerings, was not available for review; neither Guidance nor the Main Office could locate the list of course offerings at the time of the review; not all core-curriculum courses were included in the student GPA calculations per the Curriculum Report; course GPA eligibility was not always consistent on the Curriculum Report; and Data from the Genesis Education System became unavailable (disappeared) during the process of gathering information for the review.

According to Mr. Berman's Employment Agreement, his responsibilities included ensuring that student record-keeping procedures complied with State and federal law and District policy, and establishing procedures for safe storing and integrity of all school records.

Mr. Ferguson was never given a written copy of the Board's policies and procedures, although he asked for one. He sat down with the superintendent, Dr. Bandlow, and the acting principal, Dr. Romano, to decide on the agreed-upon procedures that would be utilized in the review. Mr. Ferguson was not provided with a list of course offerings by Ms. Balletto or Dr. Romano. While Mr. Ferguson reported that certain transcripts and grade-change approvals were missing, there was no further inquiry made to see if these records were in the Guidance office file drawers, where student records were stored for two years. In addition, Ms. Meller remained in her position after she had received her letter of reprimand and after Mr. Berman had been fired. There was no testimony as to what steps were taken to secure the student files during the period of time that Ms. Meller remained on staff.

Mr. Ferguson made findings regarding weighted and unweighted courses vis-à-vis GPA. He was not aware that during the 2006–2007 school year, plus and minus signs had attached to grades. He acknowledged that this change in the grading system could explain why the grades in the Genesis system and the hard-copy grades found in

the guidance counselors' folders, which might have been run before the change was made, were not the same. Mr. Ferguson was also not aware that in 2007–2008 there was a change in the course weighting, which he acknowledged would mean that the older, hard copies of the transcripts in the students' files would not necessarily agree with the weighted GPAs found in the Genesis transcripts that he generated at the time of his review. As for the finding that 85 percent of all grade-scale adjustments tested did not have the proper grade-change approval slips, Mr. Ferguson stated that he checked the student folders for this information and was told that this was where the forms were kept. He did not check the guidance counselors' folders to see if the slips were located there.

Mr. Ferguson was not given a copy of the class-rank policy. The policy states that class rank will be calculated by the final grade in all academic subjects, except those subjects for which no credit is awarded, and will not include failing grades. The testimony of several witnesses, including Ms. Balletto, Mr. Wolff and Dr. Romano, differed on what would be considered an "academic subject." Ms. Balletto was questioned about the document that spoke about courses that were not counted in the GPA. She stated that the document was not Board policy, and some of the courses on the list were not courses at all, but considered clubs by the Board. Mr. Ferguson was not charged, as part of his review, with determining what were academic as opposed to non-academic subjects.

Mr. Berman emphasized that he believed that every course taken by a student should count for credit. He brought the issue to the attention of six prior superintendents, but none of them wanted to deal with the issue. When he brought it to Dr. Bandlow's attention, the superintendent said that they would have to study the issue and take their recommendations to the Board. Mr. Berman held one meeting on the subject in December 2008, which Mr. Wolff attended. Following that meeting, Dr. Bandlow put together a formal committee to make recommendations to the Board. The recommendations included counting in the class rank all courses for which a student received a grade. To date, those recommendations have not been passed on by the Board.

According to the Organizational Chart of Personnel and Reporting Responsibilities, which was revised on September 8, 2008, the guidance counselors reported to the director of School Counseling Services, also known as the supervisor of Guidance. The supervisor of Guidance, who was on the same level as the principal of the high school, reported to the assistant superintendent. The director of Special Services also reported to the assistant superintendent of schools. The chart also showed that there was a dual reporting requirement of the guidance counselors to the supervisor of Guidance and to the principal of the high school. (The District did not produce the organizational chart that was in effect before that date, and Dr. Romano testified that he could not say what policy was in effect before, since he had not seen the prior organizational chart.) The guidance counselors reported to the supervisor of Guidance, who reported to the assistant superintendent. According to the job description that Mr. Berman received when he was first hired, he was required to supervise all administrative, professional, paraprofessional and non-professional personnel in the high school. This included the vice principals of the school. Mr. Berman testified that the supervisors of Guidance and Special Education never reported to him.

The Guidance office was housed in the high school in close proximity to the principal's office. It was Mr. Berman's testimony that he was in the Guidance office every day. Ms. Pettigrew claimed that Mr. Berman came into the Guidance office about once a week. Ms. Pettigrew said that Mr. Berman never asked to check the grade-change sheets, nor did she ask him about grade changes, because he was not part of the Guidance Department and he did not evaluate her. Ms. Stamoulis claimed that she never saw Mr. Berman coming down to the office to look at transcripts, and she only saw him come down to the Guidance office one or two times a year. Ms. Leon testified that she saw Mr. Berman in the Guidance office many times during the year, although she did not give an exact number of times per week or month. The secretaries claimed that prior to Dr. Romano becoming assistant superintendent, they had never seen an assistant superintendent in the Guidance office.

All of the secretaries testified that they received no formal training in how to perform their duties, but learned "on the job" by asking questions of their fellow secretaries or the guidance counselors.

After Ms. Appelbaum left her position as supervisor of Guidance in 2002, Margaret Brennan became the supervisor. She remained the supervisor for five years. Despite the fact that she held this position during the time that Ms. Meller instructed secretaries to change grades and decile rankings and alter report cards, she was never reprimanded. Nor did the District bring any other type of charges against her. According to Dr. Romano, he and Dr. Bandlow accepted Ms. Brennan's explanation that she was merely a "figurehead" and that Ms. Appelbaum continued to run the Guidance Department after she became vice principal.

There was no proof presented or testimony elicited that indicated that Mr. Berman had knowledge about Ms. Meller's illegal activities.

Sharon Amato, the supervisor of curriculum and instruction for English as a Second Language (ESL), Bilingual and World Language, spoke with Sun Kim, the lead ESL teacher, in September 2008 about the fact that she had been notified by the Department of Education that there were new rules promulgated. According to these rules, ESL students would no longer be permitted to take the High School Proficiency Assessment (HSPA) in their native language.[3] Shortly thereafter, Ms. Kim gave Ms. Amato a list of five students (one student's name was later crossed out, leaving four students' names) who she was concerned were not making the level of progress needed to graduate the following year and to be successful on the HSPA. Ms. Amato asked Ms. Kim to check with the parents to see if they approved of placing their child back one year. Ms. Kim subsequently told her that she had spoken with the parents and four of them approved. Ms. Amato then went to Ms. Pettigrew with a list of students, and asked her to move the listed students from the eleventh grade back to the tenth grade. (Prior to this, it had always been a guidance counselor, with the

[3] Ms. Amato testified that previously an ESL student could take the Special Review Assessment (SRA) in his native language. She said, however, that at the time in question she had been notified by the Department of Education that students would have to take the SRA in English. Later she was informed that the Department had gone back to allowing the students to take the SRA in their native languages.

authorization of the supervisor of Guidance, who would make such a request. However, at this time there was no supervisor of Guidance.) Ms. Pettigrew said that she needed authorization to make the change.

Ms. Amato approached Mr. Berman and told him that she wished to move the students back to the tenth grade on the recommendation of Ms. Kim and the approval of the parents. She said that two of the students were new registrants to the high school, and of the two other students, one had transferred in the prior year and the other had extremely poor language skills. She told Mr. Berman that the ESL teacher had said that the students were not prepared for the eleventh grade and that it would be cruel to subject them to the HSPA test. Ms. Amato felt that the change would benefit the students and was in their best interest. She felt that, besides having sufficient credit, ESL students needed to have certain skills and knowledge that were part of the State curriculum. Based on those criteria, she felt that it was in keeping with school policy to recommend that the students be put back to the tenth grade. Mr. Berman checked the students' records and saw that, while they had sufficient credits to be in the eleventh grade, in most of the cases the students were taking courses that would normally be taken in the ninth or tenth grades. In addition, three of the students were in the beginning ESL course, which was the lowest-level course for students who could speak and read very little English. One had not tested out of beginning ESL for three years. (Most students test out after one year.) Translating student transcripts from foreign schools to American schools is done by guidance counselors and is very subjective. Mr. Berman did not believe that it was right to be handing out diplomas to students who could not read, write or speak English. Mr. Berman approved the change based on his review of the transcripts and his interpretation of the District's promotion/retention policy, which "recognizes that, in general, students shall be placed at the grade level to which they are best suited academically, socially, emotionally and physically," and the final decision as to whether a child progresses to the next grade "will rest with school authorities." Mr. Berman viewed these statements to mean that if a student did not have the academic skills necessary then he should not be in a certain grade level simply because he had sufficient credits. The student should be academically suited for the grade. It was Mr. Berman's opinion that if the students progressed sufficiently by the end of the school year (2009), then they could be put into the twelfth grade for the

next school year. There were no additional courses that the students would have to complete; rather, the decision on whether the student could be promoted would be based on how he performed in his ESL courses.

This was the first time that Mr. Berman had moved a student who was on the ESL track back a grade and the first time that Ms. Amato had asked to do so. Ms. Amato acknowledged that she did not ask for written consent from the parents to this change, and relied upon Ms. Kim's representation regarding the parents' wishes. Mr. Berman did not ask for any written authorization. Ms. Amato did not go through the proficiency requirements for the HSPA with Mr. Berman, nor did Mr. Berman ask her for this information.

The HSPA exam is first taken in the spring of the junior year, and if the student does not pass, then the exam is taken again in the fall of the senior year. If the student does not pass the second time, then he can take an SRA test, which is a test in which teacher assistance is permitted. A student who passes certain sections of the test but not others only has to retake the parts of the test that he has failed.[4] According to the "Guide to the HSPA" put out by the Department of Education, students with limited English are required to take the HSPA in the eleventh grade.[5]

The overall impact on the HSPA results of these four students not taking the test in March 2009 was negligible. Because of the small ESL population at the high school, they were not a significant subgroup in terms of the HSPA statistics. In addition, in the past the general education population at the high school had a 96 percent passing rate. Four students passing or failing would only affect the statistics by 1 or 2 percentage points.

Elizabeth Moreland became employed as an assistant principal for building management at Fort Lee High School in September 2008. She took over the job

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[4] Mr. Berman asserted that passing the math part of the test required some degree of English proficiency.

[5] Mr. Wolff testified that the students in question were put back into the eleventh grade sometime in the spring of 2009 and took the HSPA test in March 2009. Dr. Romano disputed this, and said that while the students were put back into the eleventh grade, they were not moved in sufficient time to take the HSPA in March. According to him the students had only two chances to pass the test, and one of the students had not done so by the time of his testimony in the spring of 2010.

responsibilities of Robert Kravitz, who had left in June 2008. When she was hired, there was no director of Guidance. While it was not within her official duties, since there was no director of Guidance staff brought their issues and concerns regarding Guidance to her. Ms. Moreland reported to Mr. Berman and worked closely with him. Casey No Miller, the school psychologist, approached Ms. Moreland at the end of October 2008 and informed her that when she met with special education students to work on their college admissions applications, she had to calculate their GPAs by hand because the Genesis calculations were incorrect. She identified the fact that collaborative courses of special education students were not being counted toward their GPAs, and special education courses were easily identifiable. It is against the regulations for courses to be identifiable as "special education" on a transcript. Ms. Moreland told Mr. Berman about this situation. Mr. Berman immediately approved a change in the names of the special education courses, so that they would not be identifiable, and also told Ms. Moreland to contact Genesis to see what steps had to be taken to recalculate the GPAs to include the collaborative special education classes.[6] At the direction of Mr. Berman, Ms. Moreland also spoke to Cheryl Best, the head of curriculum and instruction in the District, and Drs. Romano and Bandlow. Dr. Romano also instructed Ms. Moreland to make the appropriate changes in the Genesis system. The supervisor of Special Education for the District was not notified of this problem in the Genesis reporting system. Ms. Moreland had to go back into the system, from 2004 forward, to revise the course names and GPAs. In her search she found out that other elective courses and ESL courses were also not included in the GPAs.

The period of June 16–20, 2008, was examination week at Fort Lee High School. Seniors were only required to come to school during that week if they had an examination to take. If a senior was scheduled to take an examination and did not appear for it, then he was marked absent. All other seniors were not marked absent if they did not come to school because they did not have an examination. This way of marking absences had been the policy before Mr. Berman came to the high school and remained in force throughout the time that he was the principal. Mr. Berman was never informed by prior superintendents that this practice was incorrect and that another

[6] Resource-room courses were still not included in the GPAs as per Board policy.

designation should be placed in the Genesis system to show that seniors were excused from attending school during this period of time or that they had to attend school even though they did not have a scheduled exam.

Prior to the Genesis computer system being installed at the high school, grades were recorded in a system called Asbury Park. In that system the director of Guidance signed the students' transcripts. Once the school switched to the Genesis system, the transcripts had the principal's signature on them. Mr. Berman called Genesis to see if the signature could be changed to that of the director of Guidance. He was told that it could not be changed. Initially he had the transcripts brought to his office for them to be stamped with his signature. However, this became a cumbersome and time-consuming exercise. Therefore, a stamp was given to the supervisor of Guidance, Ms. Brennan, who gave it to the head secretary, Marcia Leon. The signature stamp was supposed to have been stored in Ms. Leon's desk, which was to be kept locked.

Frank Palatucci, principal of Highland Regional High School in Blackwood, N.J., has been a principal for a total of twenty-seven years and was formerly the president of the New Jersey Principals and Supervisors Association. According to Palatucci, it was the practice in his school for transcripts to be signed with a signature stamp. The stamped signature of the director of Guidance went on all student transcripts. Mr. Palatucci does not review the transcripts, nor does the supervisor of Guidance, because of the volume of transcripts that is generated.[7] It is the responsibility of the individual guidance counselors to review the transcripts to make sure that they are correct. Mr. Palatucci's signature stamp, which is used on each diploma, is kept in his secretary's locked drawer. The director of Guidance's signature stamp is also kept in the secretary's locked drawer.

When Mr. Berman started at Fort Lee High School, there was no written plan in place for how fire drills or other emergency evacuations should be conducted. Mr. Berman got a committee together to develop a plan. The plan was distributed to every faculty member and was reissued each school year. According to the plan, all

[7] Mr. Palatucci's school is approximately the same size as Fort Lee High School. In his school, the director of Guidance is directly under his supervision, and he evaluates the supervisor.

staff and pupils were to leave the building as soon as the alarm sounded. Three secretaries in the main office stayed behind to call the police and fire departments to notify them that it was not a real emergency, but only a drill. In addition, the secretaries "interfaced" with the head custodian, who rang the alarms and monitored the telephones. All of the rest of the staff and students were to leave the building. Mr. Berman walked around the building to make sure that everyone had left and that there was no talking in the halls. In September 2008, Ms. Moreland received inquiries from teachers wanting to know if they had to evacuate the building in the case of a drill. There were also questions about fire-drill protocol. Ms. Moreland sent out a memo to staff reminding them of the fire-drill policy and protocol, which included evacuation of the building.

During the time that Dr. Romano was acting principal, after tenure charges were brought against Mr. Berman, he conducted fire drills. On two occasions, while he was checking the halls, he found faculty members and staff in the building during the drill. He claimed that they told him that Mr. Berman had told them that they did not have to evacuate the building during the drills.

During Mr. Berman's approximately seven years as principal of Fort Lee High School he never received an evaluation that said that he needed improvement in any area, nor did he ever receive any form of discipline. In 2002 he received a special merit increment. In April 2007 the Middle States Association[8] evaluated Fort Lee High School. Middle States issued a report which stated that "under the direction of Mr. Berman and his very competent administrative team, Fort Lee High School has made significant improvements in many areas." The report discussed the fact that the population in the community had changed from upper-middle-class students, many of whom were of Japanese and Korean descent, to a more working-class population with a higher concentration of Hispanic students. The report noted that many teachers credited Mr. Berman with responding positively to the changing demographics. The report also noted that Mr. Berman was always looking for new programs and was supportive of innovative programs.

[8] The Middle States Association of Colleges and Schools is a group of school administrators who come to high schools and evaluate the academic standards of the school.

Mr. Berman's last action plan had as one of his goals improvement of the HSPA scores of the Hispanic students to a 74 percent passing rate. In the 2006–2007 school year only 50 percent of the Hispanic students who took the HSPA test in the eleventh grade passed. Mr. Berman instituted a program where, in addition to the regular math classes, students who were in lower-level math in the eleventh grade would take a second period of math. As a result, in the 2007–2008 school year 71.8 percent of the Hispanic students taking the HSPA passed the math portion of the test.

According to a report to the Board of Education outlining the incidents of vandalism, violence, weapons possession, substance abuse, police reports and police complaints at Fort Lee High School during the period from March 3 through June 30 2008, while Mr. Berman was principal, and the same period in 2009, when Dr. Romano was principal, there was a 69.6 percent decrease in the number of instances of violence, vandalism, weapons possession and substance abuse from twenty-three to seven from 2008 to 2009. The number of instances requiring a police report decreased 82.6 percent, from twenty-three to four, and the number of police complaints decreased 90 percent, from twenty to two. While the drop was not as dramatic, there also had been a steady decline in the incidents of vandalism, violence, weapons possession and substance abuse from eighty-six reported cases in 2006–2007 to seventy-two reported cases in 2007–2008.

In 2008 there was an incident in which it was brought to Dr. Bandlow's attention that there were pictures of Jennifer Viti, one of the assistant vice principals at the High School, on Facebook, a social-networking website. She had a beer in her hand and was in a provocative pose. In a meeting with Ms. Viti, Dr. Bandlow and Dr. Romano, Mr. Berman said that he was shocked by the pictures and knew nothing about the Facebook page. In another incident, Louis Pagano, a substance abuse counselor, was accused of inappropriate behavior with a student in the high school. The original charges stemmed from incidents that occurred prior to Dr. Bandlow's and Dr. Romano's tenure at Fort Lee. At that time, Mr. Pagano was warned not to have contact with the student. When Dr. Bandlow and Dr. Romano became superintendents there was another incident involving a younger sister of the first student. In a meeting with

Dr. Bandlow and Dr. Romano regarding these new charges, Mr. Berman stated that he was shocked and disappointed and knew nothing about the new allegations. He pointed out, however, that since Mr. Pagano was not under his supervision, but rather reported to the assistant superintendent, there was nothing that he could do about it.

Prior to Dr. Bandlow becoming superintendent of Fort Lee schools, Joanne Calabro held the position. Mr. Berman had had a good relationship with Ms. Calabro until some students pointed out to him that she had plagiarized a speech she gave to the National Honor Society inductees. Mr. Berman called Ms. Calabro about the speech and his students' reactions. Pressure was put on the Board of Education not to renew Ms. Calabro's contract. Ms. Calabro asked Mr. Berman, as president of the administrators and supervisors association, to support her before the Board. The association convened a meeting and issued a vote of "no confidence" against Ms. Calabro. Ms. Calabro's contract was not renewed. Following this, the relationship between Calabro and Berman soured.

Ms. Appelbaum retired at the end of February 2008. Prior to her retirement, Mr. Kravitz, who had been a teacher of business education, was appointed to fill her position of vice principal. He shadowed her from November 2007 until March 2008, when he assumed the vice principal position. As part of his duties he was responsible for putting the students' schedules together for the following year, which was to be completed by July. Mr. Berman met with Mr. Kravitz and went over the broad outlines of what needed to be done for the scheduling. However, he did not go into detail and did not work with him in conjunction with the Genesis system. Mr. Kravitz had to deal with that himself. Mr. Berman called Superintendent Calabro and recommended that Ms. Appelbaum be called in as a consultant to assist Mr. Kravitz. He also asked Mr. Kravitz if he would like Ms. Appelbaum's assistance in making up the schedule. Unbeknownst to Mr. Berman, Ms. Calabro had told Mr. Kravitz that she did not want to pay Ms. Appelbaum the exorbitant amount of money that she wanted to work as a consultant on the project. Mr. Kravitz told Mr. Berman that he had the scheduling under control, and Ms. Calabro told Mr. Berman that she had talked to Mr. Kravitz and he felt that he could handle the scheduling himself. Mr. Berman was not available for consultation during the month of July, when he was on vacation. The guidance

counselors, other than Ms. Meller, came in over the summer to assist Mr. Kravitz. In the interim, Mr. Kravitz had been appointed principal of an elementary school in the District. At the end of July, Mr. Kravitz presented the schedules to Mr. Berman and said that they were ready to be mailed out. When Ms. Meller came in during August, she claimed that there were problems with the scheduling and brought the problems to Mr. Berman's attention. Mr. Berman asked Ms. Meller and Ms. Acosta to clean up the problems. While most of the issues were resolved by the time school began, there were still some scheduling problems after the start of the semester. It is not clear whether these problems were the result of mistakes on Mr. Kravitz's part or whether the problems resulted from Ms. Meller meddling with the class assignments. Some parents called to complain about scheduling issues. By this time Dr. Bandlow had been appointed superintendent and was aware of the problems. He blamed Mr. Berman for not handling the situation effectively.

According to Dr. Romano, the incidents involving Ms. Viti, Mr. Pagano and Mr. Kravitz all made Dr. Bandlow question Mr. Berman's ability to be an effective principal. He believed that Mr. Berman was always making excuses for himself. According to Dr. Romano, the incident involving Meller changing grades was "the straw that broke the camel's back."

ARGUMENTS OF THE PARTIES AND ANALYSIS OF THE LAW

1. Tenure Charges

The tenure of education personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. According to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a "'statutory right imposed upon a teacher's contractual employment' . . . [that] may not be forfeited or waived." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting 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), and citing Red Bank Educ. Ass'n v.

Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees "from dismissal 'for unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (citing Zimmerman, supra, 38 N.J. at 71). Lack of fitness is usually demonstrated by a series of incidents, but it also may be found when there is a single incident that is sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326, 327 (E. & A. 1944). While tenure was designed to protect employees, teachers are responsible to act in a professional manner and to serve the welfare of the students in their care. In the final agency decision in In re Tenure Hearing of Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, 321, the Commissioner stated:

> [T]he teachers of this State . . . 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. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.

Among the charges lodged against Mr. Berman was "conduct unbecoming." This conduct was defined by the administrative law judge in In the Matter of the Tenure Hearing of Motley, State-Operated School District of Newark, Essex County, 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>:

> "Unbecoming conduct" is an elastic term 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 a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. Hartmann v. Police Dep't of

> Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). 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).

It is the obligation of the District to prove the tenure charges by a preponderance of the credible evidence. The Commissioner, in In the Matter of the Tenure Hearing of Grundfest, School District of Madison, Morris County, EDU 5326-98, Comm'r (June 20, 2000), rev'g Initial Decision (March 29, 2000), aff'd, St. Bd. (November 1, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, outlined what a board of education had to prove in order to meet its burden in a tenure charge:

> Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. The ramifications for respondent would be not only the loss of his tenured employment, but also the automatic referral of the matter to the State Board of Examiners for possible revocation of his teaching certificate, and the possible loss of his pension benefits. Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence [the tenure charges against respondent].

As the District acknowledges in the instant case, the primary basis for the tenure charges lodged against Mr. Berman is that as the "captain of the ship" he was "asleep at the switch while illegal, inappropriate and discriminatory actions were taking place at the Fort Lee High School—Berman's responsibility." The District alleges that because Mr. Berman had a close relationship with Leslie Appelbaum, the former director of Guidance whom he had recommended for the position of vice principal of the high school, and Ms. Appelbaum had knowledge of Ms. Meller's illegal activities, Mr. Berman must have known about these illegal activities. In the alternative, as principal, Mr. Berman should have been aware of the illegal activities. As a result of his failure to fulfill his supervisory responsibilities and his lack of oversight, "he permitted an atmosphere of corruption to exist." As was stated above, I found no evidence that

Mr. Berman had any knowledge about Ms. Meller's doctoring of transcripts and report cards prior to Ms. Meller coming to Mr. Berman in February 2009 and the subsequent discovery of her illegal activities. Further, other than testimony that Mr. Berman and Ms. Appelbaum had a long-standing cordial relationship, as did Ms. Appelbaum with Ms. Meller, there was not one shred of evidence that Mr. Berman knew about Ms. Meller's actions. A finding of guilt by a preponderance of the credible evidence certainly cannot be sustained based on nothing more than supposition and rumor.

The argument that as principal of the school Mr. Berman should have been aware of the illegal activities and that his lack of oversight and negligence in fulfilling his supervisory responsibilities led to these wrongdoings is a more viable argument. However, there are problems with this position as well. In the first place, there is a real question as to what authority Mr. Berman had over the Guidance Department. The District presented an organizational chart that showed a chain of command from the guidance counselors to the director of school counseling and up to the assistant superintendent. There is another line which goes from the director of school counseling over to the principal of the high school as well. However, this chart is dated "Revised 9-08-8." This was only five months prior to the discovery of Ms. Meller's longstanding illegal activities. There were no documents presented or testimony elicited from the District as to the chain of command prior to that time. Mr. Berman testified that he never supervised the Guidance staff, and in fact had protested to prior and present superintendents that there was organizational dysfunction, because none of the supervisors reported to him, even though they were housed in his high school.[9] The testimony bore out the fact that Mr. Berman did not have a say in the selection of the supervisors, nor did he evaluate the supervisors or the people under the supervisors, including the members of the Guidance Department. As the testimony of Mr. Wolff demonstrated, he did not copy Mr. Berman on his e-mail to staff regarding changing of grades because he did not think about it. Certainly, if the director of student counseling thought that he was accountable to the principal of the school he would have copied him

[9] The District pointed to a negative letter that Mr. Berman wrote to the superintendent advocating that Ms. Brennan not receive tenure. The District said this contradicted Mr. Berman's assertion that he had no control over the Guidance Department. However, if Mr. Berman really had some form of control over Guidance, he could have blocked Ms. Brennan's tenure directly. As it was, Ms. Brennan received tenure despite Mr. Berman's protestations.

on an important e-mail about changing of grades. He sent this e-mail to Dr. Romano, whom he recognized as his superior, but not to the principal of the school.

As another sign that Mr. Berman was not performing his duties as "captain of the ship," the District alleged that Mr. Wolff, who had only been a supervisor of Guidance for a short time, discovered that Ms. Meller had been changing grades, while Mr. Berman, who had been principal for seven years, had not discovered this illegal activity. This allegation is a distortion of the facts. There is no evidence that Mr. Wolff initiated an investigation about doctoring of grades, etc., prior to Ms. Meller's asking him if she could change a grade. Mr. Wolff did not discover that Ms. Meller was changing grades; rather, Ms. Meller brought this situation to his attention by asking him if she could do so. In the same vein, the District has alleged that the way that Mr. Berman responded to Ms. Meller's request to "average a student's grade" was another indication that he was acquiescing to the practice of grade changing or he was failing to properly supervise his staff. I cannot reach such a conclusion from the testimony presented. There were no proofs presented that Mr. Berman said that he approved Ms. Meller's request. Rather, in line with his testimony that he believed that the supervisor of Guidance had authority over the guidance counselors, Mr. Berman took Ms. Meller immediately to Mr. Wolff and made her repeat her request. When Mr. Wolff said that it was illegal and she could not change grades, Mr. Berman did not protest, but rather concurred in the supervisor's opinion. Whether another administrator would have handled the situation differently is certainly not proof that Mr. Berman in any way condoned Ms. Meller's actions or was promoting illegal activity in the school or was failing to supervise the high school staff.

The District has asserted that the doctoring of transcripts and report cards (approximately six per year) was done openly, and if Mr. Berman had been in the Guidance office as often as he claimed to have been he would have discovered what was going on. There certainly was conflicting testimony as to how often Mr. Berman was in the Guidance office. However, all of the secretaries who testified opined that Ms. Brennan, who supervised that office for five to six years and whose office was in the Guidance Department, was not aware of the grade changing, etc. If Ms. Brennan, who supervised the department, was not aware, then why should Mr. Berman, who had a

whole high school to supervise, be charged with the knowledge that this activity was going on or be held responsible for finding out that doctoring was occurring?

I also find it strange that the District accepted without question Ms. Brennan's representation that she was a mere figurehead and, therefore, she was not responsible for what occurred on her watch. Based on this representation, the District took no further action against her, even though she was the direct supervisor of Ms. Meller. Yet the District has lodged tenure charges against Mr. Berman, who, at best, was indirectly involved with Ms. Meller. The District also took no action against the secretaries who did the actual doctoring of the report cards and transcripts. While I can understand the District's position that the secretaries were only following orders, it would seem that some type of discipline, however minor, would have been appropriate. Yet it is the inconsistent testimony of these secretaries as to the amount of time that Mr. Berman spent in the Guidance office that forms an important part of the District's case.[10]

The District pointed to Mr. Berman's employment contract, which said that he was responsible to ensure that student record-keeping procedures were followed and the records were safely stored. It was the District's position that Mr. Berman took the path of least resistance and simply trusted that staff duties were being performed correctly, when in reality something went terribly wrong. Ms. Meller was able to alter transcripts over a period of time because of the lack of oversight and the failure to monitor the system. As such, Mr. Berman gave tacit approval to Ms. Meller to change grade-point-average deciles or alter student transcripts. The District also seems to assert that if Mr. Berman had been checking the transcripts on a regular basis he would have discovered the doctoring of the transcripts. It seems clear from the evidence presented that Mr. Berman was far from an expert on the computer system. He relied on staff to generate transcripts, which he reviewed, and he was not familiar enough with the system to train Mr. Kravitz or Ms. Moreland on how to operate it. However, the question really is whether, even if Mr. Berman had been more conversant in Genesis, he would have discovered the illegal activity that was occurring. The testimony revealed that most of the grade changes were not occurring in the Genesis system

[10] The credibility of these secretaries is somewhat questionable because they were the people who actually changed the transcripts and had motivation to testify in a manner favorable to the District.

itself, but rather occurred after the transcript was printed out. At that point the secretaries, on the instructions of Ms. Meller, whited-out grades and deciles and changed them. Report cards were also doctored, but that was also accomplished through whiteout and covering up a marking period of courses and grades and then recopying the card. Unless a person physically reviewed each transcript and report generated from Genesis and compared it with the transcript or report sent to the colleges or employers, there would be no way of uncovering the manipulation that occurred. A number of individuals testified that more than 1,000 transcripts went out in a given year. Certainly, a principal who was responsible for managing a high school with more than 1,000 students could not also be held responsible for reviewing all of the transcripts and report cards that were sent out by the Guidance Department. Mr. Palatucci, who was a long-term principal of a high school that was approximately the same size as Fort Lee High School, testified that he did not review the transcripts sent out, and neither did the director of Guidance, because the transcripts were just too voluminous. Even as to any grade changes that were registered in Genesis, reviewing all of the transcripts would appear to be a job for the director of Guidance, not the principal of the school. Yet, that person was not held responsible in any way for the criminal activity of the guidance counselor.

The District has claimed that one of the reasons that Ms. Meller was able to initiate and continue her illegal activities was that Mr. Berman did not keep his signature stamp in a safe place. As a result, it was available to anyone in the Guidance Department to be used for illegal and improper purposes. There was uncontroverted testimony from Mr. Berman that under the prior computer system it was the supervisor of Guidance, rather than the principal, whose signature went on the transcripts. Mr. Berman inquired of Genesis personnel whether the signature could be changed back to that of the supervisor of Guidance. He was told that it could not. Initially the transcripts were physically brought over to Mr. Berman's office for his stamped signature. However, the process was cumbersome and time consuming and so a signature stamp was left in the Guidance office; the stamp was supposed to be kept in a locked drawer by Ms. Leon. Since the transcripts were generated and sent out by the Guidance Department, it would be natural for that office to have the signature stamp. There was testimony by Dr. Romano that on at least two occasions he saw the stamp

lying out on a desk in the Guidance office. The problem here is that the charges are not that some unauthorized stranger used the stamp. The stamp was used by Guidance Department personnel at the direction of a professional in the Guidance Department who was acting in an unprofessional manner. While the District seems to allege that Mr. Berman was derelict in his duties by relying on professionals to perform their duties in a professional and responsible fashion, Dr. Romano, when questioned as to whether he followed up with Ms. Moreland about a correction in the Genesis system regarding special education grades, stated that he did not follow up because he relied on her professionalism to complete the job as required. However, Mr. Berman apparently was not supposed to rely on the professionalism of the Guidance Department staff to use the stamp in an appropriate manner.

The District also accused Mr. Berman of failing to take proper care of student records. As part of this charge the District pointed to the finding of Mr. Ferguson, an accountant with Ferraioli, Wielkotz, Cerullo & Cuva, PA, who did a compliance review of student records for the period of July 1, 2005, to June 30, 2008. According to Mr. Ferguson, he was charged with investigating whether the policies and procedures of the District had been followed with regard to record-keeping. However, Mr. Ferguson testified that he was never given a copy of the policies and procedures that were supposed to be the basis of his investigation, because the policies and procedures could not be found. Rather, he sat down with Drs. Bandlow and Romano and they informed him of the District's policies and procedures. These were the guidelines that he used in conducting his investigation. In his report Mr. Ferguson stated that all 2007–2008 transcripts had been destroyed and were apparently shredded. However, during the hearing it became clear that Mr. Ferguson had no firsthand knowledge of this shredding. Rather, he could not locate the files.[11] Someone, though he could not recall who, told him that the files had been shredded. He then memorialized this in his report and it became a "fact." The problem is that there was no testimony of anyone that they saw the records being shredded. In addition, there was testimony that Ms. Meller remained on the staff after Mr. Berman had been terminated. She had already received a reprimand and was under suspicion for additional charges. Certainly, she had

[11] He did not check in the Guidance office for the student files, although there was testimony that certain of these files were kept there.

motivation to shred records, if they were in fact shredded. There was no testimony as to what steps Dr. Bandlow or Dr. Romano took to ensure the integrity of the student records while Ms. Meller remained at the school. Under these circumstances, the alleged shredding of records cannot be blamed on the negligence of Mr. Berman in failing to properly secure student records. As for Mr. Ferguson's finding that many of the grade-scale adjustments did not have the proper grade-change approval slip, Mr. Berman pointed out that the records should have been in the Guidance office in locked file drawers under the main counter. Mr. Berman did not have a key to this lock. It would seem to have been the responsibility of the supervisor of Guidance, in whose office the student records were supposed to be kept under lock and key, rather than that of Mr. Berman. If certain grade-change approval slips were missing, then why did Mr. Ferguson not ask Mr. Wolff or Ms. Brennan where these slips would be? They were the people in charge of the Guidance office and the files that were kept in the office.

Mr. Ferguson also found that "over 50% of 2006–07 senior year and weighted GPAs recorded on the transcripts did not agree to the GPAs shown in the Genesis Education System." However, after narrowing the scope, "only one of the individual grade GPAs did not agree, but all of the weighted GPAs on the transcripts tested did not agree to the weighted GPAs shown in the Genesis Education System." What became clear during the testimony was that Mr. Ferguson had not been made aware of the grading change that had occurred during the 2006–2007 school year, when plus and minus signs were added to grades. On cross-examination, Mr. Ferguson acknowledged that this change in the grading system could explain why the grades that he retrieved from the Genesis system at the time that he did his review differed from the earlier hard copies that he found in the guidance counselors' folders for the students. It was also clear from Mr. Ferguson's testimony that he was not aware that a grade in an honors course was given more weight than the same grade in a non-honors course.

Mr. Ferguson also found that not all core-curriculum courses were included in the student's GPA calculation per the Curriculum Report (i.e., Physical Education). The testimony clearly demonstrated that there was a wide disparity of opinion as to what courses should have been included in the GPA calculation. The policy on class rank stated:

> Class rank will be calculated by the final grade in all academic subjects, except those subjects for which no credit is awarded, and will not include failing grades. Weighted credit will be calculated for grades earned in advanced placement and honors courses. The class ranking of a pupil who has transferred to this district will include the grades earned in the regular program of the prior school.

The question became what constituted an academic subject. According to the testimony of Mr. Wolff and Dr. Romano, any course for which a student earned credit was an academic course. Mr. Wolff had put together a list of 140 courses that should have been included in the GPA. Yet, when Ms. Balletto testified, she pointed out that a number of courses on the list were considered clubs and were not sanctioned courses according to the Board of Education. The issue of which classes are to be included in the GPA seems yet to be decided, and no updated class-rank policy was introduced in evidence.[12] Mr. Berman presented uncontroverted testimony that he did not agree with Policy 5430, Class Rank, and had taken his concerns to six prior superintendents, none of whom wanted to tackle the issue because it involved the Board of Education. When he took his concerns to Dr. Bandlow, the superintendent said that the matter had to be studied and a recommendation made to the Board. Mr. Wolff testified that prior to his formally assuming his position at Fort Lee, he was asked to attend a meeting conducted by Mr. Berman that involved the issue of what courses should be included in the GPA. Later, Mr. Wolff was given the job by the superintendent of putting together a list of courses that were presently not counted toward the GPA, and helping to form a committee of professionals and citizens to study the issue. Certainly, there was nothing in the testimony presented that demonstrated that Mr. Berman was derelict in dealing with the GPA issue.

A more thorny issue is the charges surrounding discriminatory practice toward special education students. The District alleged:

> The High School during Berman's tenure had long had a discriminatory stance toward special education students.

[12] Policy 5430, Class Rank, was adopted on December 20, 1999.

> Grades from special education courses were specifically excluded from the GPAs of students in the special education program. Only the grades that they received in their regular education classes were counted.

The charge arose out of the testimony of Ms. Moreland and Dr. Romano. Ms. Moreland testified that Ms. No Miller, a school psychologist, brought it to the vice principal's attention, shortly after she assumed her position in October 2008, that the grades that special education students received for collaborative courses were not counting toward their GPAs.[13] Ms. No Miller also pointed out that the law prohibited any demarcation on a transcript that signaled that a student was taking special education courses. Some of the special education courses listed in Genesis were clearly designated as special education courses. Ms. Moreland testified that normally Ms. No Miller's concerns would have been brought to the attention of the supervisor of Guidance, but at the time there was no acting supervisor, so Ms. No Miller came to Ms. Moreland for advice, even though Ms. Moreland was not charged with responsibility for this area of education. After her conversation with Ms. No Miller, Ms. Moreland spoke with Mr. Berman, who told her to contact Genesis and fix the problem, because special education collaborative courses had to be counted and the law had to be followed. Ms. Moreland also discussed the problem with Dr. Romano, who gave her similar advice.

The District alleged that as a result of Mr. Berman's not doing his job correctly, regular education students' class ranking was artificially raised at the expense of the students in the special education program, and the special education students were systematically denied the opportunity to improve their GPAs and class rank. This allegation assumes that the special education students' class rank would have improved with the addition of their grades from collaborative courses. There was no evidence presented to substantiate this position, and it could also be that the students' grades in collaborative courses were lower than in other courses and could have brought down their GPAs and class rank. Be that as it may, the courses should have been included and demarcated in such a way that they did not alert anyone reading a transcript that the courses were for special education students. Certainly, if Mr. Berman had been

[13] Collaborative courses were those courses that special education students took with general education students. The general education students received credit toward their GPAs for these courses, but the special education students grades were not registered in Genesis for the purpose of calculating their GPAs.

more familiar with Genesis this glitch in the system might have been discovered earlier.[14] However, it is interesting that the District never brought its concerns about the special education courses to the attention of the supervisor of Special Education. Certainly, it was that person who was primarily responsible to ensure that special education students' credits were properly recorded and that courses were listed in conformity with special education law. In addition, Dr. Romano acknowledged that special education fell under the exclusive control of the director of Special Education. Child Study Team members reported to the director, who in turn reported to the assistant superintendent. Guidance Department witnesses made it clear that they were told that they should have nothing to do with special education students, including assisting them in their college applications, because this was the domain of the Special Education Department. It appears somewhat suspect, given this chain of command, that Mr. Berman, rather than the supervisor of Special Education, is being charged with discriminatory practices for failure to have special education students' course credits included in the students' GPAs.

The District's next argument involves HSPA testing. The District alleged that New Jersey law requires that all eleventh-grade students take the HSPA.[15] Mr. Berman circumvented State law requirements by authorizing four students to be moved from the eleventh grade to the tenth grade in order to avoid them having to take the HSPA exam. According to the District, the motivation for allowing this move was that, if these students took the test and failed, this would bring down the overall test scores for the high school. It had been one of the goals of Mr. Berman's Professional Growth Plan to improve the instruction for ESL and bilingual students, especially Hispanic students, in preparation for their taking the math portion of the HSPA. Demoting ESL students from the eleventh grade to the tenth grade was an attempt to accomplish the goal without actually providing the necessary curriculum changes.[16] Dr. Romano testified that as long as a student had sufficient credits, he should be kept in the grade that matched his credits. In addition, he pointed out that the HSPA manual specifically stated that ESL students were not exempt from taking the test, although accommodations could be

[14] There was testimony that the Genesis system had check marks that were activated next to a course name that indicated whether the course was to be calculated in the GPA.

[15] See N.J.S.A. 18A:7C-6.1.

[16] One of the students had a Hispanic surname.

made for the ESL student. The District asserted that, as a result of Mr. Berman's actions, these four students missed an opportunity to take the HSPA in the spring of 2009; they were only given two, instead of three, bites at the apple. At least one of the students, as of the spring of 2010, had not passed the HSPA test, which was required for graduation from high school.[17]

According to the testimony elicited from Sharon Amato, the supervisor of curriculum and instruction for ESL, Bilingual and World Languages, she had initially spoken to Sun Kim, a senior ESL teacher, in September 2008 about the fact that the Department of Education would no longer permit an ESL student to take the HSPA test in the student's native language.[18] Following this conversation, Ms. Kim expressed concern about certain students' ability to succeed, and gave Ms. Amato a list of four students whom she wanted to move back to the tenth grade. Ms. Amato then approached Ms. Pettigrew with a note with four students' names written on it,[19] and asked her to move the students from the eleventh grade to the tenth grade. Ms. Pettigrew testified that she would not make the change without written authorization. At the time there was no supervisor of Guidance, so Ms. Amato went to Mr. Berman to ask for his approval. She explained to Mr. Berman, after speaking with Ms. Kim about the testing changes, that for the sake of the students it would be better to place the students in the tenth grade to improve their language skills. According to Mr. Berman, he approved this change because he thought that the move would be in the students' best interest. He believed that students should not receive a high school diploma if they cannot read and write English. The fact that the Guidance Department had deemed that the students had sufficient credits to be in the eleventh grade was not the complete story. He referred to the District's promotion/retention policy, which stated: "High school students may not move to the next grade level unless they have satisfactorily completed the required number of credits as specified in the regulation of this policy. Parents/guardians will be notified whenever exceptions are contemplated in

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[17] Dr. Romano testified that Mr. Wolff was incorrect when he testified that the students were able to take the HSPA in March 2009. There is no question that the students were placed back in the eleventh grade at some point in the spring of 2009. Their courses were not changed because they moved back a grade in October 2008.

[18] It was actually the SRA test given to students in the spring of their senior year that Ms. Amato was told could not be given in a student's native language. Students were permitted to use a translation dictionary, and instructions could be given in their native language. The policy was again changed and students are permitted to take the SRA in their native languages.

[19] There was another name on the note, which had been crossed out at some point.

a student's normal progression from level to level. The final decision in all cases will rest with school authorities." (Emphasis added.) Both Ms. Amato and Mr. Berman confirmed that they had the parents' permission to make this change. Ms. Amato also testified that she considered other factors besides the number of credits that the students had earned when recommending that they be placed back a grade. Namely, she pointed to another portion of the promotion/retention policy that said that "students shall be placed at the grade level to which they are best suited academically, socially, emotionally and physically." Mr. Berman testified that two of the four students were new to the United States; one had transferred from another school one year earlier; and the other, who had been in the high school for several years, was extremely low functioning in language skills. Mr. Berman also emphasized that despite the number of credits that the students had accumulated, almost all the courses that they were taking at the time were ninth- and tenth-grade courses rather than eleventh-grade offerings. During cross-examination, Dr. Romano acknowledged that a majority of the courses that these students were taking were usually scheduled for students in their freshman or sophomore years.

Ms. Amato testified that she had never made a request of this nature before, and Mr. Berman acknowledged that he had never before been asked to demote ESL students in this way. When I questioned Ms. Amato and Mr. Berman as to the purpose of moving the students back a grade if their courses were not being changed, they both stated that since the students were basically taking ESL courses there would be no course change from one grade to another. Basically it was the amount of time that the students would be exposed to ESL-style learning. If the students were able to progress with the ESL instruction to the next level, then they would be ready to enter the twelfth grade by the end of the school year. If not, they would remain in the ESL program for an additional year.

The testimony certainly presented a difference of philosophy between Dr. Romano and Ms. Amato and Mr. Berman as to what the criteria is for placing a student in a particular grade. There was also contradictory testimony from Ms. Pettigrew, who claimed that when she asked Mr. Berman why the students were being put back, he said that he was doing this because the students were recent

entrants to the school and were ESL students with limited English ability, and they would most likely not be able to pass the HSPA and would need more time to gain proficiency. As a result of these contradictions, I am left to question the motivation for placing these students back a grade. The District opined that the motivation was the fact that Mr. Berman had been told that he needed to improve the Hispanic students' math HSPA results and the ESL students' scores on the HSPA. By demoting these students a grade, the students would not have to take the test, and their potentially low scores would not be reflected in the school's statistics. However, this hypothesis was refuted by the testimony of Mr. Berman and a document from the Department of Education website captioned "High School Proficiency Assessment Mathematics: 2007–08." According to Mr. Berman's testimony, which was bolstered by the exhibit, there would be little or no impact from these students not taking the HSPA. The ESL population at Fort Lee has never been statistically significant enough to be counted as a subgroup for the HSPA results. In addition, the general education population at the high school had previously had a 96 percent passing rate. Even if these four ESL students took the test and all failed, it would only make a 1 or 2 percentage-point difference in the passing rate, which was well above the state average. Based on the credible testimony presented, it appears that Mr. Berman's motivation for approving the movement of the four HSPA students back a grade was not to circumvent the State law requirements for the HSPA, but to attempt to provide a meaningful education for these students and prepare them to function in an English-speaking society.

As for the Hispanic students, Dr. Romano claimed that Mr. Berman failed to meet the goal in his action plan to improve their math scores in the HSPA up to 74 percent from the prior 50 percent passage rate. Mr. Berman testified that in an effort to improve these students' HSPA scores, he instituted support math classes in addition to the regular math classes. On the 2007–2008 HSPA examination, the Hispanic students' pass rate increased to 71.8 percent. While it is true that Mr. Berman did not meet the 74 percent goal outlined in the action plan, it can hardly be seen as a failure that the passage rate for Hispanic students on the math HSPA was raised almost 22 percentage points.

The District has also charged Mr. Berman with failing to adhere to critical safety requirements. It is the District's contention that Mr. Berman allowed staff members, including a supervisor, to remain in the building during fire drills. After Mr. Berman was terminated, Dr. Romano took over as acting principal. He testified that during two fire drills in March, while he was patrolling the halls of the school, he discovered staff members who had not evacuated. When questioned, they stated that Mr. Berman had not required them to leave the building during fire drills.

Mr. Berman responded that there was nothing to indicate that he violated the statute relating to fire drills, which does not say that the building has to be totally evacuated, but rather requires all teachers "to keep all doors and exits of their respective rooms and buildings unlocked during the school hours." N.J.S.A. 18A:41-1. Mr. Berman testified that when he first came to the school there were no written procedures regarding what should be done in case of a fire drill or other emergency procedure. He convened a committee to develop a plan, and that plan was reissued each year that he was principal of the school. The plan called for all staff and pupils to leave the school as soon as the alarm sounded. He also stated that three secretaries in the main office and the head custodian remained in the building to handle the calling of the police and fire departments and the ringing of the reentry bell. Mr. Berman said that he would walk around the building during fire drills to make sure that everyone had evacuated. Mr. Berman said that he was shocked to hear Dr. Romano's description of what occurred during the March fire drills that he conducted.

In deciding this issue, I found the testimony of Ms. Moreland most persuasive. As proof that Mr. Berman was not enforcing the evacuation policy, the District pointed to Ms. Moreland's testimony that when she first came to the high school she found staff members in the faculty room during a fire drill. In fact, Ms. Moreland stated that after she saw that staff was remaining behind, she made sure that the written policy on fire drills was issued again. This occurred in the fall of 2008. Yet in the spring of 2009 staff was still claiming that they did not have to exit the school. It appears to me that these staff members, who were caught red-handed by Dr. Romano, used Mr. Berman as an excuse. He was not there to contradict their assertion of permission. However, their statements contradict both Mr. Berman and Ms. Moreland's testimony that there was a

written policy that people exit the building during fire drills, and they checked to be sure the policy was enforced.

The District also pointed to a report issued on school violence which showed that there was a dramatic and substantial decrease in violence, vandalism, weapons and substance abuse among Fort Lee High School students during the period March 3, through June 30, 2009, when Dr. Romano was acting principal.[20] The District attributed this to the fact that Mr. Berman was not actively engaged with respect to ensuring a safe environment for students. Mr. Berman pointed to a prior report covering 2006–2008, which also showed a decrease in the incidents of vandalism, violence, weapons possession and substance abuse, although the decrease was not as great as that achieved during the period March through June 2009. The assertion was that the downward trend began well before Dr. Romano took over the reins at the high school. While it is clear that there was a definite decrease in the incidents of violence in the school from March to June 2009, the District's conclusion that it resulted from Mr. Berman's departure and Dr. Romano's tighter administrative control is a simplistic leap that cannot be made from the testimony presented.

The District asserted that Mr. Berman assigned inexperienced staff to perform important functions with no guidance or direction. As an example, the District pointed to the problems that developed as a result of Mr. Kravitz's handling of the scheduling. It was clear from Mr. Kravitz's testimony that he was no fan of Mr. Berman. Mr. Kravitz certainly did not appreciate the fact that Mr. Berman had criticized his handling of the scheduling for the 2008–2009 school year. It was also clear that Mr. Berman, because of his own lack of familiarity with the Genesis computer system, did not give Mr. Kravitz hands-on assistance in working out the schedule. On the other hand, there was testimony from Mr. Kravitz that he shadowed Ms. Appelbaum, his predecessor, for two months before she left. She certainly was familiar with the computer system and scheduling, which she had done for many years. Mr. Berman offered to have Ms. Appelbaum come back to assist Mr. Kravitz with the scheduling, but Mr. Kravitz

[20] The report showed a decrease of 69.6 percent in incidents of violence, vandalism, weapons possession and substance abuse; a decrease of 82.6 percent in incidents requiring a police report; and a decrease of 90 percent in incidents requiring a police complaint.

declined. Mr. Berman took Mr. Kravitz at his word when he said that he had the situation under control and did not need Ms. Appelbaum's assistance. What Mr. Berman did not know was that Ms. Calabro, the superintendent of schools, had told Mr. Kravitz that she did not want to hire Ms. Appelbaum as a consultant because her fee was exorbitant. When Mr. Berman called Ms. Calabro about getting assistance for Mr. Kravitz, he was told that Mr. Kravitz felt that he could do the job without assistance and she had confidence in him. Thus Mr. Berman was erroneously reassured from two sources that Mr. Kravitz had the ability to complete the task. Mr. Kravitz testified that he tried to contact Mr. Berman during the month of July, but he was on vacation and did not respond. He also testified that he got assistance from the guidance counselors, save Ms. Meller, who did not surface until August.

There was certainly a lot of finger-pointing going on during the testimony as to who was responsible for the problems with the scheduling. Mr. Kravitz testified that the schedules were complete and ready to go by the end of July. It appears that once Ms. Meller returned from vacation and looked at the schedule she did not like what she saw. Whether there were actual flaws in the scheduling or she just did not think that her "special students" had gotten the choice schedules is not clear, but it appears that she made changes that had a ripple effect on the entire schedule. Mr. Berman claimed that when the scheduling problems became apparent he called in guidance counselors, and almost all of the problems were resolved by the end of the first week of class. He also claimed that every year there are scheduling problems that need to be resolved and that some problems linger past the first week of school. Dr. Romano viewed the problem as much more severe. Certainly, if Mr. Berman had been more familiar with the computer system, some of the problems could have been avoided. However, it is also true that the lack of communication about using Ms. Appelbaum as a consultant added to the scheduling problem. Finally, it appears that Ms. Meller's interference negatively impacted the whole situation.

Mr. Berman was also charged with negligence in adhering to the law regarding attendance records in the high school. Dr. Romano testified that during senior exam week students were marked present even though they were not present in school. He opined that the practice at the high school of not marking a senior student absent if the

student was not required to be in school to take an examination was inaccurate record-keeping. Some other designation should have been inserted in the Genesis system to show that these students were not present at school, but had some form of excused absence. Mr. Berman testified that the policy of not marking the senior students absent when they were not required to be in school to take an examination had been in effect long before he came to the high school, and he was not aware of any other designation that could be put in Genesis that would reflect those students' status.[21] The District's assertion that Mr. Berman's failure to raise the issue of the proper designation to the District administration resulted in the records being misleading appears to me to be an over-dramatization of the situation. It was clear that this procedure had been in effect for many years. The District officials knew full well that if a senior did not have an exam, then the student did not have to be in school. If the student did have an examination and did not attend, then the student was marked absent. Certainly, the system could have been changed, if the Board wished to do so, but it was an over-dramatization to allege that Mr. Berman permitted inaccurate attendance record-keeping.

2. Increment Withholding

Mr. Berman is appealing the District's withholding of his increment for the 2009–2010 school year. N.J.S.A. 18A:29-14 states:

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

The decision to withhold an increment is subject to the "arbitrary standard." It cannot be overturned unless the decision is found to be arbitrary, without rational basis, or adduced by improper motives. See Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960).

[21] Genesis did not mark students present, but only recorded students that were absent.

The District argued that once the Board discovered the criminal activities that had been occurring under Berman's tenure, there was no other option than to suspend Berman without pay and withhold his increment. The District claimed that Mr. Berman did not attempt during his testimony to rebut the validity of the increment withholding. In reality, Mr. Berman's whole case was an attempt to prove that the charges against him were false and unsubstantiated. There is a different burden of proof for sustaining tenure charges, i.e., by a preponderance of the evidence, than for increment withholding, i.e., arbitrary and capricious. However, if the charges are not proved, then it would be difficult to say that the District's action in withholding the increment is sustainable, especially in this case, where the District has made it clear that the withholding of an increment is based entirely on the allegations contained in the tenure charges. As to the other charges that the District brought unrelated to the Meller activities, it has not been shown that Mr. Berman was ever put on notice that these were practices that the administration found objectionable or that needed remediation. Before his increment was withheld, Mr. Berman should have been given an opportunity to correct any problems or practices that his superiors found wanting. Mr. Berman never received a negative review from prior superintendents, nor did he receive anything in writing from the current superintendents to advise him that there was a need for improvement.

CONCLUSIONS

Based on the reasoning above, I **CONCLUDE** that the District has failed to sustain its burden of proving the tenure charges against Mr. Berman.

I further **CONCLUDE** that since the withholding of Mr. Berman's increment was based, according to the District, on the tenure charges, especially those relating to Ms. Meller's illegal activities, and since the District has not proved those charges, the withholding of Mr. Berman's increment was arbitrary and capricious.

ORDER

It is hereby **ORDERED** that the tenure charges against Mr. Berman be dismissed and that Mr. Berman be paid all back pay and benefits due to him.

Further, it is **ORDERED** that Mr. Berman be paid his salary increment for the 2009–2010 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.

8/16/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: August 16, 2010

Date Mailed to Parties:

db

APPENDIX

WITNESSES

For Fort Lee:
Rosa Pettigrew
Yvette Stamoulis
Marcia Leon
Lawrence Wolff
Cheryl Balletto
Sean Ferguson
Frank Romano
Elizabeth Moreland
Robert Kravitz

For Jay Berman:
Sharon Amato
Jay Berman
Michelle Morgenstern
Frank Palatucci

EXHIBITS

For Petitioner:

P-1	E-mail from Lawrence A. Wolff, February 6, 2009
P-2	Memo from Lawrence A. Wolff, February 24, 2009
P-3	Summary of Interview with Rosa Pettigrew, February 13, 2009
P-4	Summary of Interview with Marcia Leon, February 13, 2009
P-5	Summary of Interview with Yvette Stamoulis, February 23, 2009

P-6	Fort Lee High School Transcript Review conducted by Cheryl Balletto and Ana Flores
P-7	Report in Connection with a Compliance Review of Student conducted by Ferraioli, Wielkotz, Cerullo & Cuva, P.A.
P-8	List of courses that have not counted towards student grade point averages
P-9	Memorandum from Dr. Frank Romano, June 1, 2009
P-10	Fort Lee Board of Education Policy 5430, "Class Rank"
P-11	Daily Percentage Absent and Tardy Report for Fort Lee High School for the week of June 16, 2008 through June 20, 2008
P-12	Employment Contract between Fort Lee Board of Education and Jay Berman dated December 17, 2001
P-13	Fort Lee Board of Education Policy 5125, "Pupil Records"
P-14	Report card for Amy Rose Muller
P-15	Transcript report for Amy Muller
P-16	Transcript report for Amy Muller
P-17	Transcript report for Kwang Seo
P-18	Transcript report for Kwang Seo
P-19	Transcript report for Anita Vichkulwrapan
P-20	Transcript report for Anita Vichkulwrapan
P-21	Report card for Anita Vichkulwrapan
P-22	Berman approving changes to grades
P-23	Examples of transcripts with grades deleted; Shiu-Hin Chon, Maria Claudia Vega-Gazabon, Shogo Kishikawa, Wu Zou, Isabel DeLuna Polanco
P-24	Genesis printout showing changes made to grades
P-25	Report to Board of Education regarding Vandalism, Violence etc...
P-26	Curriculum report
P-42	Report card for Ki Woong Jin
P-43	Transcript report for Ritee Parikh

P-44 Transcript report for Ritee Parikh

P-45 Transcript report for Keilchi Nagayama

P-46 Report card for Keilchi Nagayama

P-47 Transcript for Keilchi Nagayama

P-48 Transcript for Danny Han

P-49 Report card for Danny Han

P-50 Transcript for Danny Han

P-51 Transcript for Kevin Kim

P-52 Report card for Kevin Kim

P-53 Transcript for Kevin Kim

P-54 Transcript for Joseph Lim

P-55 Report card for Joseph Lim

P-56 Transcript for Joseph Lim

P-57 Transcript for Carlos Mota

P-58 Transcript for Carlos Mota

P-59 Report card for Carlos Mota

P-60 Transcript for Kameron Joyner

P-61 Transcript for Kameron Joyner

P-66 Transcript report for Argyrio Nikolaidis

P-67 Report card for Argyrio Nikolaidis

P-68 Report card for Dong Woo Rhim

P-69 Transcript report for Dong Woo Rhim

P-70 Report card for Helen Nunez

P-71 Transcript report for Helen Nunez

P-72 Transcript report for Helen Nunez

P-73	Transcript report for Helen Nunez
P-74	Report card for Helen Nunez
P-75	Job description for Director of Counseling
P-76	Job description for assistant superintendent
P-77	Job description for superintendent of schools
P-78	Archived data of the electronic violence and vandalism report from the DOE
P-79	For Lee High School's suspension report vandalism 2008-2009
P-80	Jay Berman action plan of March 2008
P-81	Annual written performance report for Jay Berman July 1, 2006-June 30, 2007
P-82	Observation report for 2007-2008 for Berman
P-83	Action plan for achieving instructional goals 2007-2008
P-86	Action plan for achieving instructional goals 2007-2008 dated March 27, 2008
P-87	Observation report for Jay Berman 7-1-06 – 5/1/06
P-88	Accomplishments for Jay Berman, 2003/2004
P-89	Professional growth plan for Jay Berman for 2005-2008
P-90	Observation report for Jay Berman, 7/1/06-6/30/07
P-91	Annual performance report for Jay Berman 2003-2004 school term
P-92	Action plan for Jay Berman, 2003-2004
P-93	Accomplishments for Jay Berman, 2003/2004
P-94	Annual performance report for Jay Berman 2002-2003 school term
P-95	Annual performance report for Jay Berman 2002-2003 school term
P-96	June 10, 2002 correspondence from high school staff to Nancy Stern, president of the Fort Lee Board of Education commending Jay Berman's services
P-97	Annual performance report for Jay Berman 2001-2002 school term
P-98	Annual performance report for Jay Berman 2001-2002 school term

P-99 Annual performance report for Jay Berman 2001-2002 school term

P-100 Memo from Jay Berman dated April 10, 2002 to Dr. V. Taffaro

P-101 School bomb threat certificate

P-102 School safety plan

P-103 Annual performance report for Jay Berman 2001-2002 school term

P-104 Action plan for achieving district goals 2002-2003 dated October 4, 2002

P-105 Middle States evaluation

P-106 Organizational chart

P-107 March 11, 2009 correspondence form Robert Cicchino to Ray Bandlow, re: OFAC report

P-108 August 20, 2009 correspondence from Robert Cicchino to Ray Bandlow, re: OFAC report, enclosing report

P-109 Guide to HSPA/N.J.S.A. 18A:7C-6.1

P-110 GPA and Class Rank Study

P-111 Letter from Superintendent to Parents and Students

P-113 Photo of HS Main Hall

For Respondent:

R-1 February 26, 2009 letter to Meller

R-2 District study proposal – GPA

R-3 HSPA – Ft. Lee High School

R-4 Promotion/Retention

R-5 Promotion/Retention request

R-6 Report to Board of Education

R-7 CV Frank Palatucci, Jr.

#494-10

IN THE MATTER OF JAN RUBINO	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
MATAWAN-ABERDEEN REGIONAL	:	DECISION
SCHOOL DISTRICT, MONMOUTH COUNTY.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent, a member of the Board of the Matawan-Aberdeen Regional School District, violated *N.J.S.A.* 18A:12-24(e) of the School Ethics Act, as well as 18A:12-24.1(e) and (f) of the Code of Ethics for School Board Members, when she solicited – via the school e-mail system – and received campaign contributions from three district employees. The Commission recommended the penalty of suspension for six months in this matter. The respondent did not appeal the Commission's underlying decision, nor did she file any comments with respect to its recommended penalty.

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 suspended for six months. Accordingly, the respondent is suspended for six months as a school official found to have violated the School Ethics Act.

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

November 15, 2010

AGENCY DKT. NO. 577-9/10

IN THE MATTER OF JAN RUBINO	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
MATAWAN-ABERDEEN REGIONAL	:	DECISION
SCHOOL DISTRICT, MONMOUTH COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of a six-month suspension, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Jan Rubino, member of the Board of Education of the Matawan-Aberdeen Regional School District, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(e) of the School Ethics Act, as well as *N.J.S.A.* 18A:12-24.1(e) and (f) of the Code of Ethics for School Board Members, when she solicited – via the school e-mail system – and received campaign contributions from three district employees.

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. Rubino.

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, which did not happen here. Therefore, 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 a six-month suspension from the Board is the appropriate penalty in this matter. As clearly stated in its decision, the Commission finds this penalty congruent with that imposed in previously decided similar cases. As such, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly, IT IS hereby ORDERED that Jan Rubino be suspended from the Board for a period of six-months as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/15/10
Date of Mailing: 11/16/10

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

RECEIVED BY
CONTROVERSIES
& DISPUTES

IN THE MATTER OF	:	**BEFORE THE SCHOOL** 2010 SEP 29 PM 3:49
JAN RUBINO	:	**ETHICS COMMISSION**
MATAWAN-ABERDEEN REGIONAL	:	
SCHOOL DISTRICT BOARD OF	:	**SEC Docket No. C16-08**
EDUCATION	:	**OAL Docket No. EEC 6172-09**
MONMOUTH COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 8, 2008 by Kenneth M. Aitken alleging that Jan Rubino, a member of the Matawan-Aberdeen Regional School District Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. An answer was filed by the respondent on May 23, 2008. On May 27, 2009, the Commission voted to find probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(e), as well as N.J.S.A. 18A:12-24.1(e) and (f). The Commission dismissed the allegation that the respondent violated N.J.S.A. 18A:12-24.1(a). The Commission further voted to transmit this matter to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 6A:28-6.8(a)[1] for a *de novo* hearing where the Commission prosecuted those allegations in the complaint which it found probable cause to credit.

Following the hearing on this matter, the Administrative Law Judge (ALJ) concluded that the respondent violated N.J.S.A. 18A:12-24(e), as well as N.J.S.A. 18A:12-24.1(e) and (f) of the Code of Ethics for School Board Members. The ALJ recommended a penalty of six-month suspension. The Initial Decision of the ALJ was reviewed by the Commission at its July 27, 2010 meeting; the matter was tabled pending receipt of the full record from the OAL, which was received by the agency on July 28, 2010. The Commission obtained an extension of time in which to consider the full record of this matter at its August 31, 2010 meeting. Neither party filed exceptions to the Initial Decision. N.J.A.C. 1:1-18.4 and N.J.A.C. 1:6C-18.3. At its meeting on August 31, 2010, the Commission adopted the findings and conclusions of the ALJ for the reasons expressed in her Initial Decision, as amplified herein.

ANALYSIS

Upon its review, the Commission finds that the record sufficiently supports the ALJ's findings that the respondent violated N.J.S.A. 18A:12-24(e), as well as N.J.S.A. 18A:12-24.1(e) and (f) of the Code of Ethics for School Board Members. Here, the respondent acknowledged that, during the Board election in 2008, she sent an e-mail to two or three employees at their

[1] On April 15, 2009, the State Board of Education adopted amendments to N.J.A.C. 6A:28, the regulations governing matters that come before the School Ethics Commission. These rules became effective on May 18, 2009. However, because the complaint in this matter was filed on May 8, 2008, the Commission followed procedures and rendered its determinations herein in accordance with the rules that were in effect at the time the complaint was filed. To the extent this decision cites to regulations, they are the regulations that were in effect when the complaint was filed.

school-provided e-mail accounts. (Initial Decision at p. 2) Although the text of the respondent's e-mail was not available, the respondent at no time disputed that the text of the e-mail that she sent to school employees was consistent with Exhibit P-2, the e-mail sent by her running mate, Mr. Rubrecht. That e-mail stated:

> As we begin our campaign we find ourselves in need of many things. We are hoping you, our valued supporters, can help us once again.
>
> The days of simply placing signs on lawns, shaking hands and hoping that it will be enough to win an election are gone. Yes, our signs are a great help but we have found, after many campaigns that flyers, signs, magnetic reminder cards and postcards (along with postage) are all essential when trying to get the word out.
>
> We are at a critical crossroad in this district, needing to make some critical changes. With your continued help we can accomplish so much. As board members we will show support of our new Superintendent and help to ease his transition. We will move forward and do what's best for our children and not get caught up in the day-to-day micromanagement of the district. We will work to educate every child at every level so all of our children can reach their highest potential. We will show our community, and its organizations, that we respect and value their input and opinions and support their efforts on behalf of our children.
>
> Simply stated, we need your support of time, effort and money to run an efficient, effective and successful campaign. Only with your support can we win the election and dedicate our efforts to making the Matawan Aberdeen School District an environment where all of our children will thrive.
>
> We are currently soliciting monetary contributions to get this campaign moving in the right direction. We can no longer afford to do it alone and need your help to raise the money that will allow us to run this campaign the best way possible.
>
> Thank you in advance for whatever you can give. We promise to work hard to win this election for all of you.
>
> Jan Rubino and Marty Ruprecht
>
> P.S. of course, any contribution will be greatly appreciated but...
> A donation of $25.00 will pay for 6 signs. (we need 200)
> A donation of $50.00 will pay for 200 postcard stamps (we need 3000)

> Please make checks out to: J.R. and M.R. for Board of Education Election. We have opened an account at Commerce, by law, for any and all donations and expenditures.
>
> [Home addresses omitted.] (Exhibit P-2)

The ALJ found that the respondent "sought contributions from three district [employees] using the school email system, and they contributed to her campaign." (Id. at p. 5) The Commission notes in this regard that the ALJ's findings of fact must be accorded deference.[2] Like the ALJ, the Commission is not assuaged by the respondent's assertion that the staff members were "long-time friends" of hers. (Id. at p. 3) They were still employees of the Board of Education.

With respect to the ALJ's conclusions of law, the Commission first notes that it has determined that N.J.S.A. 18A:12-24(e) requires a showing that when the school official accepted the contribution, s/he did so based upon the understanding that it was given for the purpose of influencing him/her, directly or indirectly, in the discharge of his/her official duties. I/M/O Meera Malik and Elizabeth Vasil, C06-98 & C08-98 (September 22, 1998). In this connection, the Commission recognizes that current technology affords candidates direct and immediate access to District staff; this benefit carries with it a concomitant burden to avoid any language or conduct that may even subtly hint at reciprocity or *quid pro quo*.

Even granting that for a full year the respondent recused herself from voting on "any matters involving hiring, rehiring, tenure, contracts, collective bargaining, or other staffing matters for all district employees" (initial decision at p. 4), this does not alter the fact that *at the time of the solicitation*, the respondent: (1) requested a donation from three school employees (2) by using their school-provided e-mail accounts (3) when she was in a position to directly or indirectly affect their employment (4) and where the text of the e-mail solicitation states that the (solicited) contributions will enable the candidates "to make some critical changes." As the ALJ found, the employees contributed to her campaign. (Initial Decision at p. 4) As such, the Commission finds sufficient support in the record to concur with the ALJ that a violation of N.J.S.A. 18A:12-24(e) is established.

Next, the Commission agrees with the ALJ that the record supports the conclusion that the respondent violated N.J.S.A. 18A:12-24.1(e), as set forth in the Initial Decision, by taking private action that was of such a nature that it might have compromised the Board. (Id. at p. 7) "Private action" means any action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities of the member. N.J.A.C. 6A:28-7.1. The respondent's actions, as an incumbent candidate, may certainly be viewed as private action. As noted in the Initial Decision, there need not be a demonstration that the respondent, in fact, compromised the Board. Here, the Commission notes that as a result of the respondent's actions, the Board attorney issued a memorandum on April 4, 2008 to all Board members

[2] The Commission "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).

regarding the solicitation and/or receipt of campaign contributions from individual employees and the need for subsequent recusal on the individual's employment issues. (Exhibit P-4) One could reasonably conclude that the Board was sufficiently concerned about the implications of the respondent's actions and, therefore, turned to its counsel who quickly sought to thwart any potential violations.

Finally, the Commission agrees with the ALJ that the record supports the conclusion that the respondent violated N.J.S.A. 18A:12-24.1(f), as set forth in the Initial Decision, when she used the school e-mail for District employees as a means to solicit donations to her campaign, which yielded contributions for her campaign.

DECISION

For the reasons set forth above, the Commission adopts the Initial Decision of the ALJ finding that the respondent violated N.J.S.A. 18A:12-24(e), and N.J.S.A. 18A: 12-24.1(e) and (f).

PENALTY

The Commission further adopts the ALJ's recommended penalty of a six-month suspension, finding precedent for such a penalty where there are multiple findings of violations. (See, Yafet v. Elbert Smith, Hillside Bd. of Ed., Union County, C24-07 (October 27, 2008), aff'd, Commissioner of Education Decision No. 156-09A, decided May 15, 2009 wherein the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(e), (d), (i) and (j) and recommended a six-month suspension, which was affirmed by the Commissioner; Jacobs v. Delbury, Sussex Wantage Reg'l Bd of Ed., Sussex County, C44-07 (November 23, 2008) Commissioner of Education Decision No. 7-09SEC, decided January 9, 2009, wherein the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(e), (g), and (i) and recommended a six-month suspension, which was approved by the Commissioner.) The Commission also notes that in a series of cases where Board members were found in violation of N.J.S.A. 18A:12-24(e) and 24(b) after soliciting campaign donations from a vendor, the Commission specifically noted that it would have recommended removal of those Board members, but, at the time of its determinations, they were no longer on the Board. I/M/O Hugh Gallagher, Keansburg Bd. of Ed., Monmouth County C03-01 (July 23, 2002), Commissioner of Education Decision No. 387-02SEC decided November 6, 2002; I/M/O Judy Ferraro, Keansburg Bd. of Education, Monmouth County, C04-01 (July 23, 2002), Commissioner of Education Decision No. 348-02SEC decided September 23, 2002); I/M/O Thomas Keelen, Keansburg Bd. of Ed., Monmouth County, C06-01 (June 24, 2003), Commissioner of Education Decision No. 549-03SEC decided September 22, 2003. Thus, on balance, and in consideration of the mitigating factors in this matter, the Commission finds that the ALJ's recommendation for penalty is appropriate.

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.

Robert W. Bender
Chairperson

Mailing Date: September 29, 2010

Resolution Adopting Decision – C16-08

Whereas, the Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(e) and N.J.S.A. 18A:12-24.1(e) and (f) of the Code of Ethics for School Board Members; and

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a *de novo* hearing; and

Whereas, the Administrative Law Judge concluded in her Initial Decision that the respondent violated N.J.S.A. 18A:12-24(e) and N.J.S.A. 18A:12-24.1(e) and (f) and recommended a penalty of six month's suspension; and

Whereas, after consideration of the full record, at its meeting on August 31, 2010, the Commission adopted the Initial Decision of the ALJ; and

Whereas, the Commission finds that the within decision accurately memorializes its affirmance of the ALJ's recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on September 28, 2010.

Joanne Boyle, Executive Director
School Ethics Commission

RECEIVED
JUL 19 2010
SCHOOL ETHICS COMMISSION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EEC 6172-09
AGENCY DKT. NO. C16-08

IN THE MATTER OF JAN RUBINO,
MATAWAN-ABERDEEN BOARD OF EDUCATION,
MONMOUTH COUNTY.

Jan Rubino, petitioner, pro se

Susan M. Huntley, Deputy Attorney General, for respondent, School Ethics Commission (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: June 28, 2010 Decided: July 19, 2010

BEFORE **LAURA SANDERS**, ACTING DIRECTOR AND CHIEF ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On May 8, 2008, the School Ethics Commission (the Commission) received a complaint against Jan Rubino, a Matawan-Aberdeen Board of Education member, concerning an email sent out during her campaign for re-election to the school board. An answer was filed by Rubino with the Commission on May 23, 2008. Following a preliminary evaluation of the complaint, the Commission on May 27, 2009, voted that there was probable cause to credit four of the allegations in the complaint. These four were as follows. First, the Commission found a probable violation of N.J.S.A. 18A:12-

24(e) prohibiting solicitation or acceptance of a gift or political contribution based on an understanding that the contribution is for the purpose of influencing the candidate in the discharge of his or her duties. Second was a similar finding concerning an email to the Board attorney. Third was an alleged violation of N.J.S.A. 18A:12-24.1(c), which prohibits the taking of private action that could compromise the Board. And fourth was a probable violation of N.J.S.A. 18:12-24.1(f), which forbids the use of the schools for personal gain or the gain of friends. Having determined the matter to be a contested case, the School Ethics Commission transmitted it to the Office of Administrative Law for a fair hearing. It was filed on July 13, 2009, and heard on June 28, 2010.

Rubino acknowledges having sent an email to two or three employees at their school email addresses. She also acknowledges that her running mate sent an email to three employees through their school email addresses. She contends, however, that these were naïve errors, and that the fact that she recused entirely from all votes involving personnel for a full-year underlines that she never intended to act improperly.

Prior to the beginning of the hearing, counsel for the School Ethics Commission advised that during discovery, it became clear that Rubino's approach to the Board attorney was, not as originally charged, for the purpose of seeking contributions, but rather was for the purpose of seeking his advice. For that reason, the Commission's counsel advised the Commission is no longer pursuing any violation related to interaction with the Board attorney. This left three charges for hearing.

FACTUAL DISCUSSION

There is no dispute as to the following. In the spring of 2008, Rubino was running for her third three-year term as a Board of Education member. The election was contentious, as the Board had been splitting five-to-four on important votes. The spring 2008 campaign marked the first time Rubino had run with someone not already sitting on the Board and also the first time that she did any fundraising related to the campaign. She and her running mate, Martin Ruprecht, together composed a joint letter that each distributed electronically to friends and family. The e-mails were sent out in

approximately the third week of March 2008. No email sent from Rubino's email account was in evidence at hearing.

The factual issues concern Rubino's interaction with school employees. While she acknowledged having directly emailed two or three school employees at their school addresses, Rubino testified that she does not remember the names of those persons she contacted. She also could not recall whether she had received contributions from them; she thought she may have. She characterized the employees as long-time tenured teachers and friends made in her years serving in the Parent Teacher Organization while her children were going through school.

Rubino testified that about a month after the campaign ended, she erased the campaign materials from her laptop. The campaign ended in the second week of April 2008. Rubino purges email routinely to maintain the speed of the laptop. She said she did not recall whether the erasure occurred before or after she received the ethics complaint from the Commission, but that in any event, it was many months before she understood what the Commission wanted from her. The procedural history of the case indicates Rubino's response to the complaint was received by the Commission on May 23, 2008. A letter attesting to the answers stated that Rubino submitted them on May 12, 2008.

Although no copy of an email directly from Rubino was available, an e-mail from her running mate was offered. (P-2.) The email, which ended with the names and addresses of both candidates and their mutual-campaign bank account, was sent to three school district employees, among numerous others. Rubino testified that although the email presented itself as being from both candidates—she and Ruprecht did not pre-screen each other's lists of potential recipients. Rather, each independently sent email and letters to family and friends. From the list of recipients on the top of Ruprecht's email, Rubino identified "dgallagher" as a part-time assistant in the technology department; "lviel" as a long-time, tenured science teacher; and "kolsen" as another long-time teacher then serving as a principal. Although during the hearing, she could not recall Olsen's tenure status, she acknowledged that in response to interrogatories in February 2010 (P-3), she had stated a year earlier before the SEC

that Kathleen Olsen, a middle school principal, was not tenured at the time Ruprecht sent the March 21, 2008, email. Rubino was not copied on Ruprecht's email. The content of the email included the following:

> We are at a critical crossroad in this district, needing to make some critical changes. With your continued help we can accomplish so much. As board members we will show support of our new Superintendent and help to ease his transition. We will move forward and do what's best for our children and not get caught up in the day-to-day micromanagement of the district.
>
> . . .
>
> Thank you in advance for whatever you can give. We promise to work hard to win this election for all of you.
>
> [(P-2.)]

There was no evidence at hearing linking the solicitation of the three employees identified in Ruprecht's email with an actual contribution to either candidate. Thus, the only evidence concerning actual contributions was Rubino's statement that the three employees she personally solicited "may have" contributed.

In response to her own email solicitation, Rubino testified a friend suggested she contact the Board attorney and seek advice about the campaign. This she did. By memorandum dated April 4, 2008, the Board attorney, referencing a newspaper article, advised Board members that "Any Board member voting on the renewal or non-renewal of any individual employee in the District, after soliciting and/or receiving campaign contributions from that specific employee, would present an 'appearance of impropriety.' As a result, any Board member who either solicited and/or received campaign contributions from individual employees of the District should recuse themselves from discussions and abstain from voting on that individual's employment status." (P-4.)

Although the Board attorney advised the Board members to specifically identify which district employees were solicited, so as to determine which matters would require recusal, Rubino testified she did not do that. Rather, she went further and simply refrained, for an entire year, from voting on any matters involving hiring, rehiring, tenure, contracts, collective bargaining, or other staffing matters for all district employees.

While acknowledging that using the school email was a mistake, Rubino testified that she made no promises and was in no position to make any promises as a single, volunteer member on a nine-member board. Further, the controversy surrounding the email was emotionally difficult for not only her, but also her family.

Essentially, the Commission is charging Rubino with ethics violations for an unknown email to school district employees identified only as long-time teachers. Except that Rubino sent it, and that it "may have" resulted in contributions of unidentified size, nothing else is known about it. Additionally, the Commission is charging Rubino with contacting three district employees via a second email. The "from" portion of the email identifies Ruprecht as the sender, and Rubino is among those copied. Thus, she did not physically send the email, and there is no evidence she approved the list of people to whom it went. It did, however, represent itself as coming from both candidates and benefiting both candidates.

With regard to the identity of the school district employees emailed directly by Rubino, Rubino's testimony lacked credibility. While nearly two years have passed since the election, it is nonetheless inconsistent to characterize the two or three recipients as old friends from PTO days, but not be able to recall their identities. The erasure from the laptop is also troubling, since the controversy surrounding the email solicitation was clearly heated and continued for some weeks, and by her own account, the erasure may have occurred after receipt of the complaint. Additionally, although she stated that she and Ruprecht jointly composed the letter Ruprecht sent, she never testified that it was that exact letter she sent to the three school employees she contacted. Based on the erasure, the lack of identification, the comment that they "may have" contributed, I **FIND as FACT** that Rubino sought contributions from three district employers using the school email system, and they contributed to her campaign.

As regards to the process employed in the solicitation of the three employees by Ruprecht and Rubino's involvement, Rubino's testimony about jointly writing the letter and not pre-screening each other's lists was credible, and I **FIND as FACT** that each sent to their own list, and she did not pre-screen the list of persons on his email.

LEGAL ANALYSIS AND CONCLUSION

The first issue is whether Rubino's email violated N.J.S.A. 18A:12-24, the conflict-of-interest statute. Rubino points to the fact that the provision expressly allows board candidates to solicit and accept contributions to a campaign. She contends that there is no evidence whatsoever that she in any way knew or had reason to know that the three employees linked to contributions intended to influence her in the discharge of her duties. The conflicts law states:

> No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties[.]
>
> [N.J.S.A. 18A:12-24(e).]

Rubino's silence in regard to the contributions made to her in response to her own solicitation suggests that something less generic than a general request for contributions occurred, and I **CONCLUDE** that a violation of that portion of the statute has been demonstrated.

With regard to the second two charges, the relevant ethics-code provisions state:

> 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.
>
> [N.J.S.A. 18A:12-24.1(e) and (f).]

The Commission alleges that using school email to solicit funds was use of the schools for personal gain. I **CONCLUDE** that the use of the school email to seek campaign contributions did, in fact, constitute utilization of school district property for private use, and was therefore, a violation of N.J.S.A. 18A:12-24.1(f).

Additionally, the Commission argues that the Rubino-Ruprecht email and her email constituted private actions that could compromise the Board, and that the seriousness of the problem is underlined by the Board attorney's decision to send a memorandum to all Board members. The Commission contends that the fact that Rubino avoided voting on all personal matters for an entire year is irrelevant. The only thing that matters is that the solicitation could have compromised the Board. In other contexts, reliance upon the official counsel's advice have been deemed an adequate defense. See, for example, In re Zisa, 385 N.J. Super. 188 (App. Div. 2006), mayor's reliance on municipal attorney's advice prior to vote involving his own property held reasonable. Similarly, in other contexts, courts have held that efforts to avoid the public ill that a statute is designed to eliminate should be considered as mitigating factors in evaluating penalty. Div. of Alcoholic Bev. Control v. Maynard's t/a Maynard's Café, 192 N.J. 158 (2007). (Although ABC statute imposes strict liability for violations, mitigating factors should be evaluated in determining penalty). While I **CONCLUDE** that the emails were a private action and did have the potential to compromise the Board, the fact that the actual potential damage never occurred because Rubino refrained from all personnel matters is relevant to determining penalty.

The penalty recommended at hearing was suspension or removal from office on grounds that three separate violations occurred, and censure has been employed only in instances where a single violation occurred. In re Graves, SEC Dkt. No. C47-05, EEC 2435-06, Final Decision (July 10, 2008), http://lawlibrary.rutgers.edu/oal/search, the Commissioner of Education imposed censure on a board member who improperly involved herself directly on two separate occasions in a personnel action involving an

individual. In re Keelen, Agency Dkt. No. 289-8/03, EEC 8784-01, Final Decision (Sept. 23, 2003), http://lawlibrary.rutgers.edu/oal/search, removal was downgraded to censure only because a board member already had left the board, where the respondent had flagrantly used his official position to secure unwarranted advantage for himself. In the Matter of the Suspension of Dr. Joseph Atalla, the State Board of Education imposed a one-year suspension on a board member who was found to have threatened a member of the public at a public meeting. In two other cases, board members were censured for single violations in In the Matter of Raymond Bonker, Lenape Valley Regional Board of Education, C11-07 (March 30, 1998) releasing staff email in campaign literature without prior board discussion or approval; and In the Matter of Lawrence James, Chesilhurst Board of Education, C10-98 (December 15, 1998) asking the business administrator to intercede on a private loan from the bank holding the board's accounts.

In the application of N.J.S.A. 18A:12-24(e), the Commission has distinguished between incumbent board members and mere candidates, on grounds that candidates are not school officials as defined by the Act. See In re Guarascio, C40-08 (April 20, 2010). Had the only issue been the sending by a non-official of that particular email to three employees, a reprimand would have been appropriate as there is no evidence Rubino pre-screened the list of recipients before Ruprecht sent it to employees.

Far more serious is the missing email to district employees who did contribute but have remained unnamed. This, combined with Ruprecht's email, would merit removal, but for the steps taken to prevent the potential harm from actually occurring. Balancing the mitigating factors against the seriousness of the actions, I **CONCLUDE** that a six-month suspension is warranted.

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, P.O. 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.

Laura Sanders

July 19, 2010

DATE

LAURA SANDERS,
ACTING DIRECTOR AND CHIEF ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/caa

WITNESSES

For Petitioner, School Ethics Commission:

None

For Respondent, Jan Rubino:

Jan Rubino

EXHIBITS

For Petitioner, School Ethics Commission:

P-1 No exhibit

P-2 Email from kmruprecht@optonline.net

P-3 Page three of Answer to additional Interrogatory dated February 8, 2010 (six pp.)

P-4 Memorandum to Matawan-Aberdeen Regional School District Board of Education from Michael J. Gross, Board attorney, dated April 4, 2008

For Respondent, Jan Rubino:

No exhibits

502-10

OAL DKT. NO. EDU 9929-09
AGENCY DKT. NO. 202-8/09

G.B. and K.B., on behalf of minor children, A.B. and A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Consent Judgment, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11|22|10

Date of Mailing: 11|23|10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09929-09

AGENCY DKT. NO. 202-8/09

G.B. AND K.B. ON BEHALF OF MINOR CHILDREN, A.B. AND A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Respondent.

Richard A. Brovarone, Esq., for petitioners

Vittorio S. LaPira, Esq., for respondent

(Fogarty & Hara, attorneys)

Record Closed: September 9, 2010 Decided: October 5, 2010

BEFORE **RICHARD McGILL**, ALJ:

G.B. and K.B. filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Borough of Englewood Cliffs (respondent) in regard to their children, A.B. and A.B. The matter was transmitted to the Office of Administrative Law on September 10, 2009, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Consent Judgment. Respondent's Certified Resolution approving the settlement was submitted along with the Consent Judgment.

Having reviewed the record and the terms of settlement, 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** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

October 5, 2010

DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: OCT 8 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Attachment

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
SEP 0 9 2010

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 (Fax)
Attorneys for Respondent
Englewood Cliffs Board of Education
Our File No.: 125

GRAHAM BAZIKIAN and KATHLEEN BAZIKIAN, o/b/o minor children A.B. and A.B.,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioners,	:	OAL DKT. NO: EDUOS 0992-2009N
vs.	:	AGENCY REF. NO: 202-8/09
ENGLEWOOD CLIFFS BOARD OF EDUCATION,	:	
Respondent.	:	**CONSENT JUDGMENT**

WHREEAS, Petitioners Graham Bazikian and Kathleen Bazikian (hereinafter referred to collectively as "Petitioners"), commenced this action by filing a Verified Petition of Appeal herein, claiming that they were domiciled within the Borough of Englewood Cliffs during the 2009-2010 school year, and that their children were thus eligible to be educated by Respondent Englewood Cliffs Board of Education (hereinafter referred to as the "Board") on a tuition-free basis; and

WHEREAS, the Board filed a Counterclaim for tuition for the 2006-2007, 2007-2008, 2008-2009 and 2009-2010 school years on the grounds that Petitioners misrepresented that they were domiciled in the Borough of Englewood Cliffs during said time periods; and

WHEREAS, the parties have agreed to the entry of this Consent Judgment in settlement of disputed claims without trial or adjudication of any issue of fact or law herein;

NOW, THEREFORE, prior to the taking of any testimony, discovery, and without a trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto,

IT IS ON THIS 5th day of October, 2010;

ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment is hereby entered in favor of the Board against Petitioners, jointly and severally, on all counts of its Counterclaim with respect to the 2006-2007, 2007-2008 and 2008-2009 school years only, in the amount of $61,160.18, representing tuition for the school years set forth above, as well as attorney's fees and investigator's fees expended by the Board as a result of Petitioners' misrepresentation that they were domiciled in the Borough of Englewood Cliffs during the time periods set forth above.

2. Judgment is hereby entered in favor of Petitioners with regard to their claim that they were domiciled within the Borough of Englewood Cliffs for the 2009-2010 school year, and as such, their children were entitled to attend school in the District for the 2009-2010 school year without the payment of tuition.

3. The parties represent that they sign this Consent Judgment as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. The parties further represent that they have negotiated and fully reviewed the Consent Judgment, and that the maxim that any uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this Consent Judgment.

4. The parties acknowledge that an authorized representative of each party has signed this Consent Judgment with full knowledge, understanding and acceptance of its terms, and that this person has done so with authority to legally bind the respective party.

IT IS FURTHER ORDERED that a copy of this Order be served upon the parties within seven (7) days from the date hereof.

Richard McGill, ALJ

IN WITNESS WHEREOF, the undersigned hereby consent to the form, content and entry of the within Consent Judgment.

WITNESS:

Mary Welfel
Board Secretary/
School Business Administrator

Dated:

Sworn and subscribed before me Graham Bazikian by this 15th day of July, 2010

Notary Public

Richard A. Brovarone
Attorney at Law
of the State of New Jersey

Sworn and subscribed before me by Kathleen Bazikian this ____ day of _____, 2010

Notary Public

ENGLEWOOD CLIFFS
BOARD OF EDUCATION

By: _____
Joseph Luppino
Board President

Dated:

By: _____
Graham Bazikian

Dated:

By: _____
Kathleen Bazikian

Dated:

ENGLEWOOD CLIFFS PUBLIC SCHOOLS
143 Charlotte Place
Englewood Cliffs, NJ 07632-2681
Telephone (201) 567-7292 * FAX: (201) 567-2738

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
SEP 0 9 2010

Dominic Mucci
Superintendent of Schools

Mary Welfel
Business Administrator/Board Secretary

CERTIFIED RESOLUTION

d. WHEREAS, a dispute arose between the Englewood Cliffs Board of Education (hereinafter referred to as the "Board") and a family alleging that they lived in the Borough of Englewood Cliffs concerning their children's residency and entitlement to attend school in the Englewood Cliffs Public School District free of charge; and

WHEREAS, the parents have admitted that they did not live in the District for a three year period, and as a result, the Board and the parents have agreed that they shall provide the Board with Consent Judgment to repay the Board for tuition, costs and attorney's fees as a result of their misrepresentation, a copy of which is attached hereto and made a part of this Resolution.

NOW, THEREFORE, BE IT RESOLVED that the terms, stipulations and conditions as established in the Consent Judgment are hereby ratified and affirmed in all respects. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Consent Judgment and any other documents necessary to effect said settlement.

ROLL CALL VOTE:

AYES:	**7**
NAYS:	**0**
ABSTENTIONS:	**0**

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Englewood Cliffs Board of Education at a meeting held on August 23, 2010 by majority of the Board.

Mary Welfel
Business Administrator/Board Secretary

Dated: August 30, 2010

IN THE MATTER OF THE TENURE	:	
HEARING OF LAUREN COOKE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF EGG HARBOR,	:	
ATLANTIC COUNTY.	:	

SYNOPSIS

The petitioning Board filed tenure charges of conduct unbecoming against respondent Lauren Cooke – a tenured teacher – for allegedly making inappropriate and derogatory racial comments about another staff member and by lying to an administrator during an investigation. The petitioning Board sought revocation of respondent's tenure and termination of her employment.

The ALJ found that: on two occasions, respondent used racial epithets in reference to another member of the teaching staff, and – based on previous case law – these incidents constitute unbecoming conduct for a teacher; respondent violated school district policy 3281 by engaging in inappropriate staff behavior; respondent's inappropriate comments were made during school hours, which potentially put young children at risk, created unnecessary tension among teachers, and cast doubt on respondent's fitness to teach; however, dismissal of respondent from her tenured teaching position is not justified because her conduct does not establish her unfitness to discharge the duties and functions of a teacher since the inappropriate comments were intended to be made in confidence, and were not public statements. Accordingly – based on mitigating and aggravating factors – the ALJ concluded that respondent's removal from her tenured position is not justified, and ordered that respondent receive a 150 day suspension without pay as appropriate discipline for her unbecoming conduct.

Upon independent review of the record, the Commissioner concurred with the ALJ that respondent is guilty of unbecoming conduct, but her conduct does not justify her termination from employment. The Commissioner therefore concluded that the loss of 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges, plus an additional 30 day suspension without pay is a sufficient penalty to impress upon the respondent the seriousness of her errors in judgment. Additionally, the Commissioner ordered respondent to take coursework on racial sensitivity, at her own cost and expense, during the 2010-2011 school year.

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

November 22, 2010

OAL DKT. NO. EDU 74-09
AGENCY DKT NO. 357-12/08

IN THE MATTER OF THE TENURE	:	
HEARING OF LAUREN COOKE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF EGG HARBOR,	:	
ATLANTIC COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent and the Board of Education (Board).

This case involves tenure charges brought by the Board against the respondent Lauren Cooke, a teacher in the Egg Harbor School District. The Board charged the respondent with unbecoming conduct based on two incidents during which the respondent used a racial slur and a racially derogatory comment in reference to another teaching staff member. The Administrative Law Judge ("ALJ") found that the respondent was guilty of unbecoming conduct, and recommended that the respondent receive a 150 day suspension.

The respondent's exceptions largely reiterate the substance of her post-hearing submission at the OAL, recasting the arguments therein to support the contention that the ALJ erroneously sustained the Board's charges. Respondent asserts that the ALJ wrongfully determined that since neither of the two individuals who witnessed respondent's alleged use of the "N word" and "Aunt Jemima" had any discernable ulterior motive that it automatically means that respondent did in fact use those terms. Respondent maintains that she was equally or even more credible than the other witnesses, and her denial of the use of those phrases should hold more weight. In her exceptions, respondent also contends that the evidence is devoid of any basis for the ALJ's finding that "Aunt

Jemima" is a racist reference. Finally, respondent argues in the alternative that if the Commissioner determines the charges should be upheld, the penalty should be reduced.

In its exceptions the Board also reiterates the positions advanced in its post-hearing submission at the OAL. The Board urges the Commissioner to adopt the ALJ's determination that the respondent engaged in conduct unbecoming a teaching staff member, but takes exception to the penalty recommended by the ALJ. The Board maintains that the respondent's use of the "N word" on one occasion and "Aunt Jemima" on another occasion warrants the dismissal of respondent from her tenured teaching position.

The Board takes exception to the ALJ's determination regarding the applicable aggravating and mitigating factors in this case. In its exceptions, the Board contends that the ALJ erred in not finding as aggravating factors the fact that the respondent created a hostile work environment and that respondent failed to acknowledge that she used the phrases. The Board also takes exception to the ALJ's determination that the mitigating factors included the fact that no children or other teaching staff members, including the teacher who was the subject of the comments, heard respondent's use of the phrases. The Board emphasizes that – although the comments were not heard by others – because of where the comments were made, they could have been heard by both the students and other teaching staff members.

The Board also takes exception to the ALJ's analysis of the case law with respect to his finding that respondent's comments did not warrant dismissal, but rather a 150 day suspension. The Board stresses that the respondent's conduct in this case was more egregious than in cases cited by ALJ, and that the comments were made on two separate occasions, which amounts to a pattern of inappropriate behavior justifying the dismissal of respondent's tenure.[1]

[1] In its exceptions, the Board also seeks clarification as to whether the 150-day unpaid suspension is a form of prospective relief or whether it applies retroactively to the 120-day unpaid suspension already served pursuant to *N.J.S.A.* 18A:6-14, plus an additional 30 days.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearings conducted at the OAL on April 1 and April 16, 2010,[2] the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct. The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ, and taken into account by him in weighing the testimony and in concluding that the record supported the Board's charges. Notwithstanding respondent's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner also finds that 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 to be fully supported by the record and consistent with applicable law.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that the "[f]actors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the individual's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County*, decided

[2] The record did not include the transcript from the hearing conducted on December 4, 2009.

by the Commissioner October 14, 1997, slip. op. at 32, *citing In re Hearing of Ostergren, Franklin School District*, 1966 *S.L.D.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967). It is also well recognized that, by virtue of the unique position they occupy, educators must be held to an enhanced standard of behavior.

The Commissioner recognizes that the charges in this matter are serious in nature and finds that the inappropriate behavior of respondent necessitates the appropriate penalty. While in no way minimizing the seriousness of respondent's infractions, the Commissioner is in accord with the ALJ – for the reasons fully detailed on pages 32-36 of his decision – that under all of the circumstances and considerations existing in this matter, removal of respondent from her tenured position is an unduly harsh penalty.

The ALJ properly determined that the dismissal of the respondent from her teaching position is not justified because the conduct does not establish her unfitness to discharge the duties and functions of her position as a teacher. The notable mitigating factors include the fact that there is no evidence that the respondent has ever been the subject of any discipline during her 16 years with the district; there was no evidence presented that suggested the respondent treated the students inappropriately; her comments were not directed at a student nor did any students hear her comments; and the comments were made during private conversations. Further, the Commissioner disagrees with the Board's contention that the conduct in this matter was more egregious than in other cases where the tenured teaching staff member received a suspension rather than termination. See, *In the Matter of the Tenure Hearing of Adelphia Poston*, Commissioner Decision No. 326-06, decided October 19, 2006; *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County,* Commissioner Decision No. 371-02, decided October 21, 2002; *Jayson H. Burg v. State Operated Sch. Dist. of the City of Newark*, Commissioner Decision No. 649-97, decided December 18, 1997.

Therefore, the Commissioner finds and concludes that the loss of the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges, plus an additional 30 day suspension without pay is a sufficient penalty to impress upon respondent the seriousness of her errors in judgment displayed in this matter. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. In addition, to help insure that respondent is able to correct the inappropriate behavior, the respondent is ordered to take coursework on racial sensitivity at her own cost and expense to be completed by the end of the 2010-2011 school year. The coursework will be subject to reasonable review and approval by petitioner, who may apply to the Commissioner if respondent fails to comply with the above articulated terms.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11 | 22 | 10
Date of Mailing: 11 | 23 | 10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 74-09
AGENCY DKT. NO. 357-12/08

IN THE MATTER OF THE TENURE HEARING OF LAUREN COOKE, EGG HARBOR TOWNSHIP SCHOOL DISTRICT.

Yves C. Veenstra, Esq., for petitioner (Parker McCay, attorneys)

Clifford Van Syoc, Esq., for respondent (Van Syoc Chartered, attorneys)

Record Closed: June 7, 2010 Decided: July 22, 2010

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, a teacher in the employ of the Board of Education of the Township of Egg Harbor, Atlantic County, New Jersey, is charged with conduct unbecoming a teaching staff member in violation of the provisions of the New Jersey Administrative

Code, Board of Education policies and by violating the law against discrimination by harassing, intimidating and bullying, by making inappropriate racial derogatory comments toward another staff member; and by lying to an administrator during an investigation. Respondent requested a hearing and this matter was transmitted to the Office of Administrative Law on January 12, 2009, for hearing as a contested case.

A telephone prehearing conference was held on January 27, 2009, and a Prehearing Order was entered on January 29, 2009, settling the procedures to be followed at the hearing. Hearing dates were scheduled for March 31 and April 1, 2009.

On March 9, 2009, I entered an Order denying petitioner's motion to strike respondent's answer and deem the tenure charges admitted.

On March 23, 2009, the hearing dates of March 31 and April 1, 2009, were adjourned at the request of both counsel because of their inability to complete discovery, and an Order Amending Prehearing Order was entered on that date extending the discovery period and rescheduling the hearing for April 24 and 30, 2009.

The rescheduled hearing dates of April 24 and April 30, 2009, were adjourned at the request of attorney for respondent with the consent of attorney for the school district on the condition that the hearing dates be rescheduled for May 7, and May 21, 2009, with the understanding that counsel would be discussing the issue of back pay.

The hearing date of May 7, 2009, was adjourned at the hearing at the joint request of the parties because they had entered into settlement negotiations and had reached a possible settlement subject to approval by respondent Board of Education. The hearing date of May 21, 2009, was not adjourned.

On May 20, 2009, the hearing date of May 21, 2009, was adjourned at the request of attorney for the school district, based on the allegation of the respondent through counsel accusing attorney for the school district and his firm of conducting an

illegal investigation of the respondent leading to the tenure charges in this case. Attorney for the school district requested an opportunity to investigate this assertion. The hearing was rescheduled for June 23, 2009.

On June 20, 2009, the hearing of June 23, 2009, was adjourned at the request of respondent because of a death in her family. The matter was rescheduled for hearing on July 15, 2009.

On July 14, 2009, the hearing scheduled for July 15, 2009, was adjourned at the request of attorney for petitioner school district because of the retention by the school district of new counsel to undertake representation of the school district. The newly-retained counsel for the school district required additional time to review the matter and prepare for hearing. The hearing was rescheduled for August 19, and September 1, 2009.

On August 14, 2009, the hearing dates of August 19, and September 1, 2009, were adjourned at the request of attorney for the school district because of the unavailability of the witnesses for the school district. Because of the extensive delay in commencing the hearing, I offered approximately twelve rescheduled dates for hearing and required that the attorneys issue subpoenas for all witnesses. As a result, I scheduled the matter for peremptory hearing on October 28, and October 29, 2009.

On October 27, 2009, attorney for respondent requested an adjournment of the peremptory hearing dates because of a court conflict, the attorney being in a trial in the Superior Court. Because of my initial refusal to adjourn the peremptory hearing dates, the attorney for the school district consented to the adjournment on the condition that respondent agree to waive salary continuation until the end of the hearing in view of her attorney's trial calendar. When the respondent agreed to this condition, the hearing dates of October 28, and October 29, 2009, were adjourned and the hearing was rescheduled for December 4, 2009 and January 28, 2010, these being dates when respondent's attorney would be available.

The hearing commenced on December 4, 2009. The continued hearing date of January 28, 2010, was adjourned on January 12, 2010, at the request of attorney for respondent because of a court conflict. The matter was rescheduled for hearing on April 1, and April 16, 2010. On those dates, hearings were held and the hearing testimony concluded on April 16, 2010. At the conclusion of the hearing, the record remained open to permit the attorneys to submit written closing arguments. The record closed on June 7, 2010, with the timely receipt of the parties written closing submissions.

STATEMENT OF THE CHARGES

The respondent was charged as follows:

Charge 1. Respondent engaged in conduct unbecoming a teaching staff member by violating N.J.A.C. 6A:16-7.9(a)(2)(vi) and Board of Education Policy Number 5512.01, harassment, intimidation and bullying, by making inappropriate racial derogatory comments toward another staff member.

Charge 2. Respondent engaged in conduct unbecoming a teaching staff member by violating Board of Education Policy Number 3281, inappropriate staff conduct, by engaging in inappropriate behavior by making racial comments toward another staff member.

Charge 3. Respondent engaged in conduct unbecoming a teaching staff member by violating the law against discrimination by engaging in inappropriate behavior by making racial comments toward another staff member.

Charge 4. Respondent engaged in conduct unbecoming a teaching staff member by violating Egg Harbor Township Board of Education Policy Number 3281, inappropriate staff conduct, by lying to an administrator during an investigation.

FACTUAL DISCUSSION

Testimony of Scott P. McCartney

Dr. Scott P. McCartney testified that he was employed by the Egg Harbor Township Board of Education as an assistant superintendent for four years, then became the interim superintendent on November 1, 2008, and was permanently appointed as superintendent on January 1, 2009. Prior to his service with Egg Harbor Township he was a teacher and holds certificates as a teacher, principal and superintendent. As superintendent, he reports to the Board of Education and is responsible for all operations in the school district, including supervision of the curriculum, personnel, fiscal matters, facilities, and coordination with the Board of Education and assisting the Board in its duties and responsibilities. The Board of Education has adopted a code of conduct for teachers with the policy guidance of a consulting firm, Strauss Esmay. Ultimately, he is responsible for enforcing these policies.

In December 2008, Dr. McCartney received a referral involving Lauren Cooke. Jamesella Johnson, a teaching staff member, had been told by Tracy Hurst, another teaching staff member, that Ms. Cooke had made derogatory comments about her to other teachers. Ms. Johnson reported this to Dr. Charles Fredericks' secretary, and Dr. Fredericks reported this to Dr. Philip Heery, the prior superintendent. Dr. Heery directed Dr. Fredericks to investigate this matter.

After Dr. Fredericks performed his investigation, the matter was referred to Joetta Surace, the school district's Affirmative Action officer, for further investigation. The next

thing that occurred was Dr. Heery issued a Rice notice[1] to Ms. Cooke in September 2008. At that time Ms. Cooke was given an opportunity to participate with the Board of Education in considering this issue. Following this Dr. Heery suspended Ms. Cooke and on December 10, 2008, charges were certified against her (P-3)[2]. Dr. McCartney identified a Rice notice issued to Ms. Cooke on December 3, 2008 (P-1), with respect to the Board's consideration of certification of the charges. He did not speak to Ms. Cooke at any time prior to this.

Dr. McCartney identified the Board of Education policies regarding this matter (P-2). He also identified the packet of tenure charges filed with the Commissioner and served on the respondent, which are the subject matter of this hearing.

Dr. McCartney was questioned why "Aunt Jemima" is a racist comment. He indicated that if a Caucasian woman were called Betty Crocker, such a comment would be investigated in the same way. He admitted that afterwards it was determined that there was no merit to the report that Ms. Cooke had referred to Ms. Johnson as a "nigger bitch." He admitted that there is an expectation and desire that employees report racial slurs promptly. When he was questioned when these slurs were made he indicated that he knows one occurred on the spring 2007 "Fun Day." He acknowledged that his only knowledge of these claims is as a result of reviewing the preliminary investigation by Dr. Fredericks and the investigation by Joetta Surace. Ms. Surace reported her investigation to the superintendent and he read this. He does not recall the exact location where the second comment was made, but it was his understanding that it was not in the presence of any children.

In response to questions by respondent's attorney, Dr. McCartney stated that the Egg Harbor Township school district has a total of 8,000 students and the Township

[1] A "Rice" notice is required to be provided to persons whose "employment" is to be discussed under the Open Public Meetings Act, N.J.S.A. 10:4-6 to 21. See, Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64 (App.Div.1977) and N.J.S.A. 10:4-12b(8).

[2] Initially, I incorrectly identified the petitioner school district's exhibits as "R" exhibits. I later corrected the designation to make them "P" exhibits. There are no "R" exhibits in this case.

contains approximately 30,000 people. It is a mixed-race community with seventy percent of the population being Caucasian and thirty percent being members of minorities. The majority of the thirty percent making up the minorities are African-American. Ms. Cooke has worked for the school district approximately sixteen or seventeen years. She has interacted with students and parents of various races over those years and there was never any complaint of inappropriate actions or comments by her that he is aware of. There are approximately 700 or more teachers in the school district. Ms. Johnson is African-American. William Donio is the school district solicitor but he has also dealt with attorneys Amy Halk and Eileen Muskett of Mr. Donio's office. There is also a charge against Ms. Cooke that she lied.

Testimony of Dr. Charles Fredericks

Dr. Charles Fredericks testified that he has been employed by the school district since 1978 and is the supervisor of State and Federal programs in the school district. He holds a Ph.D. degree in educational psychology and holds certificates as principal, supervisor and school psychologist. He was a supervisor in the school and Ms. Cooke was a subordinate of his.

When a complaint is made of inappropriate conduct on the part of one of Dr. Fredericks' subordinates, he becomes involved, at least in the preliminary investigation. His secretary, Ms. Reilly, contacted him and told him that Ms. Jamesella Johnson came to her and told her that Ms. Cooke referred to Ms. Johnson as a "nigger bitch."[3] When he heard this he immediately went to the Davenport school where Ms. Johnson and Ms. Cooke worked to see Ms. Johnson. It was on December 12, 2007, at 3:30 p.m. when he met Ms. Johnson. She was obviously upset and she told him that she did not want to discuss the matter with him at that time because she was very upset and she needed to prepare for parent meetings. He then arranged to speak to her the next morning. The next day, Ms. Johnson advised him that Ms. Tracy Hurst told her that Ms. Cooke had called her a "n----- b----." She was still very upset about this. He then consulted

[3] Rather than continuously repeating this language, I am replacing it where possible with "n----- b----."

with the principal of the Davenport school, Mr. Labarka. He felt that this matter should be brought to the attention of Mrs. Surace, the Personnel officer and Affirmative Action officer of the school district. He did not discuss this allegation with Ms. Cooke. He then discussed it with the superintendent who instructed him to interview Ms. Hurst. He interviewed Ms. Hurst on December 17, 2007, and a statement was given to him.

Dr. Fredericks identified a letter dated September 8, 2008, which he sent to counsel, indicating the timeline of his involvement and his actions in investigating this matter. Ms. Muskett asked him to send the letter. He was involved in the interview of Ms. Dixon, who stated that she did not hear the words "n----- b----." However, Ms. Dixon reported hearing Ms. Cooke say, "I don't want to work with that Aunt Jemima." He also identified an e-mail sent to Ms. Cooke and others (P-5) which describes a meeting on October 11, 2008, stating that Ms. Dixon and Jordan Burke heard the term "n----- b----." He met with Ms. Dixon in June 2008.

On cross-examination, Dr. Fredericks testified that prior to December 2007, there had never been any report made to him that Lauren Cooke acted in any way that was discriminatory and there were never any statements attributed to her as being racist. He interacted with her on a bi-monthly basis for approximately eight years. He also indicated that Jamesella Johnson and Lauren Cooke interacted with each other over a period of eight years. He acknowledged that Ms. Johnson now claims there were racial undercurrents three years earlier than the alleged remarks attributed to Ms. Cooke. He also acknowledged that Ms. Cooke now alleges that Ms. Johnson has animosity towards her and wants her job.

Ms. Dixon acknowledged to Dr. Fredericks that she heard Lauren Cooke say, "I don't want to work with that Aunt Jemima over there," referring to Ms. Johnson. When questioned why she did not report this earlier, Ms. Dixon indicated she was afraid of retaliation from Ms. Cooke.

Ms. Johnson and Ms. Cooke are both Title 1 teachers under his supervision. In addition, Ms. Johnson is the parent coordinator. He explained that to him "Aunt Jemima" has racial overtones. He felt it is a given that it is a racially derogatory term based on his prior life experience. It is so because it is a racial stereotype of a servant or slave. Ms. Dixon acknowledged to him that she has never heard Lauren Cooke say anything else derogatory toward Ms. Johnson. He could not explain why the investigation did not occur when the complaint was fresh in everyone's minds.

Testimony of Joetta M. Surace

Joetta M. Surace testified she has been employed by the Board of Education of Egg Harbor Township for thirty years and has been the director of Human Resources for six years. She started her employment with the school district as an English teacher, holds certificates as a teacher, a supervisor and a chief school administrator. As director of Human Resources she is responsible for teaching staff member hiring, qualification and accreditation, and professional development. She is also the Section 504 officer and the Affirmative Action officer. As the Affirmative Action officer she is involved in handling complaints of discrimination and improper conduct.

Ms. Surace became involved in this case in late December 2007. Dr. Philip Heery, the superintendent at that time, asked her to investigate this matter. An investigation performed by Dr. Fredericks, the supervisor of the involved teachers, was turned over to her. She received written statements from Ms. Johnson and she intended to meet with and interview Lauren Cooke in order to obtain her response to the allegations. However, Ms. Cooke had called out sick on December 17, 2007. At the time everyone in the school district believed that Ms. Cooke would be returning soon and she did not want to cause undue stress or impact on Ms. Cooke's recovery from her illness, so she decided to wait until Ms. Cooke returned to work before she interviewed her concerning these allegations.

When Ms. Cooke's return to work was delayed for several months, Ms. Surace contacted Ms. Johnson to explain the delay in her investigating this matter. Eventually she decided to meet with the witnesses and did so on May 15, 2008. She interviewed both Lynn Dixon and Jordan Burke (P-6). Both stated to her that something was said by Lauren Cooke but they were reluctant to tell her what was said. She again spoke to Jamesella Johnson to explain the delay. She then spoke to counsel and she subsequently met separately with Ms. Dixon and Ms. Burke and insisted that they advise her what occurred. Lynn Dixon provided her with a typed statement. Jordan Burke wrote a statement in which she indicated Ms. Cooke referred to Ms. Johnson as a "nigger." She compiled everything in a report and turned it over to the superintendent. She also wrote a memo concerning the meeting. She identified her computer notes that were prepared after the meeting.

Ms. Surace explained that there was a meeting on August 20, 2008, with Lauren Cooke to discuss accommodations because of Ms. Cooke's illness. After that discussion, Eileen Muskett questioned Ms. Cooke about this matter. When Ms. Muskett interviewed Lauren Cooke, Ms. Cooke denied everything. Her only other interview was that Ms. Johnson testified that Stephanie Tuthill had said to her that she had heard Ms. Cooke make derogatory comments about Ms. Johnson. She spoke to Ms. Tuthill, who denied that Ms. Cooke made any statement about Ms. Johnson.

On cross-examination, Ms. Surace testified that it was never brought to her attention that Lauren Cooke ever acted in a discriminatory manner in any other way. She acknowledged that Kathy Wasner, president of the teachers' union, may have advised Ms. Cooke of this investigation. However, she indicated she waited to confront Ms. Cooke with these allegations out of human kindness. As far as she knows, Ms. Cooke did not know anything about the allegations prior to the August 20, 2008, meeting. She testified there is nothing in the written policy about delaying the investigation.

Ms. Surace testified that the entire staff has been trained not make discriminatory statements. She acknowledges that the written brochures require immediate reporting of any racially discriminatory comments made by employees. She acknowledged there has never been a previous claim that Lauren Cooke ever made a discriminatory statement against anyone. Ms. Dixon indicated to her that Ms. Cooke made a discriminatory statement about Ms. Johnson in November 2006, in the teachers' room. Jordan Burke indicated that Ms. Cooke made the discriminatory statement about Ms. Johnson in June 2007, on Fun Day in the hallway coming in from Fun Day activities. She explained that Fun Day is a day of organized activities and games celebrating the close of the school year. Both of these occurred at the Davenport school. She admitted that when a comment is made it is important for the overhearing teacher to report it immediately. She knew nothing about the specifics of the allegations.

Both of the witnesses she spoke to claimed fear of reprisal by Ms. Cooke. There were stories they had heard about her attacking her husband's face and damaging his fishing equipment. She has never seen Lauren Cooke and Ms. Johnson interact. Mr. Labarka said that there had been no interaction between them for at least a couple of years. She overhead that Lauren Cooke said that Ms. Johnson wanted her job. She acknowledged the interview of Ms. Cooke was not taped although Mr. Van Syoc was present. It was Ms. Johnson who brought up Stephanie Tuthill and said that Ms. Tuthill heard Lauren Cooke say something, but it turned out not to be the case.

Testimony of Jordan A. Brown

Jordan A. Brown (nee Burke) testified that she was employed by the Egg Harbor Township Board of Education commencing in September 2006 until June 2009, when she moved to North Carolina. She has a Bachelor's degree in Speech Language Pathology and Audiology and was hired as a speech language pathologist. She taught students from pre-school to third grade both in mainstream classes and in pull-out classes. She met Ms. Cooke when they were co-workers at the C.J. Davenport Elementary school. Ms. Cooke was a Title I Basic Skills teacher. She spoke to her

casually and as a co-worker. They had many of the same students. They had a friendly relationship as colleagues.

Ms. Brown testified that she heard Ms. Cooke state a racial epithet or slur in June 2007, in the main hallway of the elementary school. Students, some teachers and some parents were walking by within earshot. Ms. Cooke was discussing with her information that there were four Title I teachers and they were being split. Ms. Cooke specifically referred to Jamesella Johnson as a "nigger." This reference was offensive to her. She had no further discussions with Ms. Cooke afterwards. She recalls Ms. Cooke using the "N" word previously but does not recall when.

Ms. Brown indicated that she was aware of the school district's zero tolerance policy and its policy requiring notification of the school district of racial slurs immediately after they occurred. She admitted that she did not report this incident immediately. She was contacted by Joetta Surace, met with her twice and was questioned about the incident. She advised Ms. Surace what was said. Ms. Surace then asked that she put it in writing, and she replied that she did not want to do so because she was afraid of Ms. Cooke's reaction. She explained that Ms. Cooke has a strong personality and she has heard rumors of things that occurred. She eventually wrote a statement concerning the incident on June 16, 2008, and she identified it as her statement. (P-7).

On cross-examination, Ms. Brown said she is twenty-six years of age and is completing her Master's degree at the University of South Carolina. She has known Ms. Cooke since January or February 2007, when Ms. Cooke returned from an absence for medical reasons. They worked across the hall from each other. She does not remember when they first met but there were casual meetings in the hallway. She socialized with Ms. Cooke on only one occasion at Caroline's restaurant in Somers Point, New Jersey. Ms. Cooke was going on a date with someone and she called Ms. Brown and asked her to meet her at the restaurant so that she would not be alone with the date. She met Ms. Cooke at the restaurant and there was a gentleman who had a

goatee, but she does not remember anything else about him. There was nothing else unusual about that occasion.

Ms. Brown acknowledged that her mother worked for the school district for fifteen years as an English as Second Language teacher, and is now an English language learner teacher. She recalls that the incident where Ms. Cooke used the "N" word was on "Fun Day" in June 2007. She explained that "Fun Day" is a day on which the students do not attend regular classes but engage in various kinds of fun activities such as playing games. She recalls that the incident occurred at about 9:30 a.m. because the children had not yet started their activities. It occurred in the school hallway, which is fifteen or sixteen feet-wide and very long. This incident occurred months after the meeting at Caroline's restaurant. There were many people in the immediate vicinity when Ms. Cooke used the "N" word, including approximately fifty first and second grade students, ages six or seven, returning from breakfast. There were also teachers present in the hallway, although she does not remember who they were, as well as parents. About a dozen people were within twelve feet; however, she cannot identify one other person who was in the vicinity.

Ms. Brown reported the incident after many months rather than in minutes. The training on zero tolerance policy was given by Dr. Heery, Ms. Surace and a professional trainer. They gave the policy in black and white and the policy provides that the teacher has an obligation to immediately report such an incident. She indicated that Ms. Cooke never asked her to lie. The date she signed the statement (P-7), June 16, 2008, was after her father spoke to an attorney and obtained legal advice. She could not recall other specific instances when Ms. Cooke used the "N" word. They were friendly and she admitted that Ms. Cooke would tell her who she was dating. She denied ever telling Ms. Cooke that she was emotionally unstable but admitted telling her that she has a problem with bulimia. Ms. Cooke has never tried to hurt her. There were only rumors about Ms. Cooke's hurting other people. She never heard that Ms. Cooke used the term "Aunt Jemima," but believed that the term is racist based on information she acquired in her life. She admitted there were a number of minority students and parents

in the school district and she testified Ms. Cooke treated them with the same care as non-minority students and parents.

Ms. Brown did not remember that she gave any response to Ms. Cooke's use of the "N" word. The children in the vicinity were quiet since they were being supervised by a teacher who she believes was the gym teacher. She does not know if anyone else heard Ms. Cooke make the statement. She testified that Joetta Surace e-mailed her to meet with her and solicited this information from her.

Testimony of Tracie Walters Hurst

Tracie Walters Hurst testified that she resides in Northfield and is a third-grade classroom teacher. She has been a teacher since 1993, and has been in Egg Harbor Township since 1998, where she remains employed. She is certified to teach kindergarten through eighth grade. She explained that as a classroom teacher she has had other teachers come into the class to assist and others are pull-out teachers who take students out of the class. She has had Lauren Cooke as a "push in" or in-class teacher in Title I. She has had many meetings with Ms. Cooke where programs were discussed. They were co-workers but they only knew each other in school.

Ms. Hurst was aware of Ms. Cooke's use of some possible racial term at the end of November which could have been in either 2006 or 2007. Lynne Dixon, another Title I teacher, stopped in and told her something that Lauren Cooke had said to her to the effect that Ms. Cooke did not want to work in Title I kindergarten because she did not want to work with "that Aunt Jemima." When she heard that Ms. Cooke used that term, she thought of a house slave in the Civil War period.

Ms. Hurst testified that she has heard of other instances where Ms. Cooke would use inappropriate terms in referring to other teachers. For example, after a parent-teacher conference she knows that Ms. Cooke called another teacher a "dyke." Another teacher reported to her that Lauren Cooke called Jamesellen Johnson a "n----- b----."

Because of these incidents she told Jamesellen Johnson she heard that Lauren Cooke had called her a "n----- b----." After this Dr. Fredericks asked her to come to his office. She then reported what she had heard. She admitted that she had never personally heard Lauren Cooke utter these statements.

On cross-examination Ms. Hurst admitted she had never heard any of these slurs directly from Lauren Cooke. One of the teachers who reported these incidents to her was Shannon Ward who was allegedly called a dyke. She admitted that Ms. Ward and Ms. Cooke are friends and that Ms. Ward asked Ms. Cooke about this and Ms. Cooke denied ever calling her a dyke. She also indicated that Kandace Blvt reported to her that Ms. Cooke called Ms. Johnson a "n----- b----."

Ms. Hurst testified that she worked with Ms. Cooke in the same classroom and that Ms. Cooke always treated all children correctly. She admitted she was trained to report immediately when a racial slur was used so it could be investigated. She admitted that she did not report this immediately. She stated that while there was tension between her and Ms. Cooke about the program, there was never any friction between them in the classroom. She sent e-mails to Ms. Cooke because of scheduling but they never had any run-ins with each other. She admitted telling Jamesella Johnson about this rather than the school officials.

Testimony of Lynne Dixon

Ms. Dixon testified that she lives in Egg Harbor Township, New Jersey, and has been employed at the Egg Harbor Township school district as a teacher for fifteen years. In the 2006-07 school year she was at the Davenport school teaching basic and remedial skills with two pull-out students. Both she and Ms. Cooke taught Title I students. Their relationship was as co-workers and they had a cordial and friendly working relationship.

Ms. Dixon attended workshops concerning racial slurs and is aware of the policies at Egg Harbor Township school district concerning the use of racial terms. In addition, the faculty handbook, which is given to teaching staff every year with the employment contract, makes it clear that racial slurs are not tolerated.

Ms. Dixon testified that she heard racial slurs by Ms. Cooke in approximately November 2007, when she was in the teachers' room. Ms. Cooke was upset that day and said to her, "You teach third grade," and continued, "I can't work with Barbara or 'Aunt Jemima.'" Ms. Dixon testified that she knew Ms. Cooke was referring to Jamesella Johnson with a racially incorrect term and she took it as a racially incorrect term. It was upsetting and it was wrong. She admitted she did not do anything about it at the time.

In June 2008, Dr. Fredericks called her in to meet with her. At the meeting, when he confronted her whether this incident occurred, she denied it at first. She later told him and Ms. Surace about it. The incident was upsetting to her because Ms. Johnson is a great teacher and did her job. She testified that she had the same relationship with Ms. Cooke after the incident as before.

On cross-examination, Ms. Dixon acknowledged she has had a cordial relationship with Ms. Cooke both before and after the statement. She also acknowledged that Aunt Jemima is a brand name for pancake and syrup products.

Ms. Dixon admitted walking into Tracy Hurst's room on one occasion when Ms. Hurst said to her, "Can't you be our teacher because it is tough to work with Lauren Cooke." Her perception was that there was friction between Lauren Cooke and Tracy Hurst.

Ms. Dixon estimated that the teachers' room where Ms. Cooke made the comment was approximately twenty-four-feet-by-sixteen-feet. There were ten or twelve teachers in the room. Ms. Cooke made the comment in a normal voice. She does not

recall the names of any of the other teachers in the room because she was not paying attention at the time. She also testified that she has never been in the same classroom with Lauren Cooke but Ms. Cooke treats all of the students the same and is always nice. She also always seemed nice to parents.

Testimony of Jamesella Johnson

Jamesella Johnson testified that she has been employed in the Egg Harbor Township school district since 1979, although she left to serve in the Army and returned in 1990. In 2006, she was employed as a teacher in the Remedial Services Program. She did not work with or alongside Ms. Cooke. Ms. Cooke was a basic skills teacher when Ms. Johnson was a classroom teacher through 2003. In 2006-07, they were team members on the Remedial Services Team. Her relationship with Lauren Cooke in 2006-2007 was as a colleague. She had no social relationship with Ms. Cooke and only taught. Ms. Cooke never used a derogatory term addressing her or in her presence.

Ms. Johnson testified that she learned in 2004 that Lauren Cooke used a derogatory term. However, this was not the subject of this proceeding. She learned for a second time in 2007, that Lauren Cooke used a derogatory racial term towards her. It was December 2007, when she ran into Ms. Hurst who was upset by program issues. At the time, they had been told that they could not talk directly to Dr. Fredericks concerning these issues. However, they decided they would walk to Dr. Fredericks' office to discuss the matter with him. On the walk over Ms. Hurst told her that Lauren Cook called her a "N.B." In response to the question whether she perceives the letters "N.B." to be "nigger bitch," she said yes.

After Ms. Johnson was told this, and after they attempted to see Dr. Fredericks who was unavailable, she went back to her room and was very upset. She felt that if these were the kinds of things being said to an adult educator what kind of information is being given to the children. Ms. Johnson eventually spoke to Dr. Fredericks who questioned her about the incident. She wanted to know what the process would be to

resolve this situation. Dr. Fredericks got back to her the next day, which was either Thursday December 13 or Friday December 14, 2007.

On cross-examination, Ms. Johnson indicated that the information from Ms. Hurst was particularly hurtful. No one ever told her that Lauren Cooke denied ever saying this or that she wanted to sit down and meet with her in order to deny ever saying this. She admitted that this information about the incidents is required to be reported immediately to nip it in the bud and to allow the accused to defend herself. She admitted that for years she and Lauren Cooke did not talk to one another. She heard something from Lauren Cooke before this incident. However, she did not disclose it to school officials because she did not want to give credence to ignorance. She explained that it involved Lauren Cooke referring to someone as a "dot head." However, she just let it go even though she felt it was offensive. She also feels that the term Aunt Jemima is derogatory. She wanted to ask Ms. Cooke if she said the statement and if so she wanted an apology. She does not need to work in a negative environment and wanted to know the rules. She never said to Lauren Cooke that she wanted her job. She never looked down and had to veer off while they were walking toward each other. She admitted hearing the term "malicious gossip" in the workplace. She has never watched Lauren Cooke teach.

Testimony of Lauren Cooke

Lauren Cooke testified that she has been employed as a teacher by Egg Harbor Township Board of Education for seventeen years since 1993. She teaches Title I services to remediate students' problems with reading and math.

During her employment, she came to know Jordan Burke and she also worked with her mother, Lori Burke. She met Lori Burke when she first started to teach. When Lori's daughter, Jordan, started teaching in the school district, she worked with her as a Title I teacher, but not in the same classroom.

Ms. Cooke was questioned about an allegation that on Fun Day 2007 in a conversation with Ms. Burke, she allegedly stated that she could not work with Jamesella Johnson and that she mentioned the word "nigger" as part of the reason why she could not work with her. In response to the question whether she used the "N" word on that day or any other day pertaining to Ms. Johnson, Ms. Cooke stated that she did not.

Ms. Cooke considered herself to be a friend of Jordon Burke, but not a close friend. They went out on one occasion at Caroline's Bar and Restaurant in Somers Point during the spring about four or five years ago. She was dating a person and was meeting him at Caroline's for the first time and Jordon Burke lived a block away so she went out with her on that one occasion.

Ms. Cooke testified that the school district provided annual training about what conduct is and is not appropriate, and whether or not using racial or other types of discriminatory slurs were appropriate in the workplace. There was a demonstration on the stage and it is also in the handbook and they were trained in these policies. It was her understanding that if she deliberately violated those policies she could lose her job.

Ms. Cooke indicated that she did not remember speaking directly to Jordon Burke on Fun Day 2007 or a specific incident.

Ms. Cooke testified that the student population she has taught over sixteen years is very diversified. It consists of African-Americans, Asians, Caucasians, Hispanics, a little bit of everything. She has worked with a diverse student population for most of the seventeen years she has been with the school district. She has also interacted with the parents of that diverse student population. She testified that, to her knowledge, there has never been even one complaint by any parent based on her interaction with them or their children. She has no disciplinary history at the school district. She has never been brought up on any charge for anything.

Ms. Cooke testified she did not receive any kind of notification of this claim until August 2008. Fun Day was in May or June of 2007. The first time that she learned about it was when she came to a meeting to speak about accommodations for her disability. There is no doubt in her mind that she never used the "N" word on that occasion.

Ms. Cooke was also questioned about the allegation that at approximately the end of November 2007, while in the teachers' room, she told Lynn Dixon, "I can't work with Barbara or Aunt Jemima." She never heard a claim that using the phrase "Aunt Jemima" is in some way racially derogatory. She has seen Aunt Jemima products, but it was not her impression that displaying these products in a grocery store was some sort of racial slur. She denied ever using the term "Aunt Jemima" to refer to anybody, including Ms. Johnson or anyone else.

Ms. Cooke testified that the assertion she discussed something with Jordan Burke in the hallway on Fun Day does not trigger a recollection of any such discussion. She also testified that the teachers' room is a place where teachers go to make copies, have coffee, and use phones and there is also a computer, and the teachers in that room would be of different races. She acknowledged that in 2008, the only other teacher that was not Caucasian was an African-American. She denied ever being in the teachers' room speaking with Ms. Dixon about Ms. Johnson. She indicated that her relationship with either Ms. Dixon or Ms. Burke was not so close or intimate that she would be likely to use a racial slur if she were inclined to do so. Her relationship with Ms. Dixon was that of a co-worker who also taught Title I. Occasionally they would compare lessons but they only socialized outside the workplace once or twice. That was when she and her ex-husband went to Florida and they might have gone to dinner with Ms. Dixon once or twice. In the fall 2007, there was no friction between her and Ms. Dixon.

Ms. Cooke first found out that someone was alleging she had made racial slurs from her union representative, Cathy Wazen. She first heard it in January 2008. When

she heard it, she felt it was a horrible thing and she wanted to have a meeting to talk this out because her reputation was at stake and she takes pride in her career. She did not hear anything about this until August 2008, when she was questioned by Ms. Muskett, the attorney for the school district. She responded truthfully to Ms. Muskett's questions. She was shocked, appalled and mortified to hear this rumor. She did not call Dr. Fredericks or Ms. Surace. She assumed the Board would contact her. She indicated that the last time she saw Ms. Dixon and Ms. Burke, they were on speaking terms in passing and their relationship was cordial and there were no grudges between them and her. There were no social interactions between the three of them which might have soured. She acknowledges that she went out on disability in December.

In response to my questions, Ms. Cooke stated that there was never an occasion on Fun Day in June 2007 when she was given class assignments that she was not happy with. She did acknowledge that Dr. Fredericks observed her and after that, he advised her he would like her to go to a new school to teach. She did not have a negative reaction to that. When Ms. Wazen advised her of the claim, Ms. Cooke stated to her that she would be willing to meet with anyone to discuss this, but nothing ever happened as a result of that.

Analysis of the testimony

This case involves two witnesses, Ms. Brown and Ms. Dixon, attributing to Ms. Cooke a racial slur and a racially derogatory description, which the appellant denies occurred. Thus, I must assess the credibility of the witnesses in order to determine whether either or both of the statements were made by Ms. Cooke.

Credibility is that quality of testimony or evidence which makes it worthy of belief. Testimony to be believed must be credible itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. In Re Estate of Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or

with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In order to assess credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). In addition, the witness' interest in the outcome, motive or bias should be considered. In State v. Spruill, 16 N.J. 73 (1954), the Court looked to the interest of a party in the outcome of a trial as a factor in evaluating the evidence, stating that every fact or circumstance tending to show the witness' relation to the case or the parties is admissible in order to determine the weight to be given to his evidence. (Ibid. at 78.)

The testimony of Jordan Brown was that she heard Ms. Cooke make a racial epithet or slur by referring to Jamesella Johnson as "nigger." From Ms. Brown's expression, tone of voice and demeanor during her testimony, it was clear that she was nervous and upset about testifying. At one point during her testimony, she became upset to the point that a recess of several minutes was required. This nervousness may be an indication that Ms. Brown was being untruthful. In addition, even though Ms. Brown was aware of the school district's zero tolerance policy toward such conduct and its policy requiring notification of racial slurs immediately after they occur, she acknowledged that she did not report this incident immediately. In fact, it was only after she had been contacted by Ms. Surace, met with her and was questioned about the incident that she stated what was said. Even then, Ms. Brown was reluctant to provide a written statement concerning the incident and did not do so until approximately a year after its occurrence after seeking the advice of counsel. Certainly her delay in reporting this incident also raises questions concerning her credibility.

On the other hand, there are other possible explanations for Ms. Brown's obvious distress. It may be inferred from her testimony that she was reluctant to come forward because she had heard rumors about Ms. Cooke and was fearful of her. It may have been this fear that caused her distress. She explained that her failure to report the

incident immediately was because Ms. Cooke has a strong personality and she was afraid of Ms. Cooke's reaction. Ms. Brown's concern about the reaction of Ms. Cooke was consistent with the testimony of other witnesses. The easy path to avoid this distress would have been for Ms. Brown to deny hearing Ms. Cooke utter a racial slur. Instead, Ms. Brown came forward, albeit reluctantly, and testified against Ms. Cooke. In addition, the surrounding circumstances seem to support the occurrence since it did occur at a time when Ms. Cooke had been advised of a reassignment with Ms. Johnson.

Also supporting Ms. Brown's credibility were the details she testified to concerning the date when the incident occurred and the location where it occurred. Ms. Brown's testimony that she had a friendly relationship with Ms. Cooke as colleagues and they socialized together on at least one occasion was not disputed. Thus, it may be inferred from the testimony of both Ms. Brown and Ms. Cooke that Ms. Cooke believed that Ms. Brown was a trusted friend and she used the racial slur in front of someone she trusted would not divulge it.

Finally, I have been unable to discern anything in the record or the surrounding circumstances to establish that Ms. Brown has any interest in the outcome of these proceedings or any undisclosed motive or bias, other than being truthful. It is for all of these reasons that I consider Ms. Brown's testimony to be credible.

The testimony of Lynne Dixon was that in November 2007, when she was in the teachers' room, Ms. Cooke was upset and stated that she could not work with "Aunt Jemima," referring to Jamesella Johnson with a racially incorrect term. Ms. Dixon's expression, tone of voice and demeanor were not unusual. She provided her testimony in a "matter of fact" way and I could discern no sign that her testimony was contrived.

Ms. Dixon also acknowledged she was aware of the policy of the school district that racial slurs are not tolerated and that they are to be reported immediately. Despite this, she admitted that she did not report Ms. Cooke's statement at the time it occurred. She also admitted she initially denied it occurred when she was confronted by Dr.

Fredericks in June 2008. However, she later admitted it occurred and provided a written statement.

Ms. Dixon testified that her relationship with Ms. Cooke was as co-workers and they had a cordial and friendly working relationship. Her details concerning the circumstances surrounding the incident are somewhat sketchy. She described the teachers' room and indicated there were ten or twelve teachers present, but she could not recall the names of any of the teachers because she was not paying attention at the time. She also testified that Ms. Cooke has always treated all students and parents well.

In reviewing the record of testimony and evidence, I could discern from no motive or interest on the part of Ms. Dixon other than being truthful in her testimony. Her testimony was not incredible or inconsistent with other testimony or with common experience. There is simply no evidence in the record showing that Ms. Dixon's testimony was anything less than credible, and I considered her to be credible.

During Ms. Cooke's testimony, her expression, tone of voice and demeanor were not unusual. She also provided her testimony in a "matter of fact" way and I could discern no sign that her testimony was contrived. I also note that the testimony of virtually all of the witnesses was to the effect that Ms. Cooke always treated all children and their parents correctly, no matter their racial background.

Ms. Cooke testified emphatically that she never uttered either the "N" word or used the term "Aunt Jemima" in referring to Jamesella Johnson. She stated that she never used either of these words. She considered herself to be a friend of Jordon Burke but not a close friend. Although denying that she used the term "Aunt Jemima," she said she never heard anyone claim that using that phrase was in some way racially derogatory. She indicated that her relationship with Ms. Dixon or Ms. Burke was not so close or intimate that she would be likely to use a racial slur if she were inclined to do so. Her relationship with Ms. Dixon was only that of a co-worker and they only

socialized outside of the workplace once or twice when they and their spouses were on vacation in Florida. Ms. Cooke denied any friction between her and Ms. Dixon. In short, Ms. Cooke could not explain any basis or reason why Ms. Burke or Ms. Dixon would make untrue allegations against her.

While I did not believe that Ms. Cooke's testimony was incredible, her testimony was overborne by the testimony of the two credible witnesses having no apparent motive for being less than truthful.

FINDINGS OF FACT

After assessing the credibility of the witnesses, and based upon the preponderance of the credible evidence in the record, I **FIND** the following as **FACTS**:

1. Lauren Cooke has been employed as an elementary school teacher in the Egg Harbor Township School District for more than sixteen years.
2. Ms. Cooke is a tenured teacher in the school district.
3. On "Fun Day" in June 2008, the date of the first incident, Ms. Cooke was speaking to Jordan Brown, another teacher in the hallway of the Davenport school.
4. The conversation took place during school hours with teachers and school children present.
5. During this conversation, Ms. Cooke referred to a third teacher, Jamesella Johnson, as a "nigger."
6. Ms. Brown was more than an acquaintance but less than a close friend of Ms. Cooke; under the circumstances I infer that Ms. Cooke's belief was that Ms. Brown was a friend and confident and that the use of the derogatory term in referring to Ms. Johnson would not be divulged to others.
7. Despite their presence, there is no evidence in the record that Ms. Cooke's derogatory statement was overheard by either other teaching staff members or students.

8. Thereafter, Ms. Brown told a third party about Ms. Cooke's statements and the matter eventually came to the attention of school district officials.
9. In November 2007, the date of a second alleged incident, Ms. Cooke was speaking to Lynne Dixon, another teacher in the teachers' lounge of the Davenport elementary school.
10. The conversation took place during school hours in the teachers' lounge with other teachers present.
11. During said conversation, Ms. Cooke referred to a third teacher, Jamesella Johnson, as "Aunt Jemima."
12. While Aunt Jemima is a cooking and baking product, it also connotes servitude involving cooking services provided by an African-American woman to a Caucasian "master" in circumstances of servitude or slavery.
13. Ms. Dixon was more than an acquaintance but less than a close friend; under the circumstances I also infer that Ms. Cooke's belief was that Ms. Dixon was a friend and confident and that the use of the term "Aunt Jemima" in referring to Ms. Johnson would not be divulged to others.
14. There is no evidence in the record that Ms. Cooke's derogatory statement was overheard by teaching staff members present in the teachers' lounge.
15. Thereafter, Ms. Dixon told a third party about Ms. Cooke's statements and the matter eventually came to the attention of officials of the school district.
16. Egg Harbor Township Board of Education Policy No. 3281 Inappropriate Staff Conduct, applies to the actions and conduct of Ms. Cooke
17. Egg Harbor Township Board of Education Policy No. 5000 Pupils, 5512.01 Harassment, Intimidation and Bullying is not applicable to Ms. Cooke.
18. While Ms. Clarke made inappropriate racial derogatory comments toward another teaching staff member, the proofs are lacking to show that her actions fall within the definition of harassment, intimidation and bullying found at N.J.S.A. 18A:37-14 and are in violation of N.J.A.C. 6A:16-7.9(a)(2)(vi) and Board of Education Policy Number 5512.01.

19. There is no evidence in the record that Ms. Cooke violated Egg Harbor Township Board of Education Policy Number 3281, inappropriate staff conduct, by lying to an administrator during an investigation.

LEGAL DISCUSSION

N.J.S.A. 18A:6-10 provides that no person shall be dismissed or reduced in compensation, "(a) if [she] 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 term unbecoming conduct is elastic and broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence 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 of 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." Hartman v. Police Dep't of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992).

Because of the position of public trust in which their profession places them, teachers are held to certain prescribed standards of behavior. In 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, the Commissioner in speaking about teachers stated:

. . .

> [T]hey 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.
>
> [Id. at 321.]

Thus, because of their custody and care of children, teachers are necessarily required to exercise a degree of self-restraint and controlled behavior unlike most other types of employment. I/M/O the Tenure Hearing of Lucarelli, 97 N.J.A.R. 2d (EDU) 537, 541. Teachers hold positions demanding public trust, and in such positions they teach, inform, 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. I/M/O the Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99.

In I/M/O the Tenure Hearing of Romanoli, the superintendent used foul and abusive language against a member of the Board of Education. I/M/O the Tenure Hearing of Romanoli, 1975 S.L.D. 352. The incident occurred after midnight in a school parking lot subsequent to a conference meeting of the Board of Education. Id. at 353. The superintendent did not deny using epithets and four-letter obscenities, but argued that his "private" actions were insufficient "to warrant the imposition by the Commissioner of one of the penalties described in [N.J.S.A. 18A:6-10]." Id. at 354. In ruling in favor of the superintendent, the Commissioner concurred that the 'private nature' of the incident was a bar to the exercise of any authority by him. Specifically, the conversation was after school hours and limited in scope to an exchange between two parties. Id. at 356. Thus, in essence, the Commissioner held that a superintendent is not, under all circumstances, a public person but that he is possessed also of private privilege. Id. at 357. On the date in question, the superintendent was acting pursuant to such privilege. According to the Commissioner, "[a] decision to the contrary would mandate the formulation of a graduated set of moral, ethical, and legal standards

applicable to the use of language by public school employees in private situations ..." Ibid. (emphasis added).[4]

In Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., a superintendent had directed racial slurs against an African-American custodian. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., EDU 9169-83, initial decision, (May 08, 1984), aff'd, Comm'r of Educ., (June 25, 1984), rev'd., State Bd. of Educ., (Feb. 06, 1985), aff'd., No. A-2859-84 (App. Div. Dec. 24, 1985). Specifically, it was charged that after a Board meeting, the superintendent had nodded to the custodian and said to a fellow board member, "Do you know what all these people have in common - they have pussy hair on their heads." Id. at *2 (initial decision). The local board refused to certify the charge, contending that although it found probable cause to credit the charge, it did not merit either dismissal or reduction of salary. Ibid. Although the ALJ and Commissioner ruled to the contrary, the State Board of Education reversed and upheld the local board's decision. Id. at *6 (State BOE decision). The Board explained,

> [r]eview of the case law reveals no case in which a single incident involving an offensive comment made after school hours to a non-student where no students were present was the basis for dismissal or reduction in salary. We therefore conclude that given the status of the existing law, it was proper for the Ridgefield Board to conclude that, in light of the Assistant Superintendant's overall pattern of conduct, this one isolated incident in which a comment was made to an adult employee after the work day during casual discussion was not sufficiently flagrant to warrant a penalty.
>
> [Id. at *6-7 (State BOE decision) (emphasis added).]

The Board, however, explicitly stated that their holding was case-specific and did not stand for the assertion that a "sexually or racially offensive remark made to individuals other than students may never warrant dismissal or reduction in salary." Id. at *7 (State BOE).

[4] "This determination is limited to the specific factual circumstances in this case. It does not negate numerous prior decisions of the Commissioner and the courts that private conduct may, in other circumstances, properly be the subject of a charge before the Commissioner." Ibid (emphasis added).

In accord with the Board's disclaimer, New Jersey case-law strongly supports the proposition that use of racial/sexual/ethnic epithets constitutes unbecoming conduct when uttered in the presence of children during school hours. In Astacio-Borja v. Bd. of Educ. of the Passaic County Technical-Vocational Sch. Dist., a tenured teacher verbally assaulted another teacher in a lunchroom filled with students. Astacio-Borja v. Bd. of Educ. of the Passaic County Technical-Vocational Sch. Dist., EDU 5963-96, initial decision, (February 13, 1998), <http://lawlibrary.rutgers.edu/oal/search.html>, adopted,[5] Comm'r (March 30, 1998) <http://www.state.nj.us/education/legal/index.html>. In particular, the offending teacher (hereinafter "Mr. T") called Ms. Astacio-Borja an 'illegal alien' who "swam here across the Rio Grande." Mr. T stated that Hispanics "should not be in this country" and "you and all your people should be sent home." Finally, Mr. T pointed to Ms. Astacio-Borja's school identification and yelled that she should be instead wearing a "green card." Ibid. Not surprisingly, ALJ Gerson concluded that the tenured teacher's comments were sufficient to warrant dismissal or reduction in salary.[6] Ibid.

While the teacher in Astacio-Borja, supra, made numerous ethnic and racial statements in the presence of students, the following two cases stand for the proposition that a single derogatory slur made in the presence of children is sufficient to dismiss a tenured teacher or reduce the teacher's salary. In I/M/O the Tenure Hearing of Matecki, Ms. Matecki instructed a class of seventh graders to straighten up their books and clean up the room before leaving the classroom. I/M/O the Tenure Hearing of Matecki, 1971 S.L.D. 566. When only one student complied, Ms. Matecki instructed him to sit down and not do "nigger work." Id. at 567.[7]. In I/M/O the Tenure Hearing of

[5] The Commissioner also remanded the matter to the local board to certify Count I of the charges.
[6] The crux of Ms. Borja's claim was that the Board abused its discretion by failing to certify tenure charges against Mr. T. ALJ Gerson agreed with petitioner, concluding, "[t]he Board's action in determining not to certify tenure charges against Mr. [T] was unreasonable and constitutes an abuse of its discretion. Not only is the charge in the matter admittedly creditable, but prior cases clearly indicate that either a dismissal or reduction in salary would be warranted." Ibid.
[7] In the interest of full disclosure, the student was white, while the class as well as the school was predominantly black. Id. at 570. The teacher was subsequently dismissed. Id. at 574. The circumstances surrounding her dismissal will be discussed in the following section.

Poston, an eighth grade teacher told a student "your mother's a dyke" in front of the entire class. I/M/O the Tenure Hearing of Poston, EDU 03876-05, initial decision, (July 19, 2006), adopted with modification, Comm'r. (October 19, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>. An investigation revealed that the student had been disruptive throughout the class and had provoked the teacher into losing her temper by repeatedly calling her a "dyke" in front of the class. Ibid. Taking these mitigating circumstances into consideration, the ALJ nevertheless found the teacher culpable of unbecoming conduct and suspended her for thirty days without pay.[8]

Finally, and certainly most helpful to deciding this case, New Jersey case-law supports the proposition that a tenured teacher's mere **use** of the word "nigger' in a school setting is per se unbecoming conduct. I/M/O the Tenure Hearing of Emri, EDU 4579-00, initial decision, (August 30, 2002), adopted with modification, Comm'r., (October 21, 2002), adopted with modification, State Bd. of Educ., (December 03, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>. In this case, Ms. Emri was having extreme difficulty with an African-American student in her class. While walking through a hallway with the assistant principal and discussing the student's extensive disciplinary history, Ms. Emri stated the student was "just your typical nigger". Ibid.[9] Reviewing the mitigating evidence before her, the ALJ opined that, "[e]ven though there [is] convincing testimony that Emri [was] not a racist, [had] African-American friends and as a teacher discourage[d] discrimination, this does not mean that she would not use, under any circumstances, the word "nigger" to describe a difficult student." Ibid. The ALJ concluded, "the use of the word "nigger" is so inappropriate as to constitute conduct unbecoming a teacher." Ibid (emphasis added). On review, the Commissioner agreed that Ms. Emri's remarks constituted unbecoming conduct. Id. at *92 (Comm'r. Decision). Thus, it appears that mere utterance of the word "nigger" by a teacher during

[8] To quote the ALJ, the student was able to "stress respondent to a point of using poor judgment, and incite her to retaliate with unbecoming language which was inappropriate of the standards expected of teachers." Ibid. (emphasis added).
[9] There is no indication that students were present in the hallway.

school hours can constitute unbecoming conduct regardless of whether any students are in the vicinity when the word is spoken.[10]

Based on the guidance provided by the above-cited cases, and based on the Findings of Fact stated above, I **CONCLUDE** that on "Fun Day" in June 2008, when Ms. Cooke was speaking to Jordan Brown, another teacher, in the hallway of the Davenport school during school hours with teachers and school children present, and referred to a third teacher, Jamesella Johnson, as a "nigger" she engaged in conduct unbecoming a teaching staff member.

Based on the guidance provided by the above-cited cases, and based on the Findings of Fact stated above, I further **CONCLUDE** that in November 2007, when Ms. Cooke was speaking to Lynne Dixon, another teacher in the teachers' lounge of the Davenport elementary school during school hours with other teachers present, and Ms. Cooke referred to a third teacher, Jamesella Johnson, as "Aunt Jemima," she engaged in conduct unbecoming a teaching staff member. I have reached this conclusion because the term "Aunt Jemima" carries the connotation of servitude or slavery involving cooking services provided by an African-American woman to a Caucasian "master."

I also **CONCLUDE** that by these incidents of unbecoming conduct, Ms. Cooke violated school district policy 3281 by engaging in inappropriate staff behavior.

Penalty

Where a teaching staff member is found guilty of violating the public trust, factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. In I/M/O the Tenure

[10] In a separate count, Ms. Emri was found to have called the same student a "nigger" during the course of a private conversation with another teacher. The ALJ likewise found this incident so inappropriate as to constitute unbecoming conduct. Ibid.

Hearing of Fulcomer, 93 N.J.Super. 404, 420-422 (App. Div. 1967). Courts recognize that even a single instance of misconduct is enough to justify removal of an unfit teacher, if it is sufficiently flagrant. Redclay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affd. 131 N.J.L. 326 (E&A 1944).

Penalties must be assessed on a case-by-case basis. Factors to be considered in assessing a penalty include the nature and gravity of the offense under all of the circumstances involved; any mitigating or aggravating factors; impact of the penalty on the teacher's career; and any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. In I/M/O the Tenure Hearing of Fulcomer, supra, 93 N.J. Super. at 422. Absent flagrant misconduct, dismissal is usually reserved for cases in which there has been a continuing pattern of misconduct accompanied by prior warnings. Id. at 421. In the context of a teacher 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).

In Matecki, supra, Ms. Matecki was dismissed for using the term 'nigger' in her predominantly African-American seventh grade class.[11] Of paramount importance, the principal testified that "he believed that the safety and welfare of both [Ms. Matecki] and the pupils in the school would be jeopardized if [Ms. Matecki] returned to the schools of New Brunswick." Matecki, supra, 1971 S.L.D. at 569. In fact, the uncontested testimony of the school administrators asserted that a major school disruption was imminent if Ms. Matecki returned. According to the administrators, "the pupils were planning, as stated in their language, to "Turn out" [Ms. Matecki's] classroom." Id. at 574. Taking into consideration past action of the pupils, the predominantly African-American makeup of the school, and the threatening statements made, the Commissioner deemed the incident grounds for dismissal. Ibid. The Commissioner concluded that, "the conduct of the teacher in the matter heretofore detailed was a

[11] Some of the cases from the preceding section will not be mentioned in this section. In those cases, the teacher was also found culpable of serious misconduct other than the use of derogatory language. As such, a review of the penalties in those cases would be misleading and exaggerated for our purposes.

demonstration of unprofessional conduct so gross, and so fraught with peril to the continued safety and well-being of both the teacher and the pupils, as to warrant the forfeiture of tenure rights." Id. at 575.

While the circumstances in Matecki, supra, left the Commissioner with no choice but to dismiss the tenured teacher, the following two cases demonstrate that suspension is generally more appropriate. In Poston, supra, a teacher told a disruptive student that his mother was a dyke in front of her entire eighth grade class. Taking into consideration all of the circumstances, including provocation, the ALJ suspended the teacher for thirty days without pay. On review, however, the Commissioner found the suspension insufficient, regardless of how grievously provoked, and increased the penalty to include the forfeiture of the 120 days of salary already withheld from Ms. Poston pursuant to N.J.S.A. 18A:6-14. Poston, supra, EDU 03876-05 at final decision <http://lawlibrary.rutgers.edu/oal/search.html>.

Finally, in Jayson H. Burg v. State Operated Sch. Dist. of the City of Newark, the ALJ determined that Mr. Burg's comments in the presence of fourth graders warranted a two-month suspension without pay. Jayson H. Burg v. State Operated Sch. Dist. of the City of Newark, EDU 3291-97, initial decision, (October 30, 1997) <http://lawlibrary.rutgers.edu/oal/search.html>, aff'd in part & rev'd in part, Comm'r (December 18, 1997) <http://www.state.nj.us/education/legal/>, aff'd, State BOE, (June 03, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. In particular, the ALJ determined that Mr. Burg had made two inappropriate and insensitive comments and ordered Mr. Burg. Ibid. The Commissioner, however, reversed in part, finding that in addition to the two comments[12], Mr. Burg had also used the word "nigger" in the fourth grade classroom. Id. at 18 (Comm'r. Decision). Accordingly, the Commissioner increased Mr. Burg's penalty to include forfeiture of 120 days' salary pursuant to N.J.S.A. 18A:6-14. Id. at 21.

[12] Mr. Burg made an inappropriate reference to "The Boys in The Hood" while in class. Mr. Burg had also told a three year old student not to touch his tape recorder because his mother could not afford to replace it. Ibid.

In the case at hand, while speaking to Jordan Brown, Ms. Cooke referred to Jamesella Johnson as a "nigger." Ms. Cooke's statements were made during school hours, in the school hallway and in the presence of teachers and children. In accordance with New Jersey case-law, Ms. Cooke's one-time use of the word "nigger" constitutes unbecoming conduct. First, as a public role model, Ms. Cooke's actions are judged with more scrutiny than that of a typical government employee. Second, as an elementary school teacher, Ms. Cooke was arguably required to exercise an even greater degree of self-restraint. Unfortunately, her failure to act appropriately has recklessly put young children at risk, has created unnecessary tension among the teachers and has cast doubt as to her fitness to teach impressionable children. Although Ms. Cooke did not direct her comments at Ms. Johnson or the children, Emri, supra, stands for the proposition that a teacher's mere use of the word "nigger" is sufficient for unbecoming conduct. Such is the case, irrespective of whether children where in the vicinity of the teacher when the racial slur was uttered. Finally, Ms. Cooke's reference to Ms. Johnson as "Aunt Jemima" on a prior occasion portray a pattern of behavior rather than an isolated incident.

To adequately ascertain the appropriate penalty in this case, a list of aggravating and mitigating factors is in order:

I. Aggravating Factors

- Ms. Cooke's statements were made during school hours;
- Ms. Cooke's reference to another teacher as a "nigger" was made in the presence of children and other teachers;
- Ms. Cooke is a teaching staff member in an elementary school;
- Ms. Cooke's statements were said out of anger and not in a joking manner;
- Ms. Cooke referred to the same teacher as "Aunt Jemima" on a subsequent occasion.

Mitigating Factors

- Ms. Cooke has been teaching for more than sixteen years;
- Ms. Cooke has not been disciplined in the past.
- Neither the teacher who was the subject of the slurs nor the children heard Ms. Cooke's statements;
- Ms. Cooke made the racial remarks believing that they were being made in confidence to friends;
- School district officials only learned of the remarks after the teachers to whom they were made related them to another individual;
- Ms. Cooke did not direct her racial remarks at a student;
- Ms. Cooke did not direct her racial remarks directly at the other teacher.

In this case, I CONCLUDE that dismissal of Ms. Cooke from her teaching position is not justified because her conduct does not establish her unfitness to discharge the duties and functions of her office or position as a teacher. The racial slur and use of a racially derogatory term by Ms. Cooke were intended to be made in confidence and were not public statements. Furthermore, the circumstances surrounding Ms. Cooke's comments appear to be less egregious than in Poston, supra, as well as Burg, supra. In Poston, supra, the teacher called the student's mother a dyke in front of her entire class. Here, Ms. Cooke made derogatory statements in the context of a private conversation. In Burg, supra, the teacher used the word "nigger" in front of the entire fourth grade class and was found to have made two other inappropriate comments in front of the children. In Poston the ultimate penalty was a thirty-day suspension without pay and forfeiture of 120 days of salary, while in Burg the petitioner was suspended for two months without pay and also forfeited 120 days of salary. Based on the mitigating and aggravating factors presented herein, I **CONCLUDE** it would be reasonable to suspend Ms. Cooke for 150 days.

DECISION AND ORDER

As to **Charge 1**, I have determined that while respondent engaged in conduct unbecoming a teaching staff member by making inappropriate racial derogatory comments toward another staff member, the proofs are lacking to show that her actions fall within the definition of harassment, intimidation and bullying found at N.J.S.A. 18A:37-14 and are in violation of N.J.A.C. 6A:16-7.9(a)(2)(vi) and Board of Education Policy Number 5512.01. Therefore, respondent is **NOT GUILTY** of Charge 1.

As to **Charge 2**, I have determined that respondent engaged in conduct unbecoming a teaching staff member by violating Board of Education Policy Number 3281, inappropriate staff conduct, by engaging in inappropriate behavior by making racial comments in referring to another staff member, and is **GUILTY** of this charge.

As to **Charge 3**, I have determined that respondent engaged in conduct unbecoming a teaching staff member by violating the law against discrimination by engaging in inappropriate behavior by making racial comments toward another staff member, and is **GUILTY** of this charge.

As to **Charge 4**, I have determined that the proofs are lacking to establish that respondent engaged in conduct unbecoming a teaching staff member by violating Egg Harbor Township Board of Education Policy Number 3281, inappropriate staff conduct, by lying to an administrator during an investigation, and that respondent is **NOT GUILTY** of this charge.

While I have found respondent's conduct in these matters was unbecoming, the foregoing findings do not establish her unfitness to discharge the duties and functions of her office or position as a teacher, and that her removal is not justified. Therefore, I **ORDER** that the respondent shall receive a 150-day suspension from duty without pay

as an appropriate discipline for these charges of unbecoming conduct for the reasons expressed above.

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

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

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

July 22, 2010
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Date Received at Agency: 7-22-10 lom

Date Mailed to Parties: 7-22-10 lom

mph/mv

APPENDIX

LIST OF WITNESSES:

For petitioner:

Scott P. McCartney
Charles Fredericks
Joetta M. Surace
Jordan A. Brown
Tracie Walters Hurst
Lynne Dixon
Jamesella Johnson

For respondent:

Lauren Cooke

LIST OF EXHIBITS:

For petitioner:

P-1	December 3, 2008, "Rice Notice" to Lauren Cooke and her attorney
P-2	Egg Harbor Township Board of Education Policies: No. 3281 Inappropriate Staff Conduct No. 5000 Pupils, 5512.01 Harassment, Intimidation and Bullying
P-3	December 10, 2008, correspondence to Lauren Cooke and to the Commission of Education transmitting certification of determination and statement of charges
P-4	Charles R. Fredericks correspondence to counsel, dated September 8, 2008, setting forth timeline of events

P-5 E-mail from Charles Fredericks to Lauren Cooke and others, dated October 11, 2007, regarding delivery of Title I services for third grade at Davenport School

P-6 Meeting with Lynne Dixon and Jordon Burke, dated May 15, 2008, and with Jamesella Johnson and Charles Fredericks, dated May 27, 2008

P-7 Jordon Burke written statement, dated June 16, 2008

For respondent:

None

505-10

KIMBERLI BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner's tenured position as an English teacher in a pre-school extended-day/extended-year program was eliminated in response to a reduction in State aid in 2008, and petitioner was reassigned to a regular program and position, effectively reducing her salary. Petitioner contended that her seniority rights were violated when three teachers with less seniority were reassigned to extended-day/extended-year programs for kindergarten through grade eight. Petitioner sought recalculation of her seniority and a reassignment to an extended-day/extended-year program and position. At a prehearing conference, the parties agreed that no genuine issues of fact existed, and filed cross motions for summary decision.

The ALJ found that: 125 pre-school teachers were reassigned to regular-school programs in response to a reduction in State aid, and the reassignments resulted in a reduction in salary for all affected teachers; three teachers reassigned to extended-day/extended-year programs for kindergarten through grade eight were less senior than petitioner, but had become highly qualified teachers under the No Child Left Behind Act of 2001; petitioner had not become highly qualified under the Act, *i.e.*, she had not taken the Elementary Teacher Content Knowledge Praxis II Assessment to demonstrate content preparation/expertise for the core academic subjects taught in elementary school. Accordingly, the ALJ concluded that petitioner was ineligible to teach kindergarten or higher because she had not met the highly qualified teacher requirement, and was therefore not eligible for reassignment to an extended-day/extended-year program and position in an elementary school. The ALJ granted summary decision to the Board and dismissed the petition.

Upon a thorough and independent 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 22, 2010

505-10

OAL DKT. NO. EDU 13373-08
AGENCY DKT. NO. 294-10/08

KIMBERLI BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Elizabeth City Board of Education is entitled to summary decision. Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/10
Date of Mailing: 11/23/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13373-08
AGENCY DKT. NO. 294-10/08

KIMBERLY BROWN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman and Barrett, attorneys)

Karen A. Murray, Esq., for respondent

Record Closed: August 23, 2010 Decided: October 6, 2010

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

STATEMENT OF FACT

On September 1, 2006, Elizabeth eliminated all of its extended-day/extended-year programs for preschool and Brown was reassigned to a regular program and position. Meanwhile, less senior but highly qualified teachers under the No Child Left Behind Act of 2001 were reassigned to extended-day/extended-year programs and positions for kindergarten through grade eight. Were Brown's seniority rights violated?

No. Under the No Child Left Behind Act of 2001, all teachers teaching in kindergarten or higher must be highly qualified.

PROCEDURAL HISTORY

On June 26, 2008, Elizabeth eliminated its extended-day/extended-year programs for preschool in response to a reduction in State aid, and on September 1, 200, Brown was reassigned to a regular program and position, effectively reducing her salary. When three teachers less senior than she were reassigned to extended-day/extended-year programs and positions for kindergarten through grade eight, Brown filed a verified petition with the Department of Education, asserting that those teachers were reassigned in violation of her seniority rights. In short, Brown seeks a recalculation of her seniority and a reassignment to an extended-day/extended-year program and position.

On October 10, 2008, Brown filed her petition with the Department of Education; on October 31, 2008, Elizabeth filed its answer; and on November 14, 2008, the Bureau of Controversies and Disputes transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under N.J.A.C. 1:1-1.1 to -21.6, and N.J.A.C. 1:31-3.9. Jurisdiction is conferred under N.J.S.A. 18A:6-9 to -25.

At the prehearing conference, the parties agreed that no genuine issues of fact existed and that the case was ripe for summary decision. The administrative law judge to whom the case was originally assigned agreed and accepted their cross-motions for summary decision.

FINDINGS OF FACT

Background Information

In February 2001, Brown obtained a provisional certificate to teach preschool through grade three.

On September 1, 2002, the Elizabeth Board of Education hired Brown as a preschool English teacher and assigned her to teach at the Frances Smith Early Childhood Center (School No. 50) and the Donald Stewart Early Childhood Center (School No. 51).

The collective bargaining agreement characterized the position as an "extended day/extended year position." Although the normal work year for teachers in the school district was 10 months, the work year for teachers in extended-day/extended-year positions was 11 months. Similarly, the work day for teachers in extended-day/extended-year positions was 8 hours and 15 minutes while the normal work day for teachers in normal positions was 6 hours and 50 minutes.

In February 2003, Brown obtained her standard certificate; in September 2004, she attained tenure; and in April 2006, she was reassigned to the Donald Stewart Early Childhood Center and no longer taught at the Frances Smith Early Education Center.

At the time, the position at the Donald Stewart Early Childhood Center was still an extended-day/extended-year position and the Donald Stewart Early Childhood Center was still one of the four extended-day/extended-year programs in the district. Westminster Academy (School No. 26); Frances Smith Early Childhood Center (School No. 50); and Dr. Martin Luther King, Jr. Early Childhood Center (School No. 52) were the other three.

Reduction in State Aid

Extended Day/Extended Year

On June 26, 2008, Elizabeth eliminated its extended-day/extended-year preschool programs in response to a reduction in State aid, effective September 1, 2008.

Westminster Academy then became the only extended-day/extended-year program in the district—but only for kindergarten through grade eight.

Extended Day

Similarly, the schools that had been extended-day programs for preschool and higher became extended-day programs for kindergarten and higher. In particular, Victor Mravlag (School No. 21), which had been extended day for preschool through grade three, became extended day for kindergarten through grade three; Dr. Albert Einstein Academy (School No. 29), which had been extended day for preschool through grade eight, became extended day for kindergarten through grade eight; and Ronald Reagan Academy (School No. 30), which had been extended day for preschool through grade eight, became extended day for kindergarten through eight.

William F. Halloran (School No. 22), which had been extended day for grades four through six, and Terrence Reilly (School No. 76), which had been extended day for grades seven through eight, remained extended day for grades four through six, and for grades seven through eight, respectively.

Extended Year

No schools in the district had ever been extended year only.

The Effect on Brown

In response to the reduction in State aid, all preschool teachers were reassigned to regular-school programs. Since the collective bargaining agreement contains separate salary guidelines for teachers in extended-day/extended-year positions, this reassignment resulted in a reduction in salary for those teachers. One hundred twenty-five teachers were affected.

Brown was one of the 125 teachers who were affected by this reduction and her salary was effectively reduced from approximately $63,000 to approximately $55,000.

The Effect on Others

Some teachers, however, were reassigned to Westminster Academy. In particular, Sandra Townes, Julia Lehman, and Melissa Fornarotto were reassigned to teach kindergarten, second grade, and third grade respectively. All three were less senior than Brown but had become highly qualified teachers under the No Child Left Behind Act of 2001, whereas Brown was more senior but had not become highly qualified under the Act.

More specifically, Brown had not taken the Elementary Teacher: Content Knowledge Praxis II Assessment to demonstrate content preparation/expertise for the core-academic subjects taught in elementary school. Nor had she met the requirements of New Jersey's High Objective Uniform State Evaluation (HOUSE) Matrix. In fact, she had not even completed let alone filed any of the requisite forms with Elizabeth or the New Jersey Department of Education.

CONCLUSIONS OF LAW

Under the No Child Left Behind Act of 2001, all teachers teaching in core-academic subjects must be highly qualified. P.L. 107-110, § 1119(a)(3). Toward this end, the implementing regulations require State educational agencies to develop their own plans to ensure it. 20 U.S.C. § 6319(a)(2).

In 2006, the United States Department of Education approved New Jersey's plan. (Ex. E at 3.) According to the memorandum the New Jersey Department of Education issued on July 30, 2007, all elementary school teachers working in a self-contained setting for kindergarten through grade five, kindergarten through grade six, or kindergarten through grade eight, and who had not become highly qualified by that time, had to satisfy the following criteria: (1) hold a bachelor's degree from a regionally accredited institution of higher education; (2) hold a valid New Jersey Teaching Certificate for which no requirement had been waived; and (3) pass the Elementary Teacher: Content Knowledge Praxis II Assessment. (Ex. E at 3.)

In that same memorandum, the New Jersey Department of Education explained that P-3 teachers were not required to take the assessment unless they were teaching K-3 or had met the requirements through New Jersey's HOUSE Matrix before June 30, 2007. (Ex. E at 5.)

Moreover, school districts were required to keep on file the requisite documentation for every highly qualified teacher in every content, including: (1) the general form (A-E) that identified the teaching assignment and grade level; (2) the NJ HOUSE Matrix (if used) together with the accompanying documentation; and (3) the statement of assurance signed by the teacher and the administrator. (Ex. E at 4.) In fact, the memorandum specifically stated in bold letters that no teacher providing direct instruction in core content areas was grandfathered or exempt from this process. Ibid.

In this case, Brown had not filed any of this documentation with the school district. More important, she had not passed the Elementary Teacher: Content Knowledge Praxis II Assessment nor had she met the requirements of New Jersey's HOUSE Matrix by July 30, 2007. Therefore, I **CONCLUDE** that she was ineligible to teach kindergarten or higher when Townes, Lehman, and Fornarotto were reassigned to Westminster Academy.

Nevertheless, Brown argues that she should have been given one of those three teaching positions because she was more senior than Townes, Lehman, and Fornarotto

at the time. In support of her position, Brown cites N.J.S.A. 18A:28-9; N.J.S.A. 18A:28-11; and N.J.S.A. 18A:28-12. Together those statutory provisions address reductions in workforce and eventual reassignment according to seniority, but they do not apply in this case because Brown was ineligible to teach kindergarten or higher. And though Townes, Lehman, and Fornarotto were less senior than Brown, they had become highly qualified teachers under the No Child Left Behind Act when they were reassigned. In fact, Brown had not even completed let alone filed any of the requisite documentation with Elizabeth or the New Jersey Department of Education. Given these circumstances, I **CONCLUDE** that Elizabeth is entitled to prevail as a matter of law and that this case be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Elizabeth is granted summary decision and that this case is **DISMISSED**.

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

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

10/6/10
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 10-6-10

Date Mailed to Parties: OCT 7 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

#506-10

OAL DKT. NO. EDU 10345-09
AGENCY DKT. NO. 235-9/09

E.C.M., on behalf of minor child, C.L.M.,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERDALE, CAMDEN 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 matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/10

Date of Mailing: 11/23/10

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10345-09

AGENCY DKT. NO. 235-9/09

E.C.M. o/b/o Minor Child, C.L.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERDALE, CAMDEN COUNTY,

Respondent.

E.C.M., petitioner pro se

Audra Pondish, Esq., for respondent (Wade, Long, Wood & Kennedy, LLC, attorneys)

Record Closed: September 29, 2010 Decided: September 30, 2010

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

This matter was transmitted to the Office of Administrative Law (OAL) on October 6, 2009, 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.

An in-person conference was scheduled for February 8, 2010, at the OAL, at which time only counsel for respondent appeared. Motions to dismiss and, in the alternative, for sanctions were made by respondent at that time pursuant to N.J.S.A. 1:1-14.4. However, one day later, E.C.M. contacted the OAL pursuant to that rule and a taped telephone conference was held pursuant thereto with the parties on February 18, 2010. A Letter Order denying dismissal but ordering sanctions was effectuated pursuant to that Order and, pursuant to ultimate compliance with the sanction order by E.C.M. , another conference was held on June 21, 2010. As a result of that conference, on August 2, 2010, the parties submitted an agreement signed by E.M. (otherwise known as E.C.M.) and by Debra L. Bruner, Superintendent of respondent. A review of that submission caused this tribunal to request a clarified submission pursuant to the requirements of N.J.A.C. 6A:3.1.13 (d). It was received at the OAL on September 29, 2010, at which time the hearing record closed. (J-1).

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, as well as the Board Resolution 2009-10, approved on September 20, 2010, which was certified to pursuant to the raised seal of the Board and the signature of Dawn Leary, Business Administrator/Board Secretary, dated September 22, 2010.

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

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

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

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

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 30, 2010
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: OCT - 8 2010

Date Mailed to Parties: OCT - 8 2010

/mamf

IN EVIDENCE

J-1 Settlement Agreement and Board Resolution 2009-10

Audra A. Pondish, Esquire
WADE, LONG, WOOD, & KENNEDY, LLC
1250 Chews Landing Road
Laurel Springs, NJ 08021
(856) 346-2800

RECEIVED
2010 AUG -2 A 11:14
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

	: NEW JERSEY OFFICE OF
E.C.M., on behalf of minor child C.L.M.	: ADMINISTRATIVE LAW
	:
Petitioner,	: OAL Docket No: EDU-10345-09
	:
vs.	: Agency Docket No: 235-9/09
	:
BOARD OF EDUCATION OF THE BOROUGH OF SOMERDALE	: SETTLEMENT AGREEMENT
	:

2010 SEP 29 A 11:32
RECEIVED

This case arises from a residency challenge brought forth by Edmund Mays, 519 N. White Horse Pike, Apt. 21, Somerdale NJ 08083.

On April 24, 2009, Debra L. Bruner, Ed.D, Superintendent provided a letter to Ms. Nakesha Robinson requesting a residential schedule. Subsequently, on May 13, 2009 Dawn Leary, Business Administrator sent a letter to Ms. Nakesha Robinson informing her that the district was going to review the circumstances surrounding residency.

Subsequently, on July 23, 2009 counsel for Somerdale Board of Education sent a letter to Ms. Nakesha Robinson setting forth their formal position that C.L.M. did not reside in Somerdale and that he would not be permitted to attend Somerdale Park School for the 2009-2010 school year.

Ms. Nakesha Robinson was informed by letter dated August 3, 2009 that the issue of C.L.M.'s residency would be discussed in executive session at the Somerdale Board of Education meeting. On August 29, 2009, counsel for Somerdale Board of Education presented a letter to the parents informing them that upon review of the information presented C.L.M. was ineligible to attend school at Somerdale Park School District.

Edmund Mays filed a residency appeal on September 4, 2009. Somerdale Board of Education submitted a response to Petitioner's residency appeal on September 29, 2009. This case was subsequently transferred to the Office of Administrative Law before Honorable John R. Futey.

A pre-hearing conference was scheduled for February 8, 2010. Audra A. Pondish, Esq. appeared on behalf of the district. The petitioner failed to appear on this date. Ms. Pondish then made two motions: (one) for a dismissal based upon Mr. mays failure to appear and (two) sanctions in the event that the matter would be re-listed for hearing. On February 18, 2010, a telephone conference was held and Judge Futey listened to explanations from both parties with

respect to the motions. Upon review and consideration of the circumstances, Judge Futey denied the Motion to Dismiss, however, he ordered the Petitioner's to pay sanctions in the amount of $380.15 to the Somerdale Board of Education.

Compliance with this sanction was a contingency that had to be satisfied prior to the case being re-listed. The Petitioner did comply and provided payment to counsel for Somerdale Board of Education.

The matter was re-listed for June 21, 2010. The petitioner's presented a Superior Court Order dated October 30, 2009 which stated that C.L.M. would attend school in the district where he resides with the parent of primary residence. The Order further stated that primary residence was with Defendant, Edmund Robinson. Counsel for Somerdale Board of Education informed the court that this new order would be presented the Somerdale Board of Education for review.

Upon consideration of the new Order and review of all the facts and circumstances in this case, Somerdale Board of Education is satisfied that C.L.M.'s primary residence is in Somerdale. In light of this fact, C.L.M. will be permitted to attend school in Somerdale for the 2010-2011 school year.

Petitioner, Edmund Mays will provide the District with a more definitive residency schedule. The basis for this request is for the safety and well-being of C.L.M. and in the event of an emergency the District needs to know who to contact.

Petitioner, Edmund Mays will advise the District if circumstances change relating to the primary residence of C.L.M.

IN WITNESS THEROF, the parties hereto have caused this Settlement Agreement to be executed by themselves.

AGREED

Edmund Mays

Dated: 7-17-2010

Debra L. Bruner, Ed.D, Superintendent
Somerdale Board of Education

Dated: 7/27/10

Board President
Martha Gray

Board Secretary

SOMERDALE BOARD OF EDUCATION
301 GRACE STREET
SOMERDALE, NJ 08083
856-783-2933

RESOLUTION 2009-10

Based on a recommendation by the Superintendent of Schools at the September 20, 2010 Board of Education meeting, the following motion was made:

Resolution to authorize the Board President and Board Secretary to sign the settlement agreement on behalf of the Board of Education.

Motion by Mrs. Giambri seconded by Mr. Toff a roll call was taken.

Motion carried: Yes 7 No 0 Abstain 0 Absent 2

I hereby certify that the foregoing is a true and exact copy of the motion adopted at the Somerdale Borough Board of Education Meeting on September 20, 2010.

Dawn Leary
Business Administrator/Board Secretary

9/22/10
Date

508-10L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ROCHELLE R. HENDRICKS
Acting Commissioner

November 23, 2010

Dr. Robert R. Higgins
State Board of Examiners
New Jersey State Department of Education
200 Riverview Plaza
Trenton, New Jersey 08625

Dear Dr. Higgins:

Please be advised that the Central Jersey Arts Charter School Board of Trustees (Board) submitted a request to the Commissioner for a recommendation, pursuant to *N.J.S.A.* 18A:6-38.1. Having reviewed the information provided by the Board, I have determined that the allegations, if true, are sufficient to warrant the suspension or revocation of the certificate held by Cheryln Sayles. The information provided by the Board is being forwarded herewith for action as the State Board of Examiners deems appropriate.

Sincerely,

Rochelle R. Hendricks
Acting Commissioner

RH/JKH

c: Vittorio S. Lapira, Esq.
Cheryln Sayles

509-10M

OAL DKT. NO. EDU 8965-08
AGENCY DKT. NO. 290-9/08

IN THE MATTER OF THE TENURE HEARING OF KIMBERLY GEURDS, EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

In this motion for clarification, the parties express conflicting positions about when the withholding of respondent's increment – ordered in Commissioner Decision No. 267-10+ (August 27, 2010) – should occur. The motion *per se*, to which there is no opposition, is granted and the parties are instructed as follows.

Respondent was administratively suspended on December 7, 2007, pending an investigation of complaints from the parents of some of her students. On September 29, 2008, formal tenure charges were certified to the Commissioner. After the Commissioner upheld the charge of unbecoming conduct – with a consequent forfeiture of 120 days' salary and one increment (and a directive that respondent take certain pedagogical courses) – respondent returned to work for the 2010-2011 school year.

Given the fact that respondent's performance during the portion of the 2007-2008 school year in which she worked resulted in sustained charges of unbecoming conduct, it follows that she did not earn an increment for her next year of service. Thus, respondent is not entitled to an increment during the present school year. Nor is respondent entitled to receive increments for the interim years. *See, e.g. In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County,* Commissioner Decision No. 371-02, decided October 21, 2002, at 34, footnote # 8. Indeed – since increments are awarded for satisfactory

performance and withheld for poor performance – it would be counter-intuitive to award increments for no performance, in a case where the respondent did not prevail.

Accordingly, the first year respondent might have been eligible for an increment would be 2011-2012, but that increment is withheld pursuant to the Commissioner's August 27, 2010 decision herein. Whether she receives an increment for 2012-2013 will depend upon her performance during the 2011-2012 school year.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/10
Date of Mailing: 11/24/10

[1] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

510-10

EDWARD D. TORRES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, and DANA REDD, MAYOR OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, a minister residing in Camden, filed a petition seeking an order directing the Board of Education of the City of Camden to place two referenda questions on a school election ballot. The two proposed questions involved, *inter alia,* removing the theory of evolution from Camden public school curricula and opening the daily school session with a moment of silence. Both the Board and the Mayor of Camden filed motions seeking dismissal of the petition.

The ALJ found, *inter alia,* that: to the extent that this case involves issues concerning school or other election-related issues, the Commissioner has no jurisdiction over such matters; to the extent that the objects of the proposed referenda involve matters concerning the conduct of the public schools and the laws affecting same – over which the Commissioner does have jurisdiction – the objects of the referenda cannot be legally performed by the Camden Board of Education and the Commissioner has no authority to permit them to occur, as the referenda implicate federal constitutional issues. Accordingly, the ALJ ordered the petition dismissed.

Upon a thorough and independent review of the record and the ALJ's decision in this matter, the Commissioner adopted the Initial Decision as the final decision, for the reasons set forth therein. 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.

November 23, 2010

OAL DKT. NO. EDU 07304-10S
AGENCY DKT. NO. 101-5/10

EDWARD D. TORRES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, and DANA REDD, MAYOR OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner. The petitioner's exceptions generally reiterate the substance of his submissions at the OAL, recasting the arguments therein to support the contention that his proposed referenda involving the theory of evolution and the need for a moment of silence should be placed on a school election ballot.

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11|23|10

Date of Mailing: 11|24|10

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07304-10S

AGENCY DKT. NO. 101-5/10

EDWARD D. TORRES,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY and DANA REDD, MAYOR OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondents.

Edward D. Torres, petitioner, pro se

Louis Capelli, Esq. and **Veronica P. Hallett,** Esq., for respondent Board of Education (Florio Perrucci Steinhardt & Fader, L.L.C., attorneys)

Michelle Banks-Spearman, Esq. for respondent Dana Redd (Howard J. McCoach, City Attorney, attorney)

Record Closed: September 28, 2010 Decided: October 15, 2010

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

Rev. Edward Torres, a minister residing in Camden, New Jersey, filed a petition with the Commissioner of Education (Commissioner) seeking an order directing the Board of Education of the City of Camden to place upon a school election ballot two

referenda.[1] The petition also named Dana Redd, the elected mayor of the City of Camden, as a respondent. After the Commissioner transferred the contested case to the Office of Administrative Law, both the Board and the mayor filed motions seeking dismissal of the petition. Each filed briefs and Rev. Torres replied with a written "Oral Argument." In addition, oral argument on the motions was held on September 28, 2010.

THE PROPOSED REFERENDA QUESTIONS

The two questions that the petition seeks to have placed before the voters of Camden read as follows:

1. Do you as a resident of Camden and a citizen of New Jersey want to end the Theory of Evolution as Science and History in the presentation of the origin and duty of mankind in your Public Schools in agreement with our New Jersey Constitution and our United States Constitution where we are grateful to Almighty God and where we are created and endowed equally by our Creator the God of Abraham?

2. Do you as a resident of Camden and a Citizen of New Jersey want the Camden Public School District to open daily session in prayer with one minute of silence to be used solely at the discretion of the individual student for quiet and private prayer, contemplation, or introspective at all K-12 schools under the discretionary authority of the Camden School Board?

In his petition, Rev. Torres notes that he has been working for a decade regarding issues relating to the Camden schools and expresses in several pages comments that reflect his view that the theory of evolution is racist and communistic ,and discusses his contention that racism and hostility to religion have played a role in what eventually he claims was an eventual refusal to present the above referenda to the voters of Camden. He lays the blame for the refusal on the Board of Education,

[1] The Petition was accompanied by seventy-nine (79) Petitions bearing signatures and addresses. The Mayor and Board have not specified whether they find these to be either sufficient in number or validity, as they have centered their opposition to Rev. Torres's efforts on grounds of jurisdiction, a lack of the existence of necessary statutory procedural steps and, most directly, on the legal impropriety of the proposed actions that the several Petitions seek to have the Board accomplish. The Petitions have not been marked as evidence for purposes of this proceeding; if the case were to proceed further they could be offered, but as they accompanied Rev. Torres's Petition they can be considered a part thereof.

whose members are appointed by the Mayor. In response to the petition, the Board has raised several contentions, ranging from a question as the jurisdiction of the Commissioner to consider this matter at all to a lack of the necessary statutory steps required for the presentation of referenda questions to the voters to the more fundamental arguments that the two actions apparently sought to be implemented after a positive vote on the referenda questions involve matters that are either outside the scope of the local board's competence and instead are directed by the State Board and State Department of Education (the science curriculum) or involve actions that have previously been determined by courts to violate the provisions of the Establishment Clause of the First Amendment to the United States Constitution (the "moment of silence" and the banning of the teaching of evolution). The Mayor has seconded these arguments, but has also argued that as her only role in regard to the conduct of the schools is to appoint the members of the Board, of which she is herself not a member, she is not a proper party to Rev. Torres' petition, as it seeks to direct the action of the Board.

A motion to dismiss a petition can be granted where, after a careful review of the claims and contentions asserted in that document and a liberal search therein for any legally recognized cause of action, it is determined that sufficient facts have not been presented to support such cause of action. It matters not whether the plaintiff can ultimately prove his contentions, but nevertheless the facts asserted must point to some cause of action that the law recognizes. In addition, if the petition seeks relief that is outside the power of the forum from which relief is requested, either on jurisdictional grounds or due to a lack of any legal authority for the relief sought, the petition may be dismissed. Motions to dismiss are not specifically identified in the Uniform Administrative Procedure Rules, N.J.A.C. 1:1 et seq., but reference to the New Jersey Rules of Court, as authorized by N.J.A.C. 1:1-1, show that such motions are recognized at R. 4:6-2 and can in some circumstances be decided under the standards for summary judgment, R. 4:46. Summary judgment in the parlance of administrative practice is summary decision, authorized by N.J.A.C. 1:1-12.5.

MAYOR REDD

It is not clear why Rev. Torres has included Mayor Redd in his petition. Camden is a Type I school district. The Mayor appoints the members of the School Board to terms. N.J.S.A. 18A:12-7. While she appoints the Board members, there is no suggestion that once they are properly seated, she has any legal right to make them act in any matter. While Rev. Torres's notes in his Petition that he has sought to have Redd use her "diplomacy and legislative experience . . . to intervene in this dispute with the Camden School Board and especially the President of the Camden School Board," Torres offers no legal authority for the Mayor having any power to act in regard to his request for the placement of these referenda on the ballot. As such, as there is no legal remedy available against Mayor Redd that is related to the subject of Torres' Petition, her dismissal as a respondent is proper.

THE CAMDEN BOARD OF EDUCATION

Initially, the Board notes that there may be an issue as to whether Rev. Torres has chosen the correct forum in which to pursue his action against the Board. While the Commissioner of Education clearly has jurisdiction over matters regarding school law and academic courses of study and curricula, Hinfey v. Matawan Regional Bd. of Educ., 77 N.J. 514 (1978), school elections are at present not considered as matters arising under the school laws. N.J.S.A. 18A:6-9 states

> 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. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.
>
> [N.J.S.A. 18A:6-9]

Thus, if the issue here is deemed to be an election question, the Commissioner is not empowered to act on the subject and the petition must be dismissed on jurisdictional grounds. Additionally, the Board notes that in regard to the placement of referenda on

a ballot, while there is no "school board election" as such in Camden due to the appointment authority of the Mayor, if any election were deemed the proper time to place referenda on school matters on the ballot, there are still procedural elements of the referenda process that are imposed by statute and which have not been fulfilled here, such that the placement of the requested referenda would not be proper. However, while the Board has chosen to note the jurisdictional issue in a footnote in its brief, it nevertheless seeks dismissal on other grounds which directly address the question of whether it could act on the subjects of the referenda even were they to be approved by the voters.

It may well be that the jurisdiction of the Commissioner is properly questioned. Rev. Torres certainly wants the Board of Education to offer to the voters the opportunity to express themselves on the topics addressed in the two questions. But underlying the request for placement of the matters on the ballot is the more fundamental question of the legal authority of the Board to do what the referenda would intend. And given the nature of Rev. Torres' concerns as expressed in the words of the questions themselves, I deem it most efficacious to base the clearly legally appropriate dismissal of the petition upon the most fundamental fact relevant to the case, that is, that as the referenda questions seek to influence the conduct of the public schools and implicate what is and what is not legally allowable in regard to that conduct, subjects that are clearly within the Commissioner's competence, the Camden School Board simply could not implement the changes in practice sought by the petitioner even if it had a mind to do so and even if the referenda were to receive an affirmative majority from the Camden electorate. As such, while jurisdictional and procedural issues do exist, as this matter involves a subject of great passion to the petitioner and more importantly, one that is no doubt of concern to others, it seems best to meet the question head on as to whether the Board of Education could even act as the referenda would seek it to do.

THE REFERENDA QUESTIONS

Simply put, while it may be of no solace to the sincerely held beliefs of the petitioner, the courts of this country, including the United States Supreme Court and

United States District Court for the District of New Jersey, have made it abundantly clear that it is a violation of the United States Constitution to either impose a "moment of silence", however couched, or to ban the teaching of evolution, the latter most clearly where the reason for the action is that evolution is seen as in contravention of the religious beliefs of those who seek to impose the ban. And as will be explained, that is precisely the reason why the petitioner seeks to take evolution out of the science and history curricula for the students of the City of Camden. And to the extent that these referenda seek to affect school curriculum and conduct, the Commissioner has jurisdiction over controversies involving these topics and can rule on the legal propriety of such matters.

BANNING THE TEACHING OF EVOLUTION

First, the Board is correct to question whether it could remove evolution from the science curriculum even if such an action was otherwise lawful. The reason for this is that the Core Curriculum for Science, established by the State Board of Education and mandated as the basic curriculum which each local board must assure its students receive, specifically includes the teaching of elements of evolution in the Life Science portion of the Curriculum, as part of a "strand" of the curriculum denominated as "E. Evolution and Diversity." Core Curriculum Content Standards for Science, pages 39-41, <http://www.state.nj.us/education/cccs/2009/final.htm>. It would appear that as to the basic content of an acceptable education in science, the State has mandated that content, and as such its determination must be seen as legally supreme to that of a local board of education. The State may be understood to have pre-empted the issue from local discretion, and therefore any attempt to remove evolution from that mandated curriculum, if such an attempt was otherwise lawful, would have to be directed to the State educational authorities and not to the local board. But in the end, it is clear that even such an attempt could not succeed.

In Epperson, v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L Ed 2d 228 (1968), the United States Supreme Court struck down as unconstitutional an Arkansas statute that made it a crime to teach the "theory of evolution." Recognizing that the law was

akin to the famous law that was the focus of the infamous Scopes "monkey" trial, Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927), the Court found that the very purpose of the law was to "suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." Epperson v. Arkansas, 393 U.S. 97, at 107.

> In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful " to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.
>
> [Id. at 108-109](footnotes not included)

It is beyond any doubt that the entire thrust and intent of the referendum question which Rev. Torres wishes to place on the ballot for the citizens of Camden to vote upon is motivated by the very same religious rationale as that which the Court understood to be the basis for both the Tennessee and the Arkansas statutes. It is not necessary to recount in detail the words of either the petition or of the written "oral argument" to simply state that Rev. Torres sees evolution as denying the role of the Creator as understood in the religious doctrine to which he, and he offers without dispute, the vast majority of citizens in Camden accept. While he also condemns evolution as a tool of racists and itself a racist doctrine this is only in reality a secondary

element of his attack on evolution.[2] The very words of the question itself express the entirely religious nature of the attack, for the proposition that evolution be eliminated from the curriculum is not simply stated without flourish, but is instead coupled to the reference to "Almighty God" and our "Creator the God of Abraham." This very language clearly recalls the Tennessee statute in Scopes. Thus, if the Camden Board were to place on the ballot this question, it would be suggesting to the voters that it could eliminate evolution from its schools for reasons that completely eviscerate the line between Church and State. The Supreme Court ultimately concluded that

> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.
>
> [Id. at 109].

It is also true that the very wording of the question implicates the concerns that led the Supreme Court to create the three-pronged test announced in Lemon v. Kurtzman, 403 U.S. 602; 91 S. Ct. 2105; 29 L. Ed. 2d 745 (1971). There, the Court held that to pass Constitutional muster a law must first ."have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " [403 U.S. 602, 612-613] (internal citations omitted). It is again clear from the very wording of the proposition that the very purpose of the elimination of evolution offered as the goal of an affirmative vote is to enshrine a particular religious viewpoint as to the origin of mankind, indeed all of "nature," and that

[2] This is in no way meant to deny that the theory of evolution, as well as other theories and facts concerning science, have been perverted at times for racist intentions; indeed, I think it fair to recognize that it has been, both in this country and elsewhere. Of course, this same argument may be made about the perversions of religious doctrine that have plagued history, often to the embarrassment of those who hold sincere religious beliefs and to the detriment, indeed often to the fatal detriment, of persons who did not hold to the same religious beliefs as others. This said, the reality that these scientific and religious understandings have been at times been misused does not suggest that our fundamental law would permit the State to ban either the teaching of evolution or of religion. But the First Amendment has been understood to create a separation of Church and State that is most apparently significant in the context of the public schools.

such action by the Board would of necessity both advance religion, that is, at least one particular religious viewpoint, while also, by necessity, entangling the Board in the maze of religious doctrine. For while the proposition rejects evolution in favor of a recognition of what may be short handedly referenced as the role of the "Creator" and "Almighty God" as understood, at least broadly, in the monotheistic, Abrahamic religious tradition, it would seem to place the Board as favoring that concept while seeming to ignore other religious traditions or the rejection of religion. Indeed, Rev. Torres realizes this fact, for in the course of his arguments that certainly advocate for a Christian religious tradition as the accepted reality of creation, with bows to the Jewish and Muslim faiths, he does allow that some accommodation would have to be made by the public schools to deal with those of other faiths or none at all. "The Buddhist, The Hindu, The Atheist, and any other religion that are offended by the God of Abraham as Creator provisions can be made either with a voucher or a charter school." Thus, the goal of the first question can be understood as to replace the current school system with one in which Rev. Torres' understanding of the monotheistic tradition, undoubtedly mediated through his sincere Christian faith, would be the anchor of the Camden public schools. And whereas today those who choose to send their children to a religious day school do so with knowledge that the public school does not seek to choose which religion it will favor, the Camden school system in Torres's vision would make such choices. This is constitutionally intolerable.

For the reasons expressed, the Camden Board of Education could not lawfully carry out the purposes and goals of the first proposed question. It could not legally implement that which the proposition seeks. In Borough of Bogota v. Donovan, 388 N.J. Super. 248 (App. Div. 2006), the Appellate Division held that as it was beyond the power of the municipality to legislate that English be the official language of the Borough, the municipality was not authorized to place a referendum question on the ballot to gauge voter sentiment. Here to, the extent that the ballot questions seek to have the Board conduct the schools in ways that it is not empowered to do, the Board could not offer these questions for voter consideration. Here the Board was certainly acting correctly when it refused to act on the request to place this question on the ballot.

MOMENT OF PRAYER, CONTEMPLATION AND INTROSPECTION

Likewise, the second question proposes that a moment of silence be mandated, but while the author has also included the seemingly less controversial wording "contemplation" and "introspective" as conjunctive terms along with "quiet and private prayer", the author has given away the real intent of the proposition by stating that the school day would "open" with a "daily session in Prayer." The Camden Board could hardly impose such a requirement, when the New Jersey State Legislature itself was prohibited from such action. In May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), the Legislature passed a statute, P.L. 1982, Ch. 205, that required that

> principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

In an action seeking declaratory and injunctive relief, the United States District Court determined that the purpose of the bill which became P.L. 1982, Ch. 205, was to "mandate a period at the start of each school day when all students would have an opportunity to engage in prayer." Judge Debevoise drew this conclusion from a number of factors which he detailed, but in the present case, the very wording of the question boldly announces that purpose. While the drafters of the legislation may have purposely eschewed the use of the word "prayer" so as to try to get around the Supreme Court's ruling in School District of Abington Township v. Schempp, 374 U.S. 203, 10 L. Ed. 2d, 844, 83 S. Ct. 1560 (1963), that school-sponsored prayer and Bible reading in the public schools was unconstitutional, to his credit Rev. Torres makes no such attempt at obfuscation. The clear purpose of the action sought in the proposition is to mandate a period of time each day for prayer. Such action is, as was the Legislature's, a violation of the First Amendment. Again, the Board was well within its right to refuse to act to bring to the voters a question which proposes action that the Board could not legally take.

Having concluded that the proposed questions would have asked the voters if they wanted the Board to conduct the Camden schools in ways that the Board could not legally carry out even if the referenda were overwhelmingly supported by a vote of the citizens of Camden, and that as such the Board was well within its right to refuse to offer these questions to the public, it is also important to note another reason why the petitioner appears not entitled to the relief he seeks and why the petition should be dismissed. In commenting on this issue it is understood that to the extent this case is viewed as an election matter and therefore outside the jurisdiction of the Commissioner, these remarks, which address grounds that the Board has put forward in support of the motion to dismiss the case, can be understood as nothing more than acknowledging the petitioner's apparent problem.

The process for a public referendum is set forth in the election statutes at N.J.S.A. 19:37-1 and N.J.S.A. 19:37-1.1.

> When the governing body of any municipality or of any county desires to ascertain the sentiment of the legal voters of the municipality or county upon any question or policy pertaining to the government or internal affairs thereof, and there is no other statute by which the sentiment can be ascertained by the submission of such question to a vote of the electors in the municipality or county at any election to be held therein, the governing body may adopt at any regular meeting an ordinance or a resolution requesting the clerk of the county to print upon the official ballots to be used at the next ensuing general election a certain proposition to be formulated and expressed in the ordinance or resolution in concise form. Such request shall be filed with the clerk of the county not later than 74 days previous to the election.
>
> [N.J.S.A. 19:37-1].
>
> Whenever a governing body of a municipality has adopted an ordinance or resolution pursuant to section 19:37-1 of the Revised Statutes, upon the presentation to the governing body of such municipality of a petition signed by 10% or more of the voters registered and qualified to vote at the last general election in such municipality, requesting the governing body of such municipality to ascertain the sentiment of the legal voters of the municipality upon any question or policy pertaining to the government or internal

> affairs thereof that is reasonably related to any proposition formulated and expressed in such ordinance or resolution, such governing body of the municipality shall thereupon adopt at its next regular meeting following the presentation of such petition a resolution requesting the clerk of the county to print upon the official ballots to be used at the next ensuing general election a certain proposition as formulated and expressed in the petition. Such request shall be filed with the clerk of the county not later than the 60th day previous to the election.\
>
> [N.J.S.A. 19:37-1.1].

Under these statutes, the process that leads to a public referendum on questions or policies cannot be initiated by the public itself. While the members of a governing body might be aware of sentiment for polling the public, to legally begin the process the governing body must first pass an ordinance or resolution requesting that the county clerk print ballots containing "a certain proposition" that must be "formulated and expressed in the ordinance or resolution." Only then may the public, through the presentation of the required petitions from the required 10% or more of the voters registered and qualified to vote at the last general election, present a petition seeking to have offered on that ballot a "proposition." But that "proposition" must be one that is "reasonably related to any proposition formulated and expressed" in the governing body's own resolution or ordinance. Where such a "reasonably related" proposition is offered, the governing body "shall" adopt a resolution which has the purpose of requesting that the clerk print on the ballot at the ensuing general election that "certain proposition" offered by the requisite percentage of the voters. Thus, the right to have a proposition offered to the voters on a ballot is not one that is available to even any appropriate number or percentage of the qualified voters as a matter of right. The requirement for an initial governing body resolution or ordinance which effectively frames at least the general topic of concern for the referendum acts as a check on the process. Presumably if the governing body refuses to pass the initial resolution that would permit the presentation of a proposition sought by a proper percentage of voters, the remedy is to vote the refusing members of the governing body out of office at the next election. But in the absence of the initial resolution, there is no apparent recourse to force the governing body to seek the sentiment of the voters on a topic that it decides

it has no interest in seeking. In The Borough of Eatontown v. Danskin, 121 N.J. Super. 68 (Law Div. 1972), Judge Merritt Lane addressed these statutes in a proceeding in lieu of mandamus. He noted, "Since submission of a petition by voters is explicitly contingent on the governing body's original resolution, which was not passed within the statutory period, neither petition nor the subsequent resolution are in compliance with N.J.S.A. 19:37-1 et seq." Eatontown, supra, at 75. Here, while the issue is not one of timeliness, nevertheless there has been no "original resolution," adopted by the Board of Education, and as such there is no basis for the Board to place these proffered questions on a general election or a special school election.

Conclusion

To the extent that this case involves issues concerning school or other election-related issues, the Commissioner has no jurisdiction over such matters and the Petition must therefore be dismissed. However, to the extent that the objects of the proposed referenda involve matters concerning the conduct of the public schools and the laws affecting such, over which the Commissioner does have jurisdiction, as the objects of the referenda could not legally be performed by the Camden Board of Education and the Commissioner would have no authority to permit them to occur, the Petition similarly must 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 days and unless 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, 2010
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: Oct. 15, 2010

Date Mailed to Parties: Oct. 15, 2010

mjm

513-10M

OAL DKT. NO. EDU 10474-08
(OAL Dkt. Nos. EDU 6956-00, EDU 8646-00, EDU 4834-01, and EDU 4607-03, ON REMAND)
AGENCY DKT. NO. 271-7/00, 381-10/00, 227-8/99 and 392-12/02
(CONSOLIDATED)

ARCHWAY PROGRAMS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENT.	:	

For Movant, Archway Programs, Inc. ("Archway"): Florio, Perrucci, Steinhardt & Fader (Steven W. Weinstein, Esq.)

For Respondent, New Jersey Department of Education ("Department"): New Jersey Office of the Attorney General, Department of Law & Public Safety, Division of Law (Joyce Atkins-Williams, DAG)

This matter was opened by way of a motion for stay from Archway of the Commissioner's October 28, 2010 Partial Decision on Remand, Commissioner's Decision #453-10R, in the above-captioned matter. Archway's submission concedes that it did not – nor does it want to at this point in time – appeal the Commissioner's determination to the Appellate Division of the Superior Court in accordance with *N.J.A.C.* 6A:3-15(a), which requires that a motion for stay be made "subsequent to or concurrent with, the filing of a notice of appeal with the court." Rather, Archway seeks leave to stay the Commissioner's Final Agency Decision pursuant to "*N.J.A.C.* 6A:4-3.6, *N.J.A.C.* 6A:3-1(e), and *N.J.A.C.* 6A:4-2.8(f)." (Archway's Motion for Stay at 1) The Commissioner is compelled to note that the provisions of *N.J.A.C.* 6A:4-1.1 *et seq.* are applicable solely to the appeal of decisions of the State Board of Examiners and the

School Ethics Commission to the Commissioner, and have no relevance whatsoever to this matter. It is additionally noted that there is no provision captioned *N.J.A.C.* 6A:3-1(e). In that Archway's submission does not satisfy the requisites necessary to request a stay of the Commissioner's decision, its motion will be deemed to be one for reconsideration of the Commissioner's decision pursuant to *N.J.A.C.* 6A:3-1.15(b).

Due to the nature and complexity of the underlying consolidated matter of which the decision at issue was a part, the following background overview is presented to assist in the comprehension of the parties' arguments with respect to the instant motion:

> Archway is a non-profit corporation which operates a private school for the handicapped authorized to educate 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 underlying controversy in this matter involves five audits conducted by the respondent Department on Archway's accounts for the school years from 1994-1995 through 1998-1999, 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. In September 2008, the Administrative Law Judge (ALJ) issued an Initial Decision recommending resolution of legal issues concerning methodologies and allowable costs in connection with the five contested audits, and further recommended that the Commissioner compute and present final mathematical calculations as to disallowances based upon those resolutions. In a final decision dated December 5, 2008, the Commissioner adopted the ALJ's recommendations regarding resolution of legal issues, but rejected the proposal regarding computation and presentation of final mathematical calculations. The Commissioner remanded the matter to the Office of Administrative Law (OAL) for such further proceedings as were necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.
>
> On remand, the ALJ determined that it was appropriate to initially resolve only the audit for the first audit year at issue – that of the 1994-1995 school year – and to reserve recommendation on the remaining years, as resolution of this particular audit will have a carryover effect on the remaining later audits; the ALJ, therefore, ordered that the Department prepare a new audit of the 1994-1995 school year. Based on that audit, and the fact that Archway indicated no

objections to the mathematical calculations contained therein, the ALJ determined that the revised Department audit dated June 25, 2010 includes the amount that Archway is obligated to return to the sending districts, and she, therefore, issued a Partial Initial Decision ordering Archway to reimburse these districts the amount of their overpayments for the 1994-1995 school.

Upon a thorough review of the record, the Commissioner adopted the Partial Initial Decision of the OAL as the final decision as to the 1994-1995 school year, and ordered Archway to return – within 60 days of this decision – a total of $2,315,855.51 to the districts which sent students to its private school for the handicapped during the 1994-1995 school year. The matter was then returned to the OAL for further action as deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2., a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Archway argues that this consolidated matter comprises five years of Department audits. As such, it maintains, the record is continuous from audit year to audit year. Each disputed issue, although broken down into separate years, was presented to arrive at a final number at the end of the 5th year. A foundational difficulty was that the ultimate final recalculation for each of the audit years impacted the subsequent year's calculations. Archway purports that when the ALJ determined she would first finalize the refund due for the 1994-1995 school year and then address each subsequent audit year serially in order to finalize the total amount due and owing, she agreed that the decisions she issued on each of the first four years

would be in the form of an interlocutory order. As such, it contends, a final number would be calculated and proceed to the Commissioner in one recommended Initial Decision, thereby insuring that the time to appeal to the Appellate Division would not begin to run until the calculations for all five years were completed. Here, however, the ALJ ultimately changed her mind or mislabeled her decision – setting in motion what Archway avers is an absurd situation – by issuing her decision as to the 1994-95 audit year as a Partial Initial Decision on Remand, resulting in a similarly titled decision by the Commissioner which is also characterized as a Final Agency Decision, necessitating appeal to the Appellate Division of only this one audit year in the consolidated case. Archway maintains that it was contemplated that the appeal to the Appellate Division subsequent to the Final Decision at the conclusion of calculations for the fifth audit would be based on a number of pre-hearing motions and a host of other rulings made by the ALJ during the course of the hearing which – in large measure – apply to all of the five audit years. It proposes that if each year is dealt with separately in Final Agency Decisions – which then proceed to the Appellate Division on appeal – this vast array of issues will have to be presented and dealt with five different times, result in five separate appeals over a lengthy period of time which involve the same record and evidence and could result in inconsistent decisions. Archway urges that staying the current "Final Decision" until all five audit years can be determined and contained in one "Final" decision is the most appropriate and efficient way to conclude this case.

In reply, the Department points out that Archway's arguments that staying the Commissioner's Final Agency Decision for the 1994-95 year is the most efficient way to proceed because it will reduce time and litigation costs, possible inconsistent results, speed up the final resolution of all of the audits and eliminate the need for multiple remands are merely speculative

in nature. Rather, it argues that granting the stay could cause more of a delay. Because of the interdependency of the calculations from one audit year to the next, having a decision from the appellate court as to the foundational calculations – those of the 1994-95 audit – would only serve to hasten the movement of this matter to its ultimate resolution. Consequently, it could very well prove to be more efficient in terms of time and litigation costs to have the appellate court consider this audit as soon as possible rather than at the conclusion of all of the calculations.

Upon her full review of the parties' submissions, the Commissioner is compelled to deny Archway's motion for reconsideration as she concludes that it fails to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. Initially, notwithstanding Archway's representation that the ALJ at some point during these proceedings may have entertained the thought of issuing interlocutory orders[1] on the calculation of monies due by Archway for the first four audit years, this is not how she ultimately chose to proceed. To the extent Archway's submissions here effectively argue that the ALJ's determination to issue a Partial Initial Decision on her calculation of monies due and owing by Archway to its sending districts for the 1994-95 school year, thereby rendering the Commissioner's final decision in this regard immediately appealable, rather than issuing an interlocutory order on this and the subsequent audits – thus forestalling Appellate Division appeal to the point when a final decision subsequent to the completion of the calculations for the last audit year (1998-99) had been issued – was a "mistake" pursuant to *N.J.A.C.* 6A:3-15(b)2., thus justifying the Commissioner's reconsideration of her October 28, 2010 decision, the Commissioner categorically disagrees. Rather, finding the reason(s) underlying the ALJ's determination in this regard wholly irrelevant,

[1] Such representation was neither confirmed nor denied in the Department's submission.

the Commissioner is in full accord with the ALJ's chosen procedural posture. Contrary to the arguments advanced by Archway, the Commissioner finds and concludes that review by the Appellate Division, at this point in time, of the propriety of the underlying methodologies, regulatory interpretations and foundational issues surrounding the calculations of the 1994-95 audit – which form the basis of the calculations of the succeeding four audit years – would operate to clarify, simplify, and insure the correctness of the calculations which will be forthcoming for the remaining audit years, thus potentially eliminating the need for any further appeals in this consolidated matter. Should one or more of the underlying rulings or orders attendant to the resultant calculations in the 1994-95 audit prove faulty, and discovery of this was not made until Appellate Division appeal at the completion of the last audit year's numbers, the entire process would have to begin all over again. The Commissioner determines that bringing closure to the processes utilized and conclusions made to-date would most effectively and efficiently expedite the adjudication and final resolution of this consolidated matter. As such, the Commissioner cannot conclude that the ALJ's ultimate determination as to the categorization of her decision as a Partial Initial Decision can in any way be termed a "mistake" within the intendment of the governing regulatory provision justifying reconsideration here. Similarly, Archway has failed to establish that this matter involves "newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence; newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or reversal of a prior judgment on which the present matter is based," so as to cause the Commissioner to reconsider her October 28, 2010 decision.

Accordingly, Archways motion for reconsideration is hereby DENIED.

IT IS SO ORDERED[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/24/10

Date of Mailing: 11/26/10

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

#514-10

OAL DKT. NO. EDU 4691-10
AGENCY DKT. NO. 86-4/10

PETER VETRANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Dismissal,[1] 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/29/10
Date of Mailing: 11/29/10

[1] It is noted that the parties' agreement also encompasses the settlement of *Peter Vetrano v. Board of Education of Asbury Park*, OAL Dkt. 6270-09, Agency Dkt. No. 119-6/09, which will be handled by a separate Commissioner decision as the cases were not consolidated.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4691-10

AGENCY DKT. NO. 86-4/10

PETER VETRANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky & Hunter, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: November 4, 2010 Decided: November 4, 2010

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 3, 2010, 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.

NOVEMBER 4, 2010
DATE

RONALD W. REBA, ALJ

Date Received at Agency: NOV 5 2010

Date Mailed to Parties: NOV 5 2010

/cad

Detzky & Hunter, LLC

Somerville Office:
33 North Bridge Street
Somerville, New Jersey 08876
908-707-4560
Fax: 908-707-0899

*Michael L. Detzky, Esq.
Stephen B. Hunter, Esq.

*Also Member of NY Bar

Freehold Office:
45 Court Street
Freehold, New Jersey 07728
732-780-3090
Fax: 732-308-3866

Reply to: Somerville

November 3, 2010

Honorable Ronald Reba
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, N.J. 08625-0049

RECEIVED
2010 NOV -3 P 4:30
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RE: PETER VETRANO and ASBURY PARK BOARD OF EDUCATION
OAL DOCKET NO. EDUOR-04691-2010S
AGENCY REFERENCE NO. 86-4/10

1/13/11

Dear Judge Reba:

Enclosed please find a fully executed copy of the Stipulation of Settlement and Dismissal in the above referenced matter, along with the required Certificate.

Please advise the undersigned if you require any additional information from the parties concerning the resolution of the above referenced matter.

Respectfully submitted,

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Michael Gross, Esq.
Peter Vetrano
Tom Bohnyak, NJEA

RECEIVED
2010 NOV -3 P 4:30
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DETZKY & HUNTER, LLC
33 North Bridge Street
Somerville, N.J. 08876
(908) 707-4560
Attorneys for Petitioner

PETER VETRANO, Petitioner, vs. ASBURY PARK BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY : : DOCKET NO. EDU-06270-2009 AGENCY REFERENCE NO. 119-6/09 : : STIPULATION OF SETTLEMENT AND DISMISSAL

PETER VETRANO, Petitioner, vs. ASBURY PARK BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY : : AGENCY DOCKET NO. 86-4/10 : : STIPULATION OF SETTLEMENT AND DISMISSAL

The matters in difference in the above entitled action having been amicably adjusted by and between the parties, with Petitioner Peter Vetrano receiving the total sum of **$7,500.00** in full

resolution of the two above referenced matters, it is hereby stipulated and agreed that these cases be dismissed with prejudice.

Michael Gross, Esq., Attorneys for Respondent

Dated:

Stephen B. Hunter, Esq., Attorneys for Petitioner

Dated: 9/29/10

Asbury Park Board of Education
[redacted]
603 Mattison Avenue, 3rd Floor
Asbury Park, NJ 07712
(732) 776-2606, Ext. 2437
Fax: (732) 988-7315

CERTIFICATE

I Geoffrey Hastings, Assistant Business Administrator of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on October 27, 2010 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

11. Petitions of Appeal

The Superintendent recommends that the Petitions of Appeal, Office of Administrative Law Docket Nos. EDU 02459-2010S; EDU 02458-2010S; EDU 06270-2009; and EDU -4691-2010S be resolved consistent with the terms set forth in their corresponding Stipulations of Settlement and Dismissal, which are on file in the Office of the Board Secretary.

Motion to approve: Mr. Brewington **Second**: Ms. Breech
Aye: 6 **Nay**: 0 **Abs**: 1 Upon roll call the motion was adopted. With Mr. Palmer abstaining.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 28th day of October 2010.

Geoffrey Hastings, Assistant Business Administrator

#515-10

OAL DKT. NO. EDU 6270-09
AGENCY DKT. NO. 119-6/09

PETER VETRANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Dismissal,[1] 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/29/10
Date of Mailing: 11/29/10

[1] It is noted that the parties' agreement also encompasses the settlement of *Peter Vetrano v. Board of Education of Asbury Park*, OAL Dkt. 4691-10, Agency Dkt. No. 86-4/10, which will be handled by a separate Commissioner decision as the cases were not consolidated.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6270-09

AGENCY DKT. NO. 119-6/09

PETER VETRANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky& Hunter, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: November 3, 2010 Decided: November 5, 2010

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 30, 2009, 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.

NOVEMBER 5, 2010
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: NOV 8 2010

Date Mailed to Parties: NOV 8 2010

/cad

Detzky & Hunter, LLC

*Michael L. Detzky, Esq.
Stephen B. Hunter, Esq.

*Also Member of NY Bar

Reply to: Somerville

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33 North Bridge Street
Somerville, New Jersey 08876
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Freehold Office:
45 Court Street
Freehold, New Jersey 07728
732-780-3090
Fax: 732-308-3866

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2010 NOV -5 A 11: 21

November 3, 2010

Honorable John Schuster
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, N.J. 08625-0049

RE: PETER VETRANO and ASBURY PARK BOARD OF EDUCATION
OAL DOCKET NO. EDUOR-06270-2009S
AGENCY REFERENCE NO. 119-6/09

Dear Judge Schuster:

Enclosed please find a fully executed copy of the Stipulation of Settlement and Dismissal in the above referenced matter, along with the required Certificate.

Please advise the undersigned if you require any additional information from the parties concerning the resolution of the above referenced matter.

Respectfully submitted,

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Michael Gross, Esq.
Peter Vetrano
Tom Bohnyak, NJEA

RECEIVED

2010 NOV -5 A 11:21

OFFICE OF ADMINISTRATIVE LAW

DETZKY & HUNTER, LLC
33 North Bridge Street
Somerville, N.J. 08876
(908) 707-4560
Attorneys for Petitioner

PETER VETRANO, Petitioner, vs. ASBURY PARK BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY : : DOCKET NO. EDU-06270-2009 AGENCY REFERENCE NO. 119-6/09 : : STIPULATION OF SETTLEMENT AND DISMISSAL

PETER VETRANO, Petitioner, vs. ASBURY PARK BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY : : AGENCY DOCKET NO. 86-4/10 : : STIPULATION OF SETTLEMENT AND DISMISSAL

The matters in difference in the above entitled action having been amicably adjusted by and between the parties, with Petitioner Peter Vetrano receiving the total sum of **$7,500.00** in full

resolution of the two above referenced matters, it is hereby stipulated and agreed that these cases be dismissed with prejudice.

Michael Gross, Esq., Attorneys for Respondent

Dated:

Stephen B. Hunter, Esq., Attorneys for Petitioner

Dated: 9/29/10

Asbury Park Board of Education

603 Mattison Avenue, 3rd Floor
Asbury Park, NJ 07712
(732) 776-2606, Ext. 2437
Fax: (732) 988-7315

CERTIFICATE

I Geoffrey Hastings, Assistant Business Administrator of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on October 27, 2010 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

11. Petitions of Appeal

The Superintendent recommends that the Petitions of Appeal, Office of Administrative Law Docket Nos. EDU 02459-2010S; EDU 02458-2010S; EDU 06270-2009; and EDU -4691-2010S be resolved consistent with the terms set forth in their corresponding Stipulations of Settlement and Dismissal, which are on file in the Office of the Board Secretary.

Motion to approve: Mr. Brewington **Second**: Ms. Breech
Aye: 6 **Nay**: 0 **Abs**: 1 Upon roll call the motion was adopted. With Mr. Palmer abstaining.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 28th day of October 2010.

Geoffrey Hastings, Assistant Business Administrator

517-10L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ROCHELLE R. HENDRICKS
Acting Commissioner

December 1, 2010

Brenda C. Liss, Esq.
Riker Danzig Scherer Hyland Perretti
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981

Dru Levasseur, Esq.
Lambda Legal
120 Wall Street, Suite 1500
New York, New York 10005

Dear Counsel:

I have reviewed the Petition and the Answer filed in the matter of *Percy Wise v. Board of Education of the North Hunterdon-Voorhees Regional School District, Agency Dkt. No. 69-4/10*, along with the proposed settlement agreement and general release.

Upon such review, I approve the settlement terms. Accordingly, the Petition is hereby dismissed subject to compliance with the terms of the settlement.

Sincerely,

Rochelle R. Hendricks
Acting Commissioner

RH/JKH

520-10

OAL DKT. NO. EDU 894-10
AGENCY DKT. NO. 36-3/10

M.S., on behalf of minor child, L.L.M.,	:	
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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/02/10

Date of Mailing: 12/02/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 894-10
AGENCY DKT. NO. 36-3/09

M.S. ON BEHALF OF L.L.M.,
Petitioner,
v.
BOARDOF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

M. S., petitioner, pro se

Kimberly A. Sukinik, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: October 22, 2010 Decided: October 22, 2010

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 6, 2010, 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.

OCTOBER 22, 2010
DATE

RONALD W. REBA, ALJ
OCT 26 2010

Date Received at Agency:

OCT 26 2010

Date Mailed to Parties:

/cad

COMEGNO
LAW GROUP, P.C.

KIMBERLY A. SUKINIK, ESQUIRE
MEMBER NJ BAR

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MOORESTOWN, NJ 08057
888.313.IDEA
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COMEGNOLAW.COM

RECEIVED
2010 OCT 22 A 10:24
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

October 22, 2010

FAX AND MAIL

The Honorable Ronald W. Reba, A.L.J.
Office of Administrative Law – Quakerbridge
Quakerbridge Plaza, Building 9
P.O. Box 049
Trenton, New Jersey 08625

Re: M.S. o/b/o L.L.M. v. Lenape Regional High School District Board of Education
Docket No. EDU-894-2010

Dear Judge Reba:

As you are aware, we represent the Lenape Regional High School District Board of Education ("Board") with regard to the above. Enclosed please find a fully executed Settlement Agreement in the above matter which has been approved by the Board at its October 21, 2010, Board Meeting. This Settlement Agreement resolves the entire matter and may be incorporated into a decision.

Thank you for your attention.

Respectfully submitted,

COMEGNO LAW GROUP, P.C.

BY: _____
KIMBERLY A. SUKINIK

KAS/
Enclosure
c: M.S., *Pro Se*
Emily Capella, Superintendent
Ellen Mears, Coordinator of Administrative Services

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.S. o/b/o L.L.M. Petitioner, v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO: EDU-894-2010 AGENCY REF: 36-3/10 **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is entered into by and between the Lenape Regional High School District Board of Education (the "Board") and M.S. on behalf of L.L.M. ("Petitioner"). Petitioner is a resident of Medford, New Jersey and the aunt of L.L.M. The Board and the Petitioners are collectively referred to as the "Parties."

WHEREAS, on or about February 1, 2010, Petitioner filed an Affidavit application with the Board seeking enrollment for L.L.M. at Shawnee High School; and

WHEREAS, on February 16, 2010, the Board issued a letter advising Petitioner that she failed to comply with the provisions of N.J.S.A. 18A:38-1(b), and therefore L.L.M. would not be enrolled at Shawnee High School; and

WHEREAS, on or about March 2, 2010, Petitioner filed a Residency Appeal which forms the basis of the above-captioned matter. Pursuant to law, L.L.M. was enrolled and attended Shawnee

High School, effective March 4, 2010;

WHEREAS, on March 19, 2010, the Board filed a Counterclaim seeking reimbursement of tuition and costs;

WHEREAS, L.L.M. finished the 2009-2010 school year at Shawnee High School; and

WHEREAS, Petitioner represents that L.L.M. will be returning to California to reside with her parents and will not be attending or seeking to attend Board schools for the 2010-2011 school year;

WHEREAS, the Parties enter into this Settlement Agreement to outline the Parties' agreement.

THE PARTIES HEREBY AGREE THAT:

1. L.L.M. shall not be enrolled with the Board for the 2010-2011 school year. L.L.M. shall not be permitted to attend any Board school for the 2010-2011 school year. Petitioner represents that L.L.M. will be returning to California to reside with one or both of her parents for the 2010-2011 school year;

2. Petitioner hereby dismisses, with prejudice, the claims in the above-captioned matter;

3. Petitioner agrees, in resolution of the Board's Counterclaim for tuition reimbursement for March 4, 2010, to pay to the Board the amount of $5,706.63 which represents the tuition and fees for L.L.M.'s attendance and enrollment at Shawnee High School from March 4, 2010, through the end of the 2009-2010 school year. Payment can be made in one lump sum within thirty (30) days of this Agreement or payments can be made monthly in the amount of $317.03 for eighteen (18) months. Monthly payments shall be made by the first of each month, beginning on August 1, 2010

and on the first of each month thereafter for seventeen (17) additional months.

4. All payments pursuant to paragraph 3 above shall be made payable to "Lenape Regional High School District" and sent to following address:

Mr. James Hager, Business Administrator
Lenape Regional High School District
93 Willow Grove Road
Shamong, NJ 080088

5. In the event Petitioner fails to make the lump sum payment within thirty (30) days of this Agreement, or fails to make the monthly payment of $317.03 for two (2) consecutive calendar months, the Board shall be permitted to reduce the amount owed and outstanding to a judgment against Petitioner with a Court of appropriate jurisdiction. The Board may seek interest and counsel fees in connection with any effort to obtain payment of the amount owed pursuant to paragraph three (3) above.

6. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties. Each party shall be responsible for their own fees and costs, including physicians' and attorneys' fees and costs, incurred in connection with this dispute, to the extent applicable;

5. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral, as well as all contemporaneous oral agreements, understandings, and negotiations;

6. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

7. This Agreement may only be amended by way of a writing signed by all Parties and counsel.

8. The Parties acknowledge that they have had the opportunity to review the terms of this Agreement with counsel and are satisfied with the representation provided. The Parties enter into this Agreement knowingly, without coercion or other improper influence.

9. The terms of this Agreement shall remain confidential.

LENAPE REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION

BY: _____
Emily Capella, Superintendent

Dated: 9/16/10

PETITIONER MANUELA SKVARLA

BY: _____
MANUELA SKVARLA

Dated: 9/4/10

521-10R

OAL DKT. NO. EDU 10159-10
(EDU 3408-10 ON REMAND)
AGENCY DKT. NO. 45-3/10

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN BLEVIS,	:	COMMISSIONER OF EDUCATION
LYNDHURST SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	

The record of this matter, the parties' revised settlement agreement, and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On September 16, 2010, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") did not include the requisite Board of Education approval.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. The Commissioner also concurs with the ALJ that the proposed settlement is consistent with the established standards governing the settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/02/10
Date of Mailing: 12/02/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10159-10

AGENCY DKT. NO. 45-3/10

(ON REMAND EDU 03408-10)

IN THE MATTER OF THE TENURE HEARING OF JOHN BLEVIS, LYNDHURST SCHOOL DISTRICT

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

Karen M. Reis, Esq., for respondent (Francis J. DeVito, P.A.)

Record Closed: October 22, 2010 Decided: October 22, 2010

BEFORE **JOANN LASALA CANDIDO,** ALJ:

This matter involves tenure charges of incapacity, conduct unbecoming and policy violations based upon John Blevis (Blevis) hostile and aggressive behavior, certified by the Lyndhurst Board of Education (Lyndhurst) against Blevis under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1. Several hearings were conducted and a decision was rendered on August 6, 2010 under OAL Docket No. EDU 10159-10. The Commissioner remanded the matter to the OAL on September 16, 2010 due to the settlement agreement not being signed by the Board's attorney and due to the file not containing a copy of the Board's resolution approving the settlement. On September 22, 2010 this matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14F-1-13.

On September 28, 2010 a letter was submitted requesting the parties to obtain and submit a copy of the Board Resolution and a copy of the Settlement Agreement signed by the Board's counsel.

A telephone prehearing was scheduled for October 21, 2010. Prior to the telephone prehearing respondent's counsel resubmitted a copy of the Settlement signed by the Board's attorney as well as the Board Resolution via fax. The Original Settlement Agreement was received by the OAL on October 22, 2010, which is attached hereto for reference.

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.

October 22, 2010
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

10-26-10

Date Mailed to Parties: OCT 26 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

RESOLUTION

Lyndhurst Board of Education

WHEREAS, Lyndhurst Board of Education ("Board"), filed tenure charges against, teaching staff member, John Blevis, under Agency Dkt. No.:45-3/10 on or about January 11, 2010 (collectively referred to as "the parties"); and

WHEREAS, John Blevis filed an answer to those charges and is prepared to defend the same; and

WHEREAS, the parties have come to an agreement that addresses the principal concerns of the Board in bringing the charges; and

WHEREAS, the Board has considered the agreement and the parties desire to make a full and final settlement of all the claims, defenses and issues between the parties; and

NOW, THEREFORE, BE IT

RESOLVED that the Board approves resolution of the tenure charges by way of settlement agreement dated July 22, 2010; and be it

FURTHER RESOLVED, that the Superintendent, Dr. Tracy Stellato, is designated and authorized to execute the settlement agreement dated July 22, 2010 on behalf of the Board

President, Lyndhurst Board of Education

PREFACE

WHEREAS, **Petitioner,** Lyndhurst Board of Education ("Board"), filed tenure charges against **Respondent,** teaching staff member, John Blevis, under AGENCY DKT. NO.:45-3/10 on or about January 11, 2010; and

WHEREAS, Respondent, John Blevis filed an answer to those charges and is prepared to vigorously defend the same; and

WHEREAS, the parties recognize the substantial expense associated with bringing the matter to trial, including the cost of production of lay and expert witnesses, counsel fees, document production and the lost productivity of administration and staff. The parties also recognize the unpredictability of litigation, the likelihood of appeals and costs in terms of time, resources and expense of this endeavor; and

WHEREAS, the parties have come to an agreement that addresses the principal concerns of the Petitioner in bringing the charges and provides the Respondent of a means to address these issues without the expense in time and resources described above; and

WHEREAS, the parties are also involved in a civil action pending in the United States District Court filed on or about October 10, 2006 and served on Petitioner on or about November 28, 2006 in which Respondent is the Plaintiff and Petitioner is a Defendant arising out of the same facts and circumstances described in the charges which also is diverting the parties time, effort and resources from the business of education;

As a result of the foregoing, Petitioner and Respondent have reached a global resolution of all the matters in difference for the following reasons:

1. Petitioner's principal concern in bringing the subject charges was the Respondent's fitness to teach in the District;
2. The parties have agreed on a plan that includes the selection of and examination by an independent forensic psychiatrist, that will assure Respondent's fitness for work before re-entering the classroom thus alleviating Petitioner's principal concern;
3. By way of background, Respondent is a tenured science teacher in petitioner's employ, and, has been so employed since 1986.
4. There have been no previous proceedings involving the Respondent, in his entire tenure with the district, regarding either his performance or conduct prior to the initiation of these charges. There have never been any disciplinary charges or performance related increment withholding proceedings initiated against him.
5. There is a civil action pending in the United States District Court in which Respondent is the Plaintiff and Petitioner is a Defendant arising out of the same facts and circumstances described in the charges. In said action, Petitioner is charged with various civil violations of Respondents rights and there are claims for money damages. The defense of this action and the uncertainty of the result have also led the parties to reach a global settlement in the best interests of Petitioner, respondent and the public.
6. As a result of all of the above, Petitioner and Respondent have reached the following agreement.

SETTLEMENT AGREEMENT

This settlement Agreement and Release ("Agreement") is made this 22nd day of July 2010 by and between John Blevis ("Blevis") and the Lyndhurst Board of Education ("Board"),

WHEREAS, Blevis and the Board have been engaged in civil litigation in the United States District Court (Civil Action No. 06-4857), in which Blevis was a Plaintiff and the Board is a Defendant and in administrative proceedings before the Commissioner of Education of New Jersey under AGENCY DKT. NO.:45-3/10 and in which the Board is the Petitioner and Blevis was the respondent; and

WHEREAS, the parties desire to make a full and final settlement of all of the claims, defenses and issues between them and to suspend and forever withdraw their claims between them and against each other in their mutual interest; and

WHEREAS, the parties declare that the settlement and withdrawal of all of the claims between them, as contemplated by this agreement, does not constitute an admission of liability, wrongdoing, guilt, malfeasance or nonfeasance by any party to this agreement and is made for the sole purpose of terminating all proceedings.

NOW WHEREFORE, in consideration of the promises, agreements, undertakings and representations contained herein, the receipt and sufficiency of which the parties acknowledge, the parties hereto, covenant and agree to be legally bound as follows:

1. Counsel for the parties, with the consent of their clients, have selected an independent psychiatrist with appropriate credentials to perform a forensic "fitness for duty" examination for Mr. Blevis and provide a report setting forth his findings to

the parties. The selected physician has no connection with any party, doctor or attorney in this or the federal litigation and is deemed to be truly independent.

2. Each party will pay for one half (1/2) of the fee charged by the psychiatrist for his services so there is no issue as to the allegiance of the doctor. Counsel for the parties have collectively reviewed the Curriculum Vitae and credentials of a number of qualified psychiatrists and selected a physician from among those deemed to be qualified for this engagement.

3. Counsel for the respective parties have contacted the selected psychiatrist and confirmed his willingness and availability to perform an exam and issue a report with reasonable promptness. Mr. Blevis has contacted the selected physician and made an appointment for the examination and report contemplated by this agreement.

4. All communications with the selected physician shall be made jointly by counsel for the respective parties. (Except that Mr. Blevis or counsel may contact the physician for the purpose of arranging and attending the examination)

5. The examination will be completed in 1 day with the expectation that a report be submitted shortly thereafter.

6. The parties have notified the independent psychiatrist, that the examination contemplated by this agreement, be completed in one day and that Mr. Blevis will make himself available for the entire day as may be required by the physician. The selected psychiatrist has been contacted by the parties and he has agreed to this procedure.

7. The physician will be provided with the reports of Dr. Head (11/10/2008,11/25/2008 &1/6/2010 reports), Dr. Sostowski (undated) and Dr. Gallina, (12/3/2009) for use in the examination and report process in such fashion as said

physician shall determine. If additional records are requested by the doctor, the parties shall confer and determine which documents shall be submitted with the intention of presenting a fair and balanced record for the physician's use. It is preferable that the doctor could reach his determination without outside influence.

8. Upon Mr. Blevis submitting to the subject examination, the Board agrees to withdraw the pending administrative tenure charges against the Respondent with the consent of the Administrative Law Judge to whom the matter is assigned. Upon approval of this settlement by the Commissioner of Education, Mr. Blevis will dismiss the pending Federal law suit without receipt of any payment. The parties will notify the federal court judge of the pending settlement with the expectation that the trial will be deferred until the Commissioner of Education acts. In any event, Blevis agrees not to seek any compensation in the federal court action if the settlement is ultimately approved by the Commissioner or the parties are otherwise satisfied with the resolution of the matter. The parties shall execute such additional documents as may be necessary to effectuate the intentions of this paragraph. The parties understand that should the Commissioner of Education not approve this agreement, the administrative tenure charges and federal court action will be reinstated.

9. If the results of the referenced examination establish that Mr. Blevis is "fit to teach", he will be immediately reinstated to a position with the Petitioner (Lyndhurst Board of Education) with back pay and benefits (pension contributions, sick and personal days, etc.) and be assigned to a teaching position within the scope of his certifications effective September, 2010. In calculating back pay, the Board will be credited with the

amount of any earnings by Blevis during his suspension period earned during regular school hours.

10. If the subject examination and report results in a finding that Mr. Blevis is currently unfit, Mr. Blevis will be granted the two year statutory period from the date of the determination to prove his fitness to work. Upon establishing, his fitness, by certification of an independent professional, or such other person upon whom the parties mutually agree, Mr. Blevis will be reinstated. During the leave period, while Mr. Blevis is receiving professional assistance, he may use his accumulated sick leave and accrue sick leave as provided in the collective negotiations agreement between the Lyndhurst Education Association and Board policy and remain as an active employee of the Board. If counseling or other professional assistance is required either while working or in advance of reinstatement, Mr. Blevis will follow that direction. Mr. Blevis shall retain his contractual health insurance benefits during any recuperative period.

11. Upon completion of the requirements of paragraphs 8 and 9, Mr. Blevis personnel file will be purged of all objectionable material as permitted by law.

12. The parties mutually agree that their shall be no retaliation by any party against the other as the result of initiating the proceedings set forth in this agreement or as the result of entering into this agreement. The parties agree to refrain from disparaging each other either orally or in writing as the consequence of anything that has arisen in the underlying litigation described herein or based upon the facts or assertions set forth therein or upon which said actions were based.

13. Applicable Law. Any dispute about this Agreement that cannot be resolved by agreement shall be decided under the terms of the general contract law of the State of New Jersey.

14. Promises of Confidentiality. Blevis, the Board agree and will instruct their individual agents, servants, employees and representatives not to divulge the contents of this Agreement. Blevis and the Board agree not to publically disseminate the matters raised in this agreement, the civil action and the administrative charges before the Commissioner, including those set forth in the administration's statement dated January 12, 2010, that are the subject hereof, the facts surrounding the same and the terms of this Agreement is of essence of this Agreement. Blevis and Board agree to be bound by the confidentiality provisions of this Agreement. This confidentiality provision shall survive, and be given full force and effect separately from any invalid, unenforceable or inoperative provision of this Agreement.

Neither Blevis nor the Board, publicly or privately, shall characterize the settlement of these matters as either a victory or a defeat. The parties, shall only state that the matters in difference were settled to the mutual satisfaction of the parties.

Blevis and the Board represent and warrant that they have not disclosed or disseminate and will not disclose or disseminate to any person or entity the terms or conditions of this Agreement, nor shall Blevis or the Board disclose or disseminate the facts surrounding the same except that disclosure is permitted:

(1) as necessary with regard to any proceeding for the enforcement of this Agreement,

(2) as may be required by a court order from any court of competent jurisdiction; and

(3) As may be required by law. It shall not be considered a breach of the obligation of confidentiality for Blevis to make disclosure of the terms of this Agreement to his spouse or counsel or to make disclosure of the terms of this Agreement and the underlying events of this Agreement in order to obtain private and confidential professional advice, or to respond to any inquiry from any governmental entity or agency.

15. Non-Retaliation/Non-Disparagement. The parties agree that they shall refrain from retaliating against any other party as the result of the participation in any civil or administrative action or because of the prosecution or defense of any claims in any of the proceedings described in this agreement.

In addition, the parties agree that they will not publicly, orally, in writing or through electronic or other media, make any disparaging remarks, statements or innuendo about any other party either by inclusion or omission in any publication. Neither party will make any statement to the press or public. If asked by the press or public about any of the matters addressed in this agreement, the parties shall respond only that all civil and administrative actions have been dismissed or withdrawn

16. Entire Agreement. The parties hereby acknowledge that no promises or inducement which is not herein expressed has been made, and in executing this Agreement. This Agreement contains the sole and the entire agreement between the parties, and completely and fully supersedes and replaces any and all prior contracts, agreements, discussions, representations, negotiations, understandings and any other communications between the parties pertaining to the subject matter hereof, the parties represent and acknowledge, in executing this Agreement, that they have not relied upon any representation or statement not set forth in this Agreement made by either party 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.

17. Accord and Satisfaction. This Agreement reflects a compromise and settlement of disputed claims in complete accord and satisfaction thereof. Neither the execution of the Agreement or performance of its terms and conditions shall be considered by any party or by any other person as an admission of liability or non-liability of any of the parties. The parties state that each of them has carefully read this Agreement and the attached Releases and that they have been fully explained to each by his/their attorneys, and that each fully understands that upon execution and performance of the covenants herein, are final and binding. The parties agree that they are bound by this Agreement.

18. Attorneys' Fees and Costs. Each party agrees to be responsible for their own attorney's fees and costs associated with this matter.

19. The parties represent that they are fully authorized to execute this agreement and that all formalities attendant to the execution of this agreement have been satisfied.

20. This agreement may be executed in counterparts, which when taken together, will constitute a completely and properly executed document.

21. If any provision, paragraph, or clause in this agreement is found to be void or illegal, the remainder of the agreement shall remain in full force and effect. Notwithstanding this provision, the cessation of all administrative proceedings against Blevis and the withdrawal of litigation against the Board are of the essence of this agreement and without which this agreement cannot stand.

The undersigned warrant and represent that they are duly authorized to sign this Agreement, and by doing so, said Agreement has been carefully read, and that the foregoing Agreement is binding on all parties.

JOHN BLEVIS

STATE OF NEW JERSEY :
: SS :
COUNTY OF BERGEN:

I CERTIFY that on July 26, 2010, John Blevis personally came before me and acknowledged under oath, to my satisfaction, that he is named in and personally signed this document.

Alfred F. Maurice
Attorney At Law of N.J.

LYNDHURST BOARD OF EDUCATION

By: _____
Dr. Tracey Stellato,
Superintendent

STATE OF NEW JERSEY :
:SS:
COUNTY OF :

I CERTIFY that on October 20, , 2010, Dr. Tracey Stellato personally came before me and acknowledged under oath, to my satisfaction, that he/she is named in and personally signed this document.

_____
Karen M. Reis
Attorney-at-Law
State of New Jersey

#522-10R

A.M.M., ON BEHALF OF MINOR CHILD, G.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, ET AL.,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner, the parent of an elementary student who was enrolled in the Park Ridge schools in 2009, initially filed an application for emergent relief in September 2009 contending, *inter alia*, that the restrictions placed on petitioner's access to school property were unlawful and made it impossible for her to send G.M. to school, since she could not be assured of his safety and freedom from retaliation for her actions advocating on his behalf. Petitioner requested that all records of absences for G.M. be expunged. The Board counterclaimed for interim judgment requiring petitioner to cause her son to attend school or otherwise comply with compulsory education laws (*N.J.S.A.* 18A:38-25 *et seq.*), and for attorney fees. Petitioner withdrew her appeal in response to the latter demand; an emergent hearing was held on the Board's counterclaim; the ALJ found that the Board had not met the necessary standard for grant of emergent relief, and dismissed the matter in its entirety. In November 2009, The Commissioner reinstated the petitioner's appeal and remanded it to the OAL for hearing solely on the school law claims. The Board filed a motion for summary decision.

On remand, the ALJ found that: there is no genuine issue of material fact, and the matter is ripe for summary decision; petitioner does not currently have legal custody of her son; custody and decision-making authority for G.M. is presently vested in the Division of Youth and Family Services (DYFS); accordingly, petitioner currently lacks the authority to pursue this litigation or to direct her son's education; petitioner at no time alleged that G.M.'s non-attendance was inaccurately recorded, but urged that she was justified in keeping him at home, therefore – absent a contention that the attendance records are inaccurate – the records cannot be expunged as they are mandated student records which must be maintained by the district pursuant to *N.J.A.C.* 6A:32-7.8(2)(e); and the remaining issues for adjudication on remand have become moot as they all pertain to G.M. attending school in the Park Ridge school district, and at present he is in the legal and physical custody DYFS, attending school in Montvale. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon 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.

December 2, 2010

OAL DKT. NO. EDU 13869-09
(EDU 11357-09 ON REMAND)
AGENCY DKT. NO. 253-9/09

A.M.M., on behalf of minor child, G.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon full consideration, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly detailed in her decision – that summary decision is appropriately granted to the Board.

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

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/02/10
Date of Mailing: 12/02/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13869-09
AGENCY DKT. NO. 253-9/09

A.M.M. ON BEHALF OF G.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,
Respondent.

A.M.M., pro se

Daniel Roberts, Esq., for respondents (Kenney, Gross, Kovats and Parton, attorneys)

Record Closed: September 23, 2010 Decided: October 18, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter comes before the Office of Administrative Law (OAL) on remand of A.M.M. on behalf of G.M. v. Park Ridge Board of Education, et al., Docket Number EDU 11357, for further proceedings in accordance with the decision of the Commissioner of

Education dated November 30, 2009. The matter was originally assigned to Maria LaFiandra, ALJ, but was reassigned to me in June 2010 upon her retirement.

A petition and request for emergent relief was filed by petitioner, A.M.M., on September 23, 2009. At that time, A.M.M.'s son, G.M., was an elementary student in the Park Ridge School District. The emergent application sought an order lifting restrictions on A.M.M.'s ability to attend school functions and be present on school property. A cross-petition for emergent relief filed by Park Ridge sought an order compelling G.M.'s attendance at school. Upon receipt of the cross-petition, A.M.M. withdrew her petition via letter dated October 7, 2009. On October 27, 2009, Judge LaFiandra issued an Initial Decision dismissing the matter in its entirety.

Both parties filed exceptions to the Initial Decision. Petitioner asked to reinstate her appeal and stated that she continued to be aggrieved by the actions of the Board. The Board asserted that both the denial of its request for emergent relief and the dismissal of its underlying claim were in error. The Commissioner directed that the matter be remanded and it was transmitted again to the OAL on December 12, 2009. The Commissioner narrowed the issues on appeal and dismissed the individually named respondents.

On April 14, 2010, the Board filed a motion to dismiss and supporting certification. Petitioner filed opposition to the motion on May 4, 2010. Via letter order dated May 21, 2010, Judge LaFiandra reserved on the motion. Documents offered in support of the Board's motion reflected that a proceeding had been instituted by the Division of Youth and Family Services (DYFS), a law guardian had been appointed to represent G.M., and that G.M. had been placed in DYFS's custody.[1] Judge LaFiandra directed the Board, through counsel, to notify the law guardian regarding this proceeding and afford the law guardian until July 1, 2010, to intervene. No request to intervene was filed.

[1] The remand decision of the Commissioner directed that there be "a prompt hearing on petitioner's application for emergent relief." The record is unclear whether efforts to schedule an emergent hearing took place prior to the filing of the motion to dismiss by the Board.

On July 21, 2010, I conferred via telephone with the parties. I felt that I lacked sufficient information about the status of DYFS's involvement in G.M.'s case to render a decision on the pending motion. Accordingly, via letter order dated July 21, 2010, I directed counsel for the Board to communicate with both the Deputy Attorney General and the law guardian to obtain updated information. I conferred again with the parties via telephone on September 1, 2010. In advance of the telephone conference, I was provided with a certification from the law guardian, and an updated order of the Superior Court. Based upon the information provided, I scheduled oral argument on the pending motion. The parties appeared on September 23, 2010, at which time the record closed.

ISSUES PRESENTED

The Commissioner's November 30, 2010, decision set forth with specificity the issues on remand, as follows:

1. The propriety of Board action in excluding A.M.M. and her then boyfriend, now husband, J.F., from school property.
2. The propriety of Board restrictions on her ability to communicate with staff.
3. The continuation of these limitations into the 2009-2010 school year.
4. The denial of A.M.M.'s request to transfer G.M. to another school within Park Ridge.
5. The request to expunge all records of absences for G.M. from June 1, 2009, to the present.

FINDINGS OF FACT

The material **FACTS** are not in dispute, and I **FIND**:

A.M.M. is the biological mother of G.M., and is a resident of Park Ridge. She married J.F. in January 2010. During the 2009-2010 school year, G.M. was enrolled in the Park Ridge public schools. The petition set forth a "lengthy, tortured and contentious history" of A.M.M.'s relationship with school personnel, and included allegations that school administration unfairly barred her and her husband from school

premises, and otherwise refused to cooperate with her in her son's best interest. A.M.M. urged in her petition that all she wishes is for school personnel to "allow [her and J.F.] to be parents and enjoy our son's education."

It is uncontroverted that A.M.M. stopped sending G.M. to school due to concerns about the ability of school personnel to ensure his health and safety. Importantly, the petition at no time alleges that the school district inaccurately recorded G.M.'s non-attendance; rather, petitioner simply urges that she was justified in keeping her son at home. A.M.M. contends, for example, that "[w]e kept our son home for three weeks as we did not feel comfortable that the school would meet our son's medical needs as we were not allowed access." The petition further states, "[w]e also kept in touch with the [sic] DYFS daily to inform them that our son was not able to attend school. They told us to keep him home." School officials asserted that petitioner was in violation of the compulsory education laws.

In or about November 2009, DYFS obtained a Superior Court order directing that G.M. return to school, and he did so on or about November 16, 2009. On February 9, 2010, the Superior Court entered an order directing that G.M. "be immediately made [a ward] of the court and placed in the immediate custody, care and supervision of the Division." The order further directed that DYFS be granted "legal and physical custody of [G.M.]," and that "[A.M.M.] and [J.F.] shall be restrained from the school property where the child attends." The order did permit A.M.M. to attend an Individualized Education Plan (IEP) meeting. At oral argument before me, A.M.M. indicated that DYFS's intervention was due to educational neglect.

While the February 9, 2010, order was temporary, a certification submitted by the law guardian for G.M., Mary Verderame, confirms that an order dated August 3, 2010, continues legal and physical custody of G.M. with the Division. A.M.M. is restrained from the home where G.M. resides, although she indicated that she is permitted supervised visitation with her son. A.M.M. urged that she will soon be reunited with her son, but the order does not reflect that a return of her son is imminent. The order schedules a follow up compliance review for October 26, 2010.

G.M. does not presently attend the Park Ridge schools, but rather attends school in Montvale. Although Ms. Verderame stated that A.M.M. "may be informally consulted from time to time regarding G.M. the power to make all decisions ultimately resides with the Division." Her representation that A.M.M. has no real decision-making power relative to G.M. appears to be supported by the statement made by A.M.M. in a September 14, 2010, letter to me that "as of this date, I do not know what school my son is enrolled in." A.M.M. does take exception to the statement in Ms. Verderame's certification that no objection was raised to G.M.'s enrollment in Montvale, stressing that she wanted her son to continue in Park Ridge as this would afford him greater continuity.

A.M.M. urged at oral argument that she intends to re-enroll her son in the Park Ridge schools once custody is returned to her, and that accordingly, the issues raised by her petition are properly before me for adjudication. She further asserted, and it is uncontroverted, that there has been no termination of her parental rights. In light of the August 2010 Superior Court order, the Board argues that petitioner lacks standing to file claims on her son's behalf, and further, that any claims regarding her lack of access to the Park Ridge schools are now moot.

CONCLUSIONS OF LAW

The Board has filed a motion seeking to dismiss the petition, but includes certifications and other documents outside the pleadings in support of its motion. Accordingly, its application is properly considered in accordance with the standards set by N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers...only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the Board is entitled to judgment as a matter of law.

Petitioner's Standing to Bring the Claims Raised by the Petition

Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div. 2004); Stubus v. Williams, 339 N.J. Super. 38, 47 (App. Div. 2001). A lack of standing precludes a court from entertaining any of the substantive issues presented for determination. Watkins v. Resorts Int'l Hotel and Casino, 124 N.J. 398, 424 (1991).

It is clear that custody and decision making authority for G.M. is presently vested in DYFS, per the August 2010 order of the Superior Court, which provided that "G.M. will remain in the custody, care and supervision of the Division." In Beck v Beck, 86 N.J. 480 (1981), the court defined "custody" as the "the legal authority and responsibility for making 'major' decisions regarding the child's welfare . . . ." Id. at 487. It is plain to me that determining to pursue litigation on a child's behalf is a major decision, as is a decision regarding a child's educational programming. It is clear from the record that A.M.M. does not have legal custody of her son at this time, and that accordingly, she lacks the authority to pursue this litigation or to direct his education.

Her arguments to the contrary are belied by her own assertion that she has been kept in the dark about details regarding her son, including a matter as simple as his school location. It is uncontroverted that A.M.M.'s parental rights have not been terminated. But even absent a termination of parental rights, custody arrangements can envision one parent retaining educational decision making power to the exclusion of the other. See F.C. on behalf of D.C. v Rockaway Twp. Bd. of Educ., EDS 11128-09, Final Decision (January 12, 2005), <http://lawlibrary.rutgers.edu/oal/search.html>. Likewise here, although A.M.M. does retain her parental rights, Ms. Verderame's certification, together with the August 2010 Superior Court order, confirms that decision-making authority for G.M. is presently vested in DYFS.

A.M.M. lacks standing to ask that G.M.'s records be expunged, and accordingly, I **CONCLUDE** that her claims relative to G.M.'s student records should be dismissed.[2]

Furthermore, even assuming for arguments sake that A.M.M. has standing to challenge the content of G.M.'s student file, she makes altogether no factual allegations which would support entry of an order expunging his records under N.J.A.C. 6A: 32-7.7. The regulation provides that student records are subject to challenge, and a parent may seek to "expunge inaccurate, irrelevant or otherwise improper information from the student record." A.M.M. does not allege that G.M.'s attendance records are inaccurate, irrelevant or improper, rather that, although he indeed was absent from school, she was

[2] A.M.M.'s claims relative to J.F. must likewise be dismissed. He is not a party to this action, nor would he have standing to bring an action relative to G.M., as he is not G.M.'s biological father.

justified in keeping him home. Her concerns are better addressed through the mechanism contained at N.J.A.C. 6A:32-7.7, which allows a parent "to place a statement in the student record commenting upon the information in the student record." Petitioner can avail herself of this right without the intervention of this tribunal. Furthermore, and importantly, absent a contention that attendance records are inaccurate, I **CONCLUDE** that they cannot be expunged, as the applicable regulations consider attendance records to be "mandated" student records, which must be maintained by a school district for 100 years. N.J.A.C. 6A:32-7.8(2)(e). For these additional reasons, I **CONCLUDE** that the claim regarding G.M.'s student records should be dismissed.

Mootness

An action is considered moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), adopted, Comm'r (May 3, 1999), <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>. In light of the intervening involvement by DYFS in G.M.'s case, I **CONCLUDE** that the remaining issues for adjudication on remand have become moot.

G.M. no longer attends the Park Ridge Schools. Accordingly, an order directing the Board to transfer him to a different Park Ridge elementary school cannot provide effective relief to petitioner. The restrictions on access to school staff and property are

likewise no longer relevant. A.M.M. urged that she sought access to the school in order to attend class events and monitor G.M.'s progress.[3] At the heart of her petition is the contention that school officials were depriving her of the opportunity to effectively parent her child, enjoy his educational success, or ensure his safety while at school. These concerns, however heartfelt, cannot be effectively addressed by me in an action against Park Ridge when it is no longer responsible for providing educational services to G.M., and he is enrolled through the intervention of DYFS in a neighboring school district.

A.M.M.'s argument that she intends to re-enroll G.M. in Park Ridge when they are reunited is likewise sincere, but does not warrant a ruling on claims and concerns that arose before DYFS's intervention. If and when the family is reunited, and if and when G.M. is enrolled again in Park Ridge, the parties will have to re-establish a productive working relationship in G.M.'s best interest. In the event they are unable to do so, this forum will always be available to address any justiciable disputes. But it is inappropriate to assume today that there will be an inability by the parties to work cooperatively, or to presuppose that the same issues will be in contention between A.M.M. and school officials if G.M. returns to Park Ridge.

Accordingly, I **CONCLUDE** that the remaining issues in contention between the parties should likewise be dismissed.

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision be **GRANTED** and the petition of appeal be **DISMISSED**.

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

---

[3] The Board argues that the February 2010 order given custody to DYFS barred A.M.M. from school property in Park Ridge, and that those restrictions remain in effect. The most recent order does not so provide, and I am unable to conclude from the order presented that those restrictions continue. Nonetheless, it is unnecessary to reach this argument in light of my conclusion that the claims regarding access to school property are moot.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 18, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: October 18, 2010

Date Mailed to Parties: OCT 19 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 4690-10
AGENCY DKT. NO. 97-5/10

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN MCMAHON, SPECIAL SERVICES SCHOOL DISTRICT AND VOCATIONAL SCHOOL DISTRICT OF GLOUCESTER COUNTY, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the parties' proposed 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 careful review of the record, the Commissioner concurs with the Administrative Law Judge that, under the circumstances of this matter, 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 of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/02/10
Date of Mailing: 12/02/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4690-10

AGENCY DKT. NO. 97-5/10

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN McMAHON, SPECIAL SERVICES SCHOOL DISTRICT AND VOCATIONAL SCHOOL DISTRICT OF GLOUCESTER COUNTY, GLOUCESTER COUNTY.

Michael J. DiPiero, Esq., for petitioner (Brown and Connery, attorneys)

Stephen J. Buividas, Esq., for respondent

Record Closed: September 28, 2010 Decided: October 19, 2010

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 3, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Amended Joint Request for Approval of Settlement indicating the terms thereof, 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 19, 2010
DATE

DONALD J. STEIN, ALJ

OCT 20 2010

Date Received at Agency:

OCT 2 0 2010

Date Mailed to Parties:

cmo

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FILED
STATE OF N.J.
OFFICE OF ADMIN LAW

2010 OCT 12 P 2:02

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN MCMAHON, BOARD OF EDUCITION OF THE GLOUCESTER COUNTY SPECIAL SERVICES SCHOOL DISTRICT BOARD OF EDUCATION, GLOUCESTER COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDU 04690-2010 S
AGENCY REF. NO. 97-5/10

AMENDED JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Gloucester County Special Services School District Board of Education ("Board") and counsel for its tenured employee Kathleen McMahon, a secretary ("McMahon"), join in moving for an order declaring that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of In re *Cardonick,* 1990 *S.L.D.* 842 (1983), as incorporated *In N.J.A.C.* 1 :1-19.1, recommending that the Settlement Agreement be approved by the Commissioner of Education, and on condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A, 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 charges certified by the Board to the Commissioner on May 13, 2010 against a tenured secretary on grounds of unbecoming conduct (See Tenure Charges and Statement of Evidence attached hereto as "Exhibit B"). The tenure charges were transmitted to the Office of Administrative Law ("OAL") as a contested case on June 1, 2010. A Scheduling and Status Conference concerning the Board's tenure charges took place before the Honorable Donald J. Stein, ALJ on August 13, 2010. On September 15, 2010, counsel informed ALJ Stein that the parties had reached a tentative settlement agreement. The settlement was expressly conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the Board and by the Commissioner so that the tenure charges might be withdrawn.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that, among other terms, McMahon was suspended without pay from May 17, 2010 through September 14, 2010, has successfully completed in-patient counseling under the auspices of the Board's Employee Assistance Program ("EAP"), will agree to submit to alcohol and substance testing on a random basis for the remainder of her career with the District, and, that should she test positive for alcohol or controlled dangerous substance use during that period, she will be subject to Termination of tenure in accordance with the principles articulated by the Commissioner in *In re Yanniello,* CD 203-95 (Jun. 12, 1995), *aff'd* S.B. 78-95 (Jan. 8, 1997), *aff'd* App. Div. Dkt. No. A-3482-96Tl (Apr. 2, 1998)(unreported) (Commissioner ruled employee and local school board may enter into binding return-to-work agreement providing for

second chance and, under terms of agreement, Commissioner rejected employee's claim to "third strike" under New Jersey Law Against Discrimination, *NJS.A.* 10-5-1 *et seq.* ("NJLAD")). In exchange for these and other terms (including McMahon's execution and delivery of a general release of any and all claims, including claims of failure to accommodate under the NJLAD), the Board has reinstated McMahon to a position consistent with her qualifications and experience.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that the Board's withholding of her increments for the 2009-2010 school year will be a permanent increment withholding, subject to the Board's ability to restore the increments in its sole discretion at a future date as is its prerogative under *Probst* v. *Haddonfield Bd. of Ed., 127NJ* 518 (1992).

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against McMahon shall be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet her objections.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

As to the charge of unbecoming conduct, the Board's justification for withdrawal of the charge includes the existence of a controverted factual record, the existence of extraordinary mitigating circumstances including that the single incident of misconduct arose from depression, anxiety and stress, that McMahon had an otherwise unblemished record but for her substance abuse problem, and the Board's commitment to the letter and spirit of the handicap

accommodation requirements of the NJLAD as previously adopted by the Commissioner in *In re Yanniello, supra,* and as affirmed by the Appellate Division in that case. As to the charges of unbecoming conduct, neglect of duty and insubordination for failure to report for testing as directed by the Superintendent, the Board's justification for withdrawal of the charges is that a genuine question exists as to whether McMahon's failure to report for testing in a timely manner was an attempt to avoid a positive substance test result.

The Board's decision to request the withdrawal of the charges is further reinforced by the fact that the Board has had an opportunity to fully investigate and assess the progress McMahon has made with respect to her substance abuse issues. It is for these reasons and the reasons expressed in the recitals of the Settlement Agreement that the Board has decided to withdraw the charges upon approval of this settlement by the Commissioner.

ACKNOWLEDGEMENT OF RIGHTS

McMahon has had the opportunity to discuss these matters with her counsel, Mr. Buividas. She has reviewed the charges against along with the discovery in support of those charges. She understands that she has the right to have a hearing on the charges against her where she can dispute the facts alleged by the District, present a defense, and have Judge Stein and ultimately the Commissioner make a determination on the validatiy of the charges. She has decided to waive that right in exchange for the guaranteed opportunity to continue her employment with the District. Counsel is satisfied that McMahon makes this decision to waive her rights knowingly and voluntarily.

CONSIDERATION OF PUBLIC INTEREST

This settlement serves the interest of the public in that it is keeping with the District's core mission of helping those that suffer from mental, physical and emotional challenges and eliminates the need for costly litigation. The Parties recognize that McMahon's issues with substance abuse are a disease that can be controlled with proper treatment and supervision. Her problem is the only blemish on an otherwise outstanding employee record with the District. This settlement provides a high level of supervision and responsibility on McMahon for the remainder of her career with the District, while ensuring that any slip on McMahon's part will be grounds for dismissal. The settlement also preserves District resources by eliminating the need for litigation expenses, and ensures an outcome that is beneficial to the District.

CONCLUSION

The Settlement Agreement was negotiated between counsel after certain facts became known during the course of discovery and preparation for hearing. Counsel, as well as McMahon and the Board which approved it, 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, recommend that the Settlement Agreement be adopted without modification by the Commissioner, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges in this matter.

Respectfully Submitted,

BROWN & CONNERY, LLP
Attorney for Petitioner,
Gloucester County Special Services
School District Board of Education

By: Michael J. DiPiero
Michael J. DiPiero

Dated: 10/8/10

LAW OFFICES OF STEPHEN J. BUIVIDAS
Attorney for Respondent,
Kathleen McMahon

By: _____
Stephen J. Buividas

Dated: 10/8/10

Exhibit A

SETTLEMENT AGREEMENT
REGARDING KATHLEEN MCMAHON
TENURE CHARGES

This SETTLEMENT AGREEMENT is entered into between the Gloucester County Special Services School District Board of Education (hereafter "Board" or "District") and Kathleen McMahon (hereafter "McMahon").

WHEREAS, McMahon has been employed continuously by the Gloucester County Special Services School District since September 4, 1994 and currently holds the title of Secretary for the Bankbridge Regional School Principal;

WHEREAS, McMahon has been accused of (1) conduct unbecoming a board employee; (2) neglect of duty; and (3) insubordination by the District related to her substance abuse issues.

WHEREAS, McMahon has been suspended since March 30, 2010;

WHEREAS, the Board directed the Board Secretary to certify tenure charges related to the allegations of misconduct on May 12, 2010;

WHEREAS, McMahon, was suspected of being under the influence of alcohol during working hours in violation of District policy and failed to report for testing in a timely manner as directed by the District;

WHEREAS, McMahon has entered into and successfully completed an intensive in-patient substance treatment program and has been continuing to participate in a comprehensive out-patient substance treatment program; and

WHEREAS, McMahon is willing to abide by the enumerated terms and conditions in this agreement, including the term that McMahon's employment with the

Board will be terminated for any violation of the agreement, no matter how slight, in exchange for the resolution of the tenure charges against her and permitting the continuation of her employment with the Board.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. The above recitals are repeated and made part of this settlement by reference.

2. McMahon shall serve a suspension without pay for the period of May 16, 2010 through September 13, 2010, which includes the 120 day period permitted by N.J.S.A. 18A:6-11.

3. McMahon agrees to forfeit her vacation leave days for the 2010-2011 school year to account for the days of administrative leave she served during the investigation of this incident.

4. McMahon voluntarily agrees to be transferred to the Non-Public Program effective upon her return.

5. McMahon shall have her salary frozen for the 2010-2011 school year. Future opportunities for salary increases to be based on performance, including but not limited to McMahon's performance in complying with the conditions of this agreement.

6. This agreement constitutes the last chance McMahon has to continue her employment with the Board. Any breach of this Last Chance Agreement shall result in McMahon's termination of her employment with the Board and

McMahon and the Board agree that McMahon shall not ever be employed by the Board again.

7. McMahon shall be subject to probation for the remainder of her employment with the Board, which shall commence upon ratification of this agreement (hereafter referenced as "probationary period"). During the probationary period McMahon shall be bound by the following conditions:

    a. Prior to her return to work, McMahon shall submit to a medical, mental health, and substance abuse evaluation. The provider(s) shall be selected by the Board, and McMahon shall execute all releases necessary for the District to receive documents related to the evaluations;

    b. Random substance testing by the District at the direction of the Superintendent or his/her designee;

    c. Attend Alcoholics Anonymous meetings weekly and supply the Superintendent with official written verification of attendance;

    d. Comply with all directions and requirements of the District assigned mentor, including but not limited to monthly conferences and written reporting;

    e. Attend quarterly conferences with the Superintendent and comply with all recommendations; and

f. Abide by all Board policies and New Jersey School Laws.

8. To the extent that the treatment referenced above is not paid for by McMahon's medical insurance with Board, McMahon shall be personally responsible for the cost of her therapeutic treatments.

9. During the probationary period, the Board shall have the right to receive and review any reports related to McMahon's progress and performance.

10. During the probationary period, McMahon agrees to submit to a medical, mental health and/or substance abuse evaluation upon the request of the Superintendent and abide by all recommendations.

11. In exchange for the valuable consideration listed herein, McMahon agrees that any violation of the Settlement Agreement, as determined in the sole discretion of the Superintendent, shall result in the immediate termination of her employment with the Board.

12. In the event of any violation of this Settlement Agreement by McMahon, as determined by the Superintendent, McMahon agrees that her employment has been terminated for cause.

13. McMahon enters this agreement knowingly and voluntarily, without coercion and with a full understanding of the rights and ramifications of this Settlement Agreement, entering into it on her own accord, after having the opportunity to consult with counsel. The signatory for the Board acknowledges that the Board authorized this Settlement Agreement at a duly-noticed meeting.

14. The Parties further agree in consideration of this Settlement Agreement that they will not assert in any judicial or administrative proceeding any statements concerning a reason that this agreement is not enforceable and/or consistent with the public's interest.

15. The Parties agree that in the event any provision or condition of this Settlement Agreement be finally determined to be in violation of any law, then such provision or condition, only to the extent that any may be so in violation, shall be deemed of no force and effect and unenforceable without impairing the validity and enforceability of the rest of the Agreement.

WITNESS:

9/20/10
Dated:

Ellen Herdegen, Superintendent
Gloucester County Special Services
School District

Kathleen McMahon

Sworn and subscribed before
me by Kathleen McMahon, the
Declarer this 20th day of
September, 2010.

Notary

Stephen J. Buividas
Attorney At Law
State of New Jersey

Exhibit B

BROWN & CONNERY, LLP
Michael J. DiPiero, Esquire
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for Petitioner

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN MCMAHON, **Respondent,** **BOARD OF EDUCATION OF THE SPECIAL SERVICES SCHOOL DISTRICT AND THE VOCATIONAL SCHOOL DISTRICT OF THE COUNTY OF GLOUCESTER,** **Petitioner.**	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** Agency Ref. No.: OAL Docket No.: **CERTIFICATE OF DETERMINATION**

I, Marjorie Workman, being duly sworn according to law upon my oath depose and say:

1. I am employed by the Petitioner, the Board of Education of the Special Services School District and the Vocational School District of the County of Gloucester (hereafter referred to as "the Board"), as the Assistant Superintendent for Business/Board Secretary for the Board of Education.

2. On April 14, 2010, the Respondent, Kathleen McMahon, Secretary to the Principal, was served with tenure charges and a supporting statement of evidence (hereafter referred to as the "Charges"), which contain the following charges of unbecoming conduct, neglect of duty, and insubordination:

a) Charge No. 1: Ms. McMahon is guilty of conduct unbecoming a Board employee, neglect of duty, and insubordination for violating the Board's Employee Substance Abuse Policy and District Practice. More specifically, on March 30, 2010, Ms. McMahon reported to work under the influence of alcohol. On March 30, 2010, Principal Ronald Rutter, as well as Dr. Susan Heiken, Director of Clinical Services, detected that Ms. McMahon smelled of alcohol. When questioned, Ms. McMahon acknowledged that she smelled of alcohol, but attributed it to the night she had prior to reporting to work. Based upon reasonable suspicion, Ms. McMahon was instructed to make arrangements to be driven to Underwood Memorial Hospital Occupational Health Medical Facility in Paulsboro for alcohol testing pursuant to Board Policy and District Practice. Ms. McMahon agreed to submit to testing. Beginning at approximately 10:00 am, Ms. McMahon claimed to be calling and leaving messages for her significant other, Mike, to transport her to the testing facility. Principal Rutter and Dr. Heiken observed Ms. McMahon making the calls and leaving messages requesting a ride to the facility.

At around 11:00 am, Ms. McMahon was advised that the District intended to transport her by ambulance to the testing facility, if she was not able to secure transportation for herself. By 12:00 pm she was picked up by her brother and sister-in-law to be taken to the testing facility, which is located approximately ten miles from the District's Offices.

At approximately 12:50 pm it was discovered that Ms. McMahon had not arrived at the testing facility. Principal Rutter attempted to contact Ms. McMahon

at her house. Principal Rutter continued to call Ms. McMahon's house and at around 1:15 pm Mike answered the phone. Mike told Principal Rutter that he did not know where Ms. McMahon was and that no calls were received at the house from the District before 12:00 pm. A review of the District phone records revealed that three outgoing calls were made from the phone Ms. McMahon was observed using from 10:00 am until after she was told that the District would call for an ambulance to transport her. All three calls were made to the same number, which was not her home number, and was out of service on March 30, 2010.

Ms. McMahon did not arrive at the testing facility until 3:00 pm at which time she immediately used the restroom at the facility without providing a urine sample as required by the testing procedure. Although she did provide a breath sample, which read 0.00%, she refused to provide a urine sample and left the facility by 3:15 pm.

Shortly thereafter, Ms. McMahon contacted Assistant Superintendent Michael Dicken and advised that her Breathalyzer test, which was administered over seven hours after she reported to work that morning, was negative. When asked why she left before taking the urine test, she said she didn't have to urinate and that her brother had to leave. When asked why it took her three hours to get to the testing facility, she stated that her brother forgot his license and had to go back to his house to get it and then they broke down and had to wait for AAA to assist them. Mr. Dicken asked Ms. McMahon if he could be provided with a copy of a receipt/documentation for the AAA service call to which Ms. McMahon altered her statement and said that it was a friend who assisted them. Statement of

Evidence and Bates Stamped Documents GCSSSD KM 01 - GCSSSD KM 17. (See Exhibit No. 1)

b) Charge No. 2: Ms. McMahon is guilty of conduct unbecoming a Board employee, neglect of duty and insubordination for failing to report for substance testing in a timely manner and refusing to submit to the substance testing based on the facts set forth in "Charge No.1". The above-referenced acts of Ms. McMahon warrant her dismissal from her position as Secretary to the Principal with the Board of the Gloucester County Special Services School District. Statement of Evidence and Bates Stamped Documents GCSSSD KM 01 - GCSSSD KM 17. (See Exhibit No. 1).

c) Charge No. 3: Ms. McMahon is guilty of conduct unbecoming a Board employee, neglect of duty, and insubordination for deliberately providing false information to the Assistant Superintendent in an attempt to frustrate the Superintendent's investigation into the allegation that Ms. McMahon violated the District's Substance Abuse Policy and District Practice based on the facts set forth in "Charge No.1". Statement of Evidence and Bates Stamped Documents GCSSSD KM 01 - GCSSSD KM 17. (See Exhibit No. 1).

3. In support of the charges, Respondent was also served with the Statement of Evidence as well as Bates Stamped documents GCSSSD KM 01 - GCSSSD KM 17. (See Exhibit No. 1)
4. On April 29, 2010, Respondent filed a written statement of position in opposition to the charges. (See Exhibit No. 2)
5. On May 12, 2010, the Board met in closed executive session at a special Board meeting held at Bankbridge Regional School, to review the merits of the charges. After evaluating

the charges, together with the supporting statement of evidence with exhibits, the Board made the following determinations by a majority vote of its full membership:

a) There is probable cause to credit the evidence in support of the charges of conduct unbecoming of a Board employee, neglect of duty, and insubordination;

b) The charges of conduct unbecoming of a Board employee, neglect of duty, and insubordination, and the evidence to support thereof are sufficient, if true, to warrant the Respondent's dismissal from her employment with the Board;

c) The charges of conduct unbecoming of a Board employee, neglect of duty, and insubordination, shall be certified to the Commissioner of Education; and,

d) Respondent shall be suspended without pay as of May 13, 2010.

6. The Board has directed me to file the charges, together with the instant Certificate of Determination, with the Commissioner of Education and to forthwith notify Kathleen McMahon of the Board's determination.

7. On May 13, 2010, I served the Respondent, as well as Respondent's representative, Steven Buividas, Esquire, with notice of the Board's determination to certify the charges with the Commissioner of Education, by United Parcel Service (UPS).

Marjorie Workman
Business Administrator/Board Secretary

Sworn to and Subscribed
before me this 13th day of
May, 2010

NOTARY PUBLIC

SUSAN PATRICE MATTSON
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES OCT. 4, 2012

Exhibit No. 1

On March 30, 2010 at approximately 9:50 a.m. Sue Heiken and I were having a conversation with Kathy McMahon. At that time Sue and I both suspected we smelled alcohol on Kathy. Sue and I notified the Assistant Superintendent and he suggested she be sent out for drug and alcohol tests. Sue immediately made arrangements for Kathy to go to the Paulsboro clinic to have blood alcohol tests run. At approximately 10:30 a.m. Sue and I informed Kathy that we thought we smelled alcohol on her and that she would have to go to be tested. She said, "maybe it was from last night it's been a tough week for me". She agreed to go for the tests and attempted to call her boyfriend, Mike, from my phone. She said there was no answer but Sue and I did hear her leave a message for Mike to call her. At approximately 11:05 a.m. I asked her to make another phone call, as she hadn't heard back from Mike. She placed another phone call from my phone and again Sue and I heard her leave a message for Mike to call her. At approximately 11:30 a.m. I informed Kathy that if someone didn't pick her up immediately we would have to call an ambulance to transport her for the tests. She tried to call Mike from her phone and I heard her leave a third message for him to call her. She then called her brother who answered and agreed to transport her. At approximately 12:00 p.m. Kathy was seen getting in a vehicle with her brother and sister-in-law. At approximately 12:50 p.m. Sue called the clinic at Paulsboro to ensure Kathy went there directly. Sue was told that Kathy hadn't arrived yet. At approximately 1:00 p.m. I called Kathy's house because she hadn't reported for the tests and hadn't called us. I called again around 1:15 and Kathy's boyfriend Mike answered the phone. He hadn't heard from her and didn't know where she was. I called her house again at approximately 1:50 and Mike still hadn't heard from Kathy. I asked him if he heard her messages and he stated that she didn't leave him any

messages and that the caller identification only showed four incoming calls that day. Two of the calls were from his Mother and the other two were from me. At approximately 3:15 p.m. I checked the call log on my phone and found that the number Kathy dialed, (856)686-9821, wasn't consistent with the phone number I used to contact her boyfriend, (856)686-9820. Please see the attached call log. I dialed the phone number I found in the call log and found that it was a disconnected phone number. I then checked the call log on Kathy's phone and found it was also the disconnected phone number. I then spoke with Sue Heiken who informed me That Kathy did show up at the clinic at approximately 3:00 p.m. and blew into the Breathalyzer but refused the urine test.

Ronald E Rutter

Ronald E Rutter

Principal

4218 SUBSTANCE ABUSE

The Board of Education recognizes that chemical dependency is an illness which is preceded by the misuse and/or abuse of alcohol, anabolic steroids, and other drugs. The Board recognizes that the use/misuse of alcohol, anabolic steroids, and other drugs, and the problems associated with it, are becoming increasingly commonplace in today's society. It is generally accepted that alcoholism and other chemical dependencies are illnesses that can be treated successfully if they are identified as early as possible, and if appropriate treatment is promptly instituted. The Board believes that the therapeutic approach to the problem is more effective than one which is solely punitive in nature.

For purposes of this policy, "substance" shall mean:

1. All controlled dangerous substances as defined and prohibited in New Jersey Statutes and Codes;

2. All chemicals which release toxic vapors as defined and prohibited in New Jersey Statutes and Codes;

3. All alcoholic beverages; and

4. Anabolic steroids.

Standard of Conduct

The Board clearly prohibits the unlawful possession, use, or distribution of illicit substances, drugs, alcohol, and/or anabolic steroids on school premises or as part of any of its activities by any employee of the district as well as reporting to the workplace under the influence of any illicit substances, drugs, alcohol, and/or anabolic steroids. Compliance with this standard of behavior is mandatory.

The Board will make every effort to educate its employees regarding the misuse of illegal substances, alcohol, drugs, and anabolic steroids. Further, the Board will assist and provide guidance to an employee who is having a problem concerning the abuse of these substances on how to receive additional help and counseling.

Program Review

The Board shall review its substance abuse program on a biennial basis to determine its effectiveness and implement changes as required and to ensure that disciplinary sanctions are consistently enforced.

Any information gathered through a school investigation, counseling session, request by an employee for help, etc., shall comply with the confidentiality requirements established in Federal regulations found in 42 CFR Part II. Employees shall be subject to procedures and sanctions defined in Regulation No. 3218. All employees shall be provided with a copy of this policy and the accompanying regulations.

N.J.S.A. 2C:33-15 et seq.; 24:21-2 et seq.
42 C.F.R. II
34 CFR 85.600 et seq.
20 U.S.C. 1145g, 3224a
41 U.S.C.A. 701 et seq.

Adopted: 19 August 2009

R 4218 SUBSTANCE ABUSE

Procedures

A. Basic procedures to be used when an employee is suspected of having a dependency upon or illegal use of a controlled dangerous substance.

1. The employee's behavior shall be observed and documented by concerned staff. Such behavior as poor working performance, negative personality changes, and poor attendance could be symptomatic of a substance abuse problem. The concerned staff member shall make this report to the Building Principal or immediate supervisor, the school physician (school medical inspector), or the school nurse.

2. The school physician (school medical inspector) or the school nurse shall notify the Building Principal upon receiving any such report(s). The Principal will notify the Superintendent of any such report(s). The Principal and Superintendent, and school nurse when appropriate, will discuss their concern for the employee's health and performance to determine if further pursuance is appropriate and necessary.

3. The Principal or school nurse, as determined by the Superintendent, shall discuss the suspected behavior with the employee as to the extent of the problem. The Superintendent shall keep accurate and detailed official written records of all incidents related to suspected substance abuse.

4. If the suspected dependency or use is confirmed, the employee shall be required to obtain professional counseling or complete an appropriate rehabilitation program.

   If necessary, an immediate leave of absence may be granted to the employee by the Superintendent. The school nurse will recommend at least two certified counseling agencies or a rehabilitation program to the Superintendent.

B. Procedures to be followed when an employee confides to a colleague or administrator that he/she has a substance abuse problem:

1. The staff member shall encourage the employee to seek help.

2. Report the concern about the potential substance abuse problem to the Building Principal.

3. The school physician or the school nurse must report the substance abuse problem to the Principal. The Principal will then follow paragraph C2 of this regulation.

C. Procedures to be followed when an employee is suspected of being under the influence of a substance during working hours:

1. Whenever it appears to any teaching staff member, school nurse, or any other employee of the school district that an employee may be under the influence of a controlled dangerous substance as defined by the New Jersey Statutes, or any chemical (including alcohol/anabolic steroids) or chemical compound which releases vapor or fumes causing condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system, this situation shall be immediately reported to the Principal, the school physician, or the school nurse.

2. The school physician or school nurse shall notify the Principal when they receive a report. The Principal shall:

   a. Notify the Superintendent of Schools.

   b. Arrange for the immediate examination of the employee by the school doctor or a doctor selected by the employee, or if such doctor is not immediately available, then arrange transportation to the local hospital. The employee shall be accompanied to the doctor or emergency room by a member of the school staff designated by the Building Principal and/or the Superintendent.

   c. A report shall be requested from the examining physician which shall set forth whether or not the employee is under the influence of a controlled dangerous substance, or any chemical, which includes alcohol, anabolic steroids, or chemical compound. This test must be made within twenty-four hours of the initial report made by the Principal.

   d. The employee shall not be permitted to resume work until he/she has submitted to the Building Principal a written report from his/her personal physician or the physician who initially examined him/her certifying that he/she is physically and mentally able to return to work.

e. If the report indicates a positive diagnosis, a Violence, Vandalism, and Substance Abuse Incident Report shall be completed by the Principal.

f. If the report indicates a positive diagnosis, the following sanctions apply:

First offense: Provided the employee is not dismissed, the employee must report to an outside certified agency for counseling for three required sessions. A report from the agency must be submitted to the Superintendent within one week after the third counseling session. A warning letter from the Superintendent will be placed in the employee's personnel folder.

Second offense: Provided the employee is not dismissed, the employee must report to an outside certified agency for counseling for five sessions. A report from the agency must be submitted to the Superintendent within one week after the fifth counseling session. A letter of reprimand will be placed in the employee's personnel folder advising him/her that a third incident will result in a suspension without pay and a loss of an increment for the following year.

Third offense: Provided the employee is not dismissed, the employee must enroll in a certified rehabilitation program. A letter must be sent to the Superintendent at the conclusion of the treatment programs. Also, the employee will be suspended for a week without pay and lose his/her increment the following year.

Fourth offense: Provided the employee is not dismissed, the employee will have a hearing before the Board in which a decision will be rendered by the Board relating to the continued employment of the employee.

g. If the employee is suspected of substance abuse or use and, in the judgment of the Board of Education, and/or its agents, shows evidence of deviation from normal, physical or mental health, the Board may require the employee to undergo a physical examination in accordance with N.J.S.A. 18A:16-2, 18A:16-3 and N.J.A.C. 6:29-7.4(f). An employee who fails to comply with this requirement shall be subject to discipline.

3. If the employee refuses to be examined for suspected substance abuse, the supervisor will notify the Superintendent immediately, or in his/her absence, his/her designee. The Superintendent or designee shall request the school employee leave the school premises immediately. If the school employee refuses to leave the school premises when required, the appropriate law enforcement agency will be called and a police report will be filed.

D. Procedures to be followed when an employee is found in possession of, and/or selling/distributing alcohol, anabolic steroids, and/or a controlled dangerous substance as defined by New Jersey Statutes and/or Codes.

1. A report will be immediately filed with the appropriate law enforcement agency if any employee is found to be using, be in possession of, or selling illicit drugs, alcohol, or anabolic steroids on the school's premises or as part of any school function.

2. If in the course of any investigation by the appropriate law enforcement agency, an employee is arrested by the police, he/she will be immediately suspended from work with pay until a Board hearing can be arranged for further disciplinary action.

3. Should the employee be found guilty of a criminal offense, he/she will have a Board hearing at which time the Board will render a decision regarding disciplinary action. He/she may be suspended without pay, lose an increment, be required to attend a rehabilitation program, or be terminated from employment.

E. Any school staff member(s) who in good faith reports an employee to the Principal or the school medical inspector or the school nurse in an attempt to help such person cure his/her dependency upon or illegal use of controlled dangerous substance(s) as defined by N.J.S.A. 2A:170-25-9 and N.J.S.A. 24:21-2 shall not be liable in civil damages as a result of making any such report as specified in N.J.S.A. 2A:62A-4. Alcohol and anabolic steroids are not listed as a controlled, dangerous substance by statute or code.

N.J.S.A. 2C:33-15 et seq.
N.J.S.A. 24:21-2 et seq.
42 C.F.R. II
34 C.F.R. 85.600 et seq.
20 U.S.C.A. 1145g, 3224a
41 U.S.C.A. 701 et seq.

Issued: 19 August 2009

ORIG/TERM	Call From/To Number	EXT		Call From/To Name
ORIG	6401_BDC	6401	0	Vtl
ORIG	3002	3002	3002	Kathy McMahon
ORIG	6303	3002	6303	Voicemail 4
ORIG	6305_Elementary	3592	0	Vtl
ORIG	3500_Elementary	3583	0	Vtl
ORIG	3068	3068	3068	Ralph Ross
ORIG	6304	3068	6304	Voicemail 5
ORIG	6305_Elementary	3592	0	Vtl
ORIG	3006	3006	3006	Sam Amico
ORIG	6304_GCIT	2711	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	6304_Elementary	3583	0	Vtl
ORIG	3145	3145	3145	Rob McMahon
ORIG	6304	3145	6304	Voicemail 5
ORIG	16096188125_GCIT	8.16096E+11	0	Vtl
ORIG	6305_GCIT	2711	0	Vtl
ORIG	3006	3006	3006	Sam Amico
ORIG	3057	3006	3057	Dawn Capone
ORIG	6869821_GCIT	86869821	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	6869821_GCIT	86869821	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	16093204424_GCIT	8.16093E+11	0	Vtl
ORIG	7834694_GCIT	87834694	0	Vtl
ORIG	6869820_GCIT	86869820	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	3068	3068	3068	Ralph Ross
ORIG	2705_GCIT	2705	0	Vtl
ORIG	3023	3023	3023	PowerSchool Office
ORIG	6304	3023	6304	Voicemail 5
ORIG	7834694_GCIT	87834694	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	6869820_GCIT	86869820	0	Vtl
ORIG	7003_BDC	6415	0	Vtl
ORIG	6869821_GCIT	86869821	0	Vtl
ORIG	6869821_GCIT	86869821	0	Vtl
ORIG	1023_GCIT	1023	0	Vtl
ORIG	4611091_GCIT	84611091	0	Vtl
ORIG	2705_GCIT	2705	0	Vtl
ORIG	6303	5004#3000#300	6303	Voicemail 4
ORIG	8481025_GCIT	88481025	0	Vtl
ORIG	2504_GCIT	2504	0	Vtl
TERM	8563453603_GCIT		0	Vtl
ORIG	2320_GCIT	2320	0	Vtl
ORIG	3023	3023	3023	PowerSchool Office
ORIG	6304	5004#3002#270	6304	Voicemail 5
ORIG	6304	5003#3002*300	6304	Voicemail 5
ORIG	2702_GCIT	2702	0	Vtl
ORIG	6869821_GCIT	86869821	0	Vtl
ORIG	7834694_GCIT	87834694	0	Vtl
ORIG	6414_BDC	6414	0	Vtl

Date	Start	End	Time(Secs)	Extention	Name
3/30/10	8:03:31 AM	8:03:45 AM	30	3000	Ron Rutter
3/30/10	8:05:50 AM	8:06:02 AM	0	3000	Ron Rutter
3/30/10	8:06:02 AM	8:06:02 AM	0	3000	Ron Rutter
3/30/10	8:53:12 AM	8:53:37 AM	2	3000	Ron Rutter
3/30/10	8:53:40 AM	8:53:45 AM	96	3000	Ron Rutter
3/30/10	8:55:32 AM	8:55:33 AM	0	3000	Ron Rutter
3/30/10	8:55:33 AM	8:55:33 AM	3	3000	Ron Rutter
3/30/10	9:05:21 AM	9:05:48 AM	4	3000	Ron Rutter
3/30/10	9:06:24 AM	9:06:28 AM	35	3000	Ron Rutter
3/30/10	9:18:36 AM	9:19:02 AM	6	3000	Ron Rutter
3/30/10	9:19:09 AM	9:19:13 AM	87	3000	Ron Rutter
3/30/10	9:35:51 AM	9:36:22 AM	4	3000	Ron Rutter
3/30/10	9:37:24 AM	9:37:25 AM	0	3000	Ron Rutter
3/30/10	9:37:25 AM	9:37:25 AM	4	3000	Ron Rutter
3/30/10	10:03:44 AM	10:03:53 AM	43	3000	Ron Rutter
3/30/10	10:24:41 AM	10:25:06 AM	2	3000	Ron Rutter
3/30/10	10:30:05 AM	10:30:27 AM	0	3000	Ron Rutter
3/30/10	10:30:27 AM	10:30:27 AM	14	3000	Ron Rutter
3/30/10	10:41:20 AM	10:41:29 AM	25	3000	Ron Rutter
3/30/10	10:42:27 AM	10:42:39 AM	85	3000	Ron Rutter
3/30/10	11:03:51 AM	11:04:03 AM	25	3000	Ron Rutter
3/30/10	11:32:17 AM	11:32:21 AM	33	3000	Ron Rutter
3/30/10	11:33:10 AM	11:33:19 AM	21	3000	Ron Rutter
3/30/10	12:09:29 PM	12:09:33 PM	380	3000	Ron Rutter
3/30/10	1:50:25 PM	1:50:36 PM	29	3000	Ron Rutter
3/30/10	1:51:35 PM	1:51:46 PM	132	3000	Ron Rutter
3/30/10	1:54:00 PM	1:54:08 PM	63	3000	Ron Rutter
3/30/10	2:01:39 PM	2:01:44 PM	57	3000	Ron Rutter
3/30/10	2:11:27 PM	2:11:34 PM	29	3000	Ron Rutter
3/30/10	2:21:14 PM	2:21:39 PM	0	3000	Ron Rutter
3/30/10	2:21:39 PM	2:21:39 PM	4	3000	Ron Rutter
3/30/10	2:23:06 PM	2:23:19 PM	31	3000	Ron Rutter
3/30/10	2:26:50 PM	2:26:52 PM	196	3000	Ron Rutter
3/30/10	2:35:53 PM	2:36:06 PM	178	3000	Ron Rutter
3/30/10	2:51:04 PM	2:51:31 PM	4	3000	Ron Rutter
3/30/10	3:08:31 PM	3:09:23 PM	6	3000	Ron Rutter
3/30/10	3:10:34 PM	3:10:44 PM	13	3000	Ron Rutter
3/30/10	3:22:49 PM	3:22:52 PM	215	3000	Ron Rutter
3/30/10	3:32:56 PM	3:33:03 PM	75	3000	Ron Rutter
3/30/10	3:48:13 PM	3:48:18 PM	64	3000	Ron Rutter
3/30/10	8:06:02 AM	8:06:02 AM	0	3002	Kathy McMahon
3/30/10	8:47:57 AM	8:48:11 AM	1	3002	Kathy McMahon
3/30/10	9:01:59 AM	9:02:02 AM	144	3002	Kathy McMahon
3/30/10	9:05:19 AM	9:05:19 AM	73	3002	Kathy McMahon
3/30/10	9:06:00 AM	9:06:32 AM	0	3002	Kathy McMahon
3/30/10	9:42:36 AM	9:42:40 AM	6	3002	Kathy McMahon
3/30/10	11:25:03 AM	11:25:03 AM	0	3002	Kathy McMahon
3/30/10	11:27:07 AM	11:27:08 AM	24	3002	Kathy McMahon
3/30/10	11:27:32 AM	11:27:37 AM	23	3002	Kathy McMahon
3/30/10	11:28:11 AM	11:28:19 AM	14	3002	Kathy McMahon
3/30/10	11:29:27 AM	11:29:39 AM	105	3002	Kathy McMahon
3/30/10	12:10:23 PM	12:10:37 PM	36	3002	Kathy McMahon

ORIG	3640 Elementary	3640	0	Vtl
ORIG	6303	5004#3002#305	6303	Voicemail 4
ORIG	6304	5004#3002#311	6304	Voicemail 5
ORIG	6304	5004#3002#358	6304	Voicemail 5

3/30/10	12:11:39 PM	12:11:45 PM	33	3002	Kathy McMahon
3/30/10	12:49:17 PM	12:49:17 PM	0	3002	Kathy McMahon
3/30/10	2:18:49 PM	2:18:49 PM	0	3002	Kathy McMahon
3/30/10	2:20:10 PM	2:20:10 PM	0	3002	Kathy McMahon

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last): Kathy McMahon

B: SSN or Employee ID No.: 149-54-3067

C: Employer Name: Gloucestor County Special Sm

Street: 850 Bank Bridge Rd

City, ST ZIP: Sewell, NJ 08080

DER Name and Telephone No.: Susan Heiken (609) 820 0363
(DER Name) (DER (Area Code & Phone Number))

D: Reason for Test: ☐ Random ☒ Reasonable Susp. ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Affix Or Print Separate Numbered Evidential Tape

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing and that the identifying information provided on the form is true and correct.

Kathleen McMahon — Signature of Employee

Date: 3 / 30 / 10 (Month / Day / Year)

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☒ EAT ☐ STT DEVICE: ☐ SALIVA ☒ BREATH* 15-Minute Wait: ☐ Yes ☒ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp. Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

SJOM — Alcohol Technician's Company

Casey A Vasta — (PRINT) Alcohol Technician's Name (First, M.I., Last)

Signature of Alcohol Technician

111 West Broad St. — Company Street Address

Paulsboro, NJ 08066 — Company City, State, Zip

856 423-0033 — Phone Number (Area Code & Number)

Date: 3 / 30 / 10 (Month / Day / Year)

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS POSITIVE

I [illegible] that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are positive.

Signature of Employee

Date Month / Day / Year

COPY 1 - ORIGINAL - FORWARD TO THE EMPLOYER GCSSSD KM 13

```
**********************
ALCOTEST 7410 PLUS
SERIAL NUMBER: ARTN-0688

ALCOTEST 7410 PRINTER
SERIAL NUMBER: ARHM-0126
**********************
DATE:          03/30/2010

SEQUENTIAL TEST #: 04668

AIR BLANK      0.000 15:05

BREATHTEST     0.000 15:05

ACCURACY       -.--- --:--
UNITS:-------%BAC-----TIME
**********************
SAT SIGNATURE:
```

CUT HERE

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

Affix Or Print Additional Test Results Here

Affix With Tamper Evident Tape

CHAIN OF CUSTODY FORM

SITE -- RTP Customer Service: 800-833-3984
LABCORP
1904 ALEXANDER DRIVE
RTP, NC 27709
1100

0545213944

SPECIMEN ID NO. 0545213944 LAB ACCESSION NO.

STEP 1: TO BE COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address and I.D. No.
UNDERWOOD HOSP/SJ OCC MED
1 WEST BROAD ST
PAULSBORO NJ 08066
856-423-0033
FAX: 856-423-4444

B. MRO Name, Address, Phone and Fax No.
DR TATYANA SKRIPNICHENKO
UNDERWOOD HOSPITAL
1 WEST BROAD ST
PAULSBORO NJ 08066
856-423-0033 FAX: 856-423-4444

Location:

C. Donor SSN or Employee I.D. No. 149 54 3067

D. Reason for Test: ☐ Pre-Employment ☐ Random ☒ Reasonable Suspicion/Cause ☐ Post Accident ☐ Periodic ☐ Other

E. Collector Site Address:
UNDERWOOD HOSP/SJ OCC MED
1 WEST BROAD STREET
PAULSBORO NJ 08066

Collector Phone No. (856) 423-0033
Collector Fax No. (856) 423-4444

F. Donor Identification Verified By: ☒ Photo I.D. ☐ Employer Representative

STEP 2: TO BE COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100°F? ☐ Yes ☐ No, Enter Remark Below Split Specimen Collection? ☐ Yes ☐ No

REMARKS: donor unable to produce enough urine; instructed to dilute instead with donor left facility at 3:30 pm before test complete CaseW 3/30/10

STEP 3: TO BE COMPLETED BY COLLECTOR AND DONOR - Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s).

STEP 4: TO BE COMPLETED BY COLLECTOR AND DONOR

G. Daytime Phone No. ( ) Evening Phone No. ( ) Date of Birth / /

H. TEST(S) REQUESTED BY EMPLOYER:
CV 75711B 5-CRT C 1 789064 9 DRUG

I authorize this collection of this specimen for the purpose of a drug screen. I acknowledge that the specimen container(s) was/were sealed with tamper-proof seal(s) in my presence, and that the information provided on this form and on the label(s) affixed to the specimen container(s) is correct. I authorize the laboratory to release the results of the test to the company identified on this form or its designated agents.

Kathy McMahon / 3 30 10
(PRINT) DONOR'S NAME (FIRST, MI, LAST) SIGNATURE OF DONOR INITIAL MONTH DAY YEAR

STEP 5: TO BE COMPLETED BY COLLECTOR AND DONOR

I certify that the specimen given to me by the donor identified on this form was collected, labeled, sealed, and released to the Delivery Service noted in accordance with applicable requirements.

X _____ AM PM
Signature of Collector
Casey Wicks 3 30 10
(PRINT) Collector's Name (First, MI, Last) Date (Month/Day/Yr.)

SPECIMEN BOTTLE(S) RELEASED TO:
Courier
Name of Delivery Service Transporting Specimen to Lab

RECEIVED AT LAB:
X _____
Signature of Accessioner
(PRINT) Accessioner's Name (First, MI, Last) Date (Month/Day/Yr.)

Primary Specimen Bottle Seal Intact
☐ Yes
☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

FORM 893 SP 8C PAGE 1 OF 2 05/04

3/30/10 Refusal to test
Signed 3/30/10
Dr Suriyon Lalit X
3-30-10 X

SITE -- RTP
1100

COPY 2 - MEDICAL REVIEW OFFICER COPY - PINK

At approximately 3:00 on March 30th, 2010 I received a phone call in the Superintendent's office at the Gloucester County Institute of Technology from Ms. Kathleen McMahon. Present in the office during the phone call were the Superintendent, the Director of Human Resources, and myself. Ms. McMahon reported to me that she had returned from her appointment at the testing facility and the results of her Breathalyzer test reported an alcohol level of 0.00% and that I/we would be receiving a report from the center shortly. I thanked Ms. McMahon for reporting the information to me and informed her that I/we had several concerns in regard to the events of the day. I specifically stated that I was concerned about the timeliness of Ms. McMahon's arrival to the testing facility, the legitimacy of the phone calls she had made to arrange for transportation to the center, and that she had left the center prior to completing the examination.

When questioned about her tardiness to the testing center Ms. McMahon stated that she had left messages at her home for transportation to the center and that no one was home at her residence. I informed Ms. McMahon that we had checked the phone number that she left the messages on and the phone was clearly disconnected. She responded by saying "Why would I not call my number, I know my home number" and she stated her number. I asked why she didn't call the correct number on numerous occasions and why would she leave a message on a phone that was disconnected. Ms. McMahon responded that she did call the correct number. I informed that our records indicated otherwise. For the record, I do not believe there were any phone calls made to the home number Ms. McMahon reported to me and the gentleman living in the house reported to the building Principal that there were not any messages left on the machine at the house for him.

I also inquired of Ms. McMahon as to why she was so late reporting to the testing center. Ms. McMahon reported that her brother and sister-in-law picked her up at the Bankbridge Regional School. She stated that her brother did not have his driver's license with him and had to return to Sicklerville, N.J. to get his wallet. She then stated that her brother's car had broken down and that he called AAA for repairs. I told her that she should get a receipt for the repair for the record and it that it would help her in the investigation. After asking for the receipt Ms. McMahon then stated, "maybe it wasn't AAA it could have been just a friend of her brother".

Finally, I questioned Ms. McMahon in regard to the chain of events that occurred once Ms. McMahon entered the testing facility. It was reported to the school district that Ms. McMahon entered the testing facility, checked in and used the lavatory. She then participated in the breathalyzer test and

was informed that she would need to provide a urine sample. At this time Ms. McMahon exited the testing facility. When I asked her she left the facility she stated that her brother had to go to work and that the last time she was at the facility she only had to take a breathalyzer. I asked her again why she left the facility without providing a urine sample. Ms. McMahon again stated that her brother had to go to work and she could wait until she had to urinate again because she had already evacuated her urine upon arrival to the facility.

I concluded the conversation with Ms. McMahon by informing her that we would be investigating the incident and that we would inform her of any action the Superintendent was intending to recommend at this time. I late called Ms. McMahon that she would be suspended with pay pending Board of Education action.

Michael C. Dill 4/13/10

To Whom It May Concern:

Timeline of events of March 30, 2010 interactions with Kathy McMahon

- At approximately 9:50 am – Ron Rutter and myself were having a conversation with Kathy McMahon in his office and we both smelled alcohol.
- We contacted Michael Dicken, Assistant Superintendent, who stated that he recommended that Kathy go and be tested.
- I contacted Underwood Hospitals clinic in Paulsboro and arranged to have them test Kathy for alcohol and drugs and told them that I would call them when she left our campus. I requested a call back from the clinic upon Kathy's arrival, as well as a call back upon the Breathalyzer with the results.
- At approximately 10:30 am Ron and I talked with Kathy and explained that we both smelled alcohol and that she would have to go and be tested. Kathy asked if it was possible that our suspicions were from alcohol that she had consumed the previous evening. Ron and I stated that we did not know, but that she would need to be tested, to which Kathy agreed. I gave her a written copy of the address and phone number of the clinic, verbally confirmed with her that she knew the location and we asked her if she could contact a family member to take her. I explained that for privacy reasons, I would suggest that she use Ron's telephone in his office, which she did, leaving a message for Mike, her boyfriend. Kathy stated that he would call her back soon and would come and take her to be tested.
- At a little after 11:00 am, Kathy still had not had a return call from Mike and was asked by Ron to call again. Kathy left another message for him.
- At around 11:30 Ron informed Kathy that she needed to arrange transportation to the clinic or we would contact an ambulance to transport her.
- Kathy stated that she again left a message for Mike and also stated that she telephoned her brother to come pick her up and transport her to the clinic.
- At approximately noon Kathy was reportedly seen to get into a vehicle with her brother and sister-in-law.
- I telephone the clinic at approximately 12:50 to follow up and make sure that Kathy had arrived. The clinic stated that there were no patients there. I made repeated telephone calls to the clinic until I was told at approximately 3:00 pm that Kathy had arrived, gone directly into the restroom, and then signed in. The clinic staff reported that Kathy was given verbal instructions on the tests to be administered and the process followed. As per clinic staff, Kathy was instructed that she would have to sit and drink water so that she could produce a urine specimen following the Breathalyzer test. Clinic staff further reported that Kathy took the Breathalyzer and immediately left the clinic as the staff was going to get her water to drink. Clinic staff telephoned me reporting the results and above events.
- I telephoned Mike Dicken and reported the above.

Susan E. Heiken

Director of Clinical Services GCSSSD/GCIT

Exhibit No. 2

Kathleen McMahon
26 Dubois Avenue
Woodbury, NJ 08096
(856)686-9820

To Whom it May Concern:

This corresdence is to address an incident that accurred on March 30, 2010.

I was accused of being under the influence of alcohol at approximately 11:30 a.m. I was instructed to obtain transportation to a clinic for testing. I made calls to a family member to no avail. At around 12:00 p.m. I was informed that if I could not get a ride immedaitely, that an ambulance would be called to transport me.

At that time I called another family member. At approximately 12:30 p.m., I was picked up at Bankbridge Regional. I was informed that my famliy member (in his haste to pick me up) did not have his driver's license, insuranace and registration information on hand. I could not, in good concience, ask him to drive me to the clinic without appropriate identification.

We arrived at his home at around 1:00 p.m. (Sicklerville). By 1:05 we started out for the clinic which is located in Paulsboro. From Sicklerville we where on the way and experienced car failure (I believe it had overheated). At that point, we pulled over and called a friend for assistance.

At approximately 3:15 I arrived at the clinic. I urinated upon arrival (not knowing that a urine test was manditory because when I was tested before the only test was a breathalizer). I immediately gave the breathalizer test and was given a reading of 0.00.

The clinician asked me to give a urine test and I explained that upon arrival I had urinated and was not sure I could give a sample. She gave me a vial asked if I could try. I agreed and went into the ladies room. I was not able to give enough of a sample so she through (what I had given) away. She then told me to sit in the waiting room and gave me a cup of water.

I could not wait any longer due to the fact that my brother had to get home because he had to work. He took me home and I immedaitely called Mike Dicken. I explained the facts and situation of the day. Mr. Dicken seemed to not believe the events. He said he would call me back to let me know of my situation. His phone call advised me that I was suspended with pay until further notice.

I was relectant to inquire about my position because I was told I would be contacted at the end of the investigation. I was contacted via express mail that I would be terminated.

Time frames notied by the administrators are very miscalculated. Mr Rutter did not contact me regarding my sobriety until approximately 11:30 not 10:00 as reported. Dr Heiken was not near me at the time and could not have samelled alcohol on my breath. Rather she was called in to support Mr. Rutter's abvious mistake.

The District gave me the opoortunity to participate in the Empolyee Assistant Program for which I am grateful. I learned many helpful ideas. As any person in recovey knows the first time is not allways the last. As you will see in the report given to the district, the report of the test read at 0.00.

I am proud and grateful to have served Gloucester County Special Services School District in the last 16 + years. . Thank you.

Fondly,
Kathleen McMahon

525-10

OAL DKT. NO. EDU 4964-09
AGENCY DKT. NO. 121-6/09

M&C INSURANCE AGENCY, INC., MCINTYRE RISK MANAGEMENT, LLC, T/A THE MCINTYRE GROUP, AND MCCOLLUM INSURANCE ABSTRACT AND TITLE AGENCY, INC.	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, MICHAEL AZZARA AND ALSTON-CALAF AND ASSOCIATES,	:	
RESPONDENTS.	:	

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

Upon review, the Commissioner observes that the Agreement is neither signed by the Camden Board of Education's attorney – who is the Board's duly authorized representative in litigation – nor authorized by a board resolution. Further, the McIntyre Group, which withdrew from the case on March 30, 2010, is included as a signator to the settlement agreement. Finally, an entity called the Graham Company has signed the settlement, notwithstanding the fact that there is no record of the Graham Company joining the action as a party.

In light of the foregoing, the Commissioner has no jurisdiction over two of the participants in the Agreement and insufficient evidence of the Camden Board of Education's consent to the Agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement to indicate the appropriate parties and to include either the Camden Board attorney's signature or a Board resolution approving the settlement and designating who may sign it on behalf of the Board. If the parties are unwilling or unable to effectuate the requested revisions, the matter shall proceed to hearing.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/03/10
Date of Mailing: 12/06/10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4964-09

AGENCY DKT. NO. 121-6/09

M&C INSURNCE AGENCY, INC., MCINTYRE RISK MANAGEMENT, LLC, T/A THE MCINTYRE GROUP AND MCCOLLUM INSURACE ABSTRACT AND TITLE AGENCY, INC.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, MICHAEL AZZARA AND ALSTON-CALAF AND ASSOCIATES,

Respondents.

Joseph F. Betley, Esq., for petitioners (Capehart & Scatchard, attorneys)

Matthew Behr, Esq., for respondents (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys)

Record Closed: October 13, 2010 Decided: October 15, 2010

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

Petitioners M&C Insurance Agency, Inc.; McIntyre Risk Management, LLC, t/a The McIntyre Group;[1] and McCollum Insurance Abstract &Title Company have challenged and sought to overturn State Monitor Michael Azzara's awarding of a contract of insurance for the Camden City Board of Education to Alston-Calaf & Associates. The petition, originally filed as a verified complaint in lieu of prerogative writs in the Superior Court of New Jersey, Camden County, on May 27, 2007, was transferred to the Department of Education for exhaustion of administrative remedies and then transmitted to the Office of Administrative Law, where it was filed for hearing as a contested case on June 17, 2009.

Petitioners subsequently filed an application for emergency relief which was denied by the Hon. Joseph F. Martone, A.L.A.J., on June 18, 2009. At that time, the matter was reassigned to this Administrative Law Judge for handling and by order dated December 8, 2009, a hearing was scheduled to begin on March 22, 2010. Soon thereafter the parties engaged in meaningful settlement negotiations and agreed upon the following settlement, the terms of which are set forth in the attached Settlement Agreement submitted on October 13, 2010. 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 and their representatives' signatures on the attached Settlement Agreement; and
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Accordingly, I **ORDER** that the parties comply with the terms of the Settlement Agreement and that these proceedings be and are hereby concluded.

[1] By way of "Dismissal Without Prejudice" dated September 4, 2009, McIntyre Risk Management, LLC, t/a The McIntyre Group, dismissed the claims its claims against the Camden City Board of Education, Michael Azzara, and Alston-Calaf & Associates, and withdrew from 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 15, 2010

DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

OCT 19 2010

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 2010

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
NEW JERSEY DEPARTMENT OF EDUCATION

M&C INSURANCE AGENCY, INC., et al. Mc INTYRE RISK MANAGEMENT, LLC, t/a Mc INTYRE GROUP, Mc CULLOM INSURANCE ABSTRACT AND TITLE AGENCY, INC. Petitioners,	
v.	OAL DKT. NO. EDU 4964-09 AGENCY DKT. NO. 121-6/09
CAMDEN CITY BOARD OF EDUC., MICHAEL AZZARA, and ALSTON-CALAF & ASSOCIATES, Respondents.	

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement"), dated 4/9/10 IDD, 2010, is by and between M&C INSURANCE AGENCY, INC., Mc INTYRE RISK MANAGEMENT, LLC, t/a Mc INTYRE GROUP, and Mc CULLOM INSURANCE ABSTRACT AND TITLE AGENCY, INC. ("Petitioners"), on the one hand, and CAMDEN CITY BOARD OF EDUCATION, MICHAEL AZZARA and ALSTON-CALAF & ASSOCIATES ("Respondents") and THE GRAHAM COMPANY ("Graham"), on the other hand.

WHEREAS, on or about May 27, 2009, Petitioners filed a Verified Complaint in the New Jersey Superior Court, Camden County, against Respondents seeking an order to show cause and temporary restraints and other relief in connection with the awarding of the Camden Board of Education insurance broker contract to Alston-Calaf & Associates;

WHEREAS, on or about June 9, 2009, after considering submiss ons by Respondents in opposition to Petitioners' request for temporary restraints, the Hon. Franc is J. Orlando, Jr., A.J.S.C., denied Petitioner's request for temporary restraints, without prejudice, and transferred the case to the Department of Education for exhaustion of administrative remedies;

WHEREAS, the Commissioner of Education transferred the matter to the Office of Administrative Law for a hearing on a contested matter, and after a contested hearing on June 18, 2009, the Honorable Joseph F. Martone, ALJ denied Petitioners' request for temporary restraints, which was subsequently confirmed by the Commissioner;

WHEREAS, on or about December 23, 2009, Petitioners and Respondent Alston-Calaf & Associates, agreed to the terms of a settlement which fully and wholly resolved this matter, the terms of which are memorialized herein;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration (the receipt and sufficiency of which are acknowledged), it is hereby stipulated and agreed among, by and between the Petitioners, Respondents and The Graham Company as follows:

1. **Payment Terms.** Within twenty (20) days of the full execution of this Agreement, Respondent Alson-Calaf & Associates and Graham will pay Petitioners a total amount of $15,000 by delivering a draft in said amount to the Petitioners' Counsel, Joseph Betley, Esquire, made payable to "Capehart Scatchard and M &C Insurance."

2. **Dismissal With Prejudice.** Within seven (7) days of the settlement payment pursuant to paragraph 1, Petitioners shall file the appropriate Stipulation with the Office of Administrative Law and the Department of Education dismissing their claims in this matter against all Respondents, with prejudice.

3. **General Release.** Petitioners ("Releasors") hereby release, acquit, remise and forever discharge Respondents and Graham, their employees, agents, officers, shareholders, affiliates, subsidiaries, attorneys, estates, and assigns ("Releasees") from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, judgments, claims and demands whatsoever, in law or equity, whether or not heretofore known, suspected or asserted, matured or unmatured, accrued or unaccrued, direct or indirect, which against the Releasees the Releasors ever had, now have or hereinafter can, shall or may have before, upon, or by reason of any matter relating to or arising out of the claims set forth the Verified Complaint and all other pleadings, briefs, certifications, and letters filed in this Action.

4. **No Admission of Liability.** It is expressly understood that neither the execution of this Agreement nor any other action taken by the Respondents in connection with Petitioner's alleged claims or this settlement, constitutes an admission by any or all of the Respondents of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Petitioners were unwarranted,

unjustified, wrongful or otherwise unlawful. The parties agree that the Respondents have entered into the Agreement for reasons other than the merits of Petitioners' claims and that the Respondents specifically deny any liability to Petitioners or to any other persons.

5. **Governing Law.** This Agreement shall be governed by and interpreted pursuant to the laws of the State of New Jersey.

6. **Execution.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of such counterparts together shall constitute but one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for any of the other counterparts. Additionally, a photocopy of the fully executed original of this Agreement shall be deemed an original for any and all purposes.

7. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes any and all prior communications, written or oral, and understandings. This Agreement may not be amended or modified in any manner except by written agreement executed by the party to be charged.

8. **Benefit of Counsel.** All parties hereto acknowledge that they have entered into this Agreement knowingly, voluntarily and with full benefit of counsel, all of whom jointly participated in the drafting of this Agreement. Any ambiguities in this Agreement will not be construed against or in favor of any Party.

M&C INSURANCE AGENCY, INC.,

By: _____ Dated: 4/5/10
Name: DUANE Myers
Title: President

Mc INTYRE RISK MANAGEMENT, LLC,
t/a Mc INTYRE GROUP,

By: _____ Dated: 4/14/10
Name: Anthony McIntyre
Title: President

Mc CULLOM INSURANCE ABSTRACT
AND TITLE AGENCY, INC.,

By: _____ Dated: 4/5/10
Name: Lynda McCullom
Title: President

CAMDEN CITY BOARD OF EDUCATION

By: _____ Dated: 3/22/10
Name: DAVID SPENCER
Title: Director

By: _____ Dated: 3/23/10
MICHAEL AZZARA

ALSTON-CALAF & ASSOCIATES

By: _____ Dated: 4-19-10
Name: E.F. Alston, Jr.
Title: President

THE GRAHAM COMPANY

By: _____ Dated: 2/4/2010

Name: A. Peter Prinsen

Title: Vice President and General Counsel

CAPEHART SCATCHARD
ATTORNEYS AT LAW

8000 Midlantic Dr., Ste 300 S
Mt. Laurel, New Jersey 08054
Phone 856.234.6800
Fax 856.235.2786
www.capehart.com

FAX TRANSMITTAL COVER SHEET

NAME	COMPANY	FAX #
Hon. Israel Dubin	OAL	609-689-4100

FROM: Joseph F. Betley

RE: M & C Insurance

DATE: October 13, 2010

Total number of pages (including cover sheet): 7

If you do not receive all the pages, please call back as soon as possible.

Original mailed: ☐ Yes ☒ No

Operator, Date & Time Sent: _____ Confirmation #: _____

MESSAGE: Attached is Settlement Agreement.

CONFIDENTIALITY NOTE:

The documents accompanying this telephone transmission contain information from the law firm of Capehart & Scatchard, P.A., which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited, and that the documents should be returned to this firm immediately. In this regard, if you have received this telecopy in error, please notify us by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
NEW JERSEY DEPARTMENT OF EDUCATION

M&C INSURANCE AGENCY, INC., et al. Mc INTYRE RISK MANAGEMENT, LLC, t/a Mc INTYRE GROUP, Mc CULLOM INSURANCE ABSTRACT AND TITLE AGENCY, INC. Petitioners,	:	
v.	:	OAL DKT. NO. EDU 4964-09 AGENCY DKT. NO. 121-6/09
CAMDEN CITY BOARD OF EDUC., MICHAEL AZZARA, and ALSTON-CALAF & ASSOCIATES, Respondents.	:	

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (AAgreement@), dated _____, 2010, is by and between M&C INSURANCE AGENCY, INC., Mc INTYRE RISK MANAGEMENT, LLC, t/a Mc INTYRE GROUP, and Mc CULLOM INSURANCE ABSTRACT AND TITLE AGENCY, INC. (APetitioners@), on the one hand, and CAMDEN CITY BOARD OF EDUCATION, MICHAEL AZZARA and ALSTON-CALAF & ASSOCIATES (ARespondents@) and THE GRAHAM COMPANY ("Graham"), on the other hand.

WHEREAS, on or about May 27, 2009, Petitioners filed a Verified Complaint in the New Jersey Superior Court, Camden County, against Respondents seeking an order to show cause and temporary restraints and other relief in connection with the awarding of the Camden Board of Education insurance broker contract to Alston-Calaf & Associates;

WHEREAS, on or about June 9, 2009, after considering submissions by Respondents in opposition to Petitioners' request for temporary restraints, the Hon. Francis J. Orlando, Jr., A.J.S.C., denied Petitioner's request for temporary restraints, without prejudice, and transferred the case to the Department of Education for exhaustion of administrative remedies;

WHEREAS, the Commissioner of Education transferred the matter to the Office of Administrative Law for a hearing on a contested matter, and after a contested hearing on June 18, 2009, the Honorable Joseph F. Martone, ALJ denied Petitioners' request for temporary restraints, which was subsequently confirmed by the Commissioner;

WHEREAS, on or about December 23, 2009, Petitioners and Respondent Alston-Calaf & Associates, agreed to the terms of a settlement which fully and wholly resolved this matter, the terms of which are memorialized herein;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration (the receipt and sufficiency of which are acknowledged), it is hereby stipulated and agreed among, by and between the Petitioners, Respondents and The Graham Company as follows:

1. **Payment Terms.** Within twenty (20) days of the full execution of this Agreement, Respondent Alson-Calaf & Associates and Graham will pay Petitioners a total amount of $15,000 by delivering a draft in said amount to the Petitioners' Counsel, Joseph Betley, Esquire, made payable to A_____.@

2. **Dismissal With Prejudice.** Within seven (7) days of the settlement payment pursuant to paragraph 1, Petitioners shall file the appropriate Stipulation with the Office of Administrative Law and the Department of Education dismissing their claims in this matter against all Respondents, with prejudice.

3. **General Release.** Petitioners (AReleasors@) hereby release, acquit, remise and forever discharge Respondents and Graham, their employees, agents, officers, shareholders, affiliates, subsidiaries, attorneys, estates, and assigns (AReleasees@) from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, judgments, claims and demands whatsoever, in law or equity, whether or not heretofore known, suspected or asserted, matured or unmatured, accrued or unaccrued, direct or indirect, which against the Releasees the Releasors ever had, now have or hereinafter can, shall or may have before, upon, or by reason of any matter relating to or arising out of the claims set forth the Verified Complaint and all other pleadings, briefs, certifications, and letters filed in this Action.

4. **Governing Law.** This Agreement shall be governed by and interpreted pursuant to the laws of the State of New Jersey.

5. **Execution.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of such counterparts together shall constitute but one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for any of

the other counterparts. Additionally, a photocopy of the fully executed original of this Agreement shall be deemed an original for any and all purposes.

6. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes any and all prior communications, written or oral, and understandings. This Agreement may not be amended or modified in any manner except by written agreement executed by the party to be charged.

7. **Benefit of Counsel.** All parties hereto acknowledge that they have entered into this Agreement knowingly, voluntarily and with full benefit of counsel, all of whom jointly participated in the drafting of this Agreement. Any ambiguities in this Agreement will not be construed against or in favor of any Party.

M&C INSURANCE AGENCY, INC.,

By: _____ Dated: _____
Name: _____
Title: _____

Mc INTYRE RISK MANAGEMENT, LLC,
t/a Mc INTYRE GROUP,

By: _____ Dated: _____
Name: _____
Title: _____

Mc CULLOM INSURANCE ABSTRACT
AND TITLE AGENCY, INC.,

By: _____ Dated: _____
Name: _____
Title: _____

CAMDEN CITY BOARD OF EDUCATION

By: _____ Dated: 3/23/10
Name: DAVID SHARPE
Title: DIR ADM

By: _____ Dated: 3/23/10
MICHAEL AZZARA

ALSTON-CALAF & ASSOCIATES

By: _____ Dated: _____
Name: E.F. Alston, Jr.
Title: _____

THE GRAHAM COMPANY

By: _____ Dated: _____

Name:

Title: _____

RECEIVED
2010 AUG 24 A 11:03
STATE OF NEW JERSEY
OFFICE OF AG OR LAW

M&C INSURANCE AGENCY, INC.,

By: _____ Dated: 4/5/10
Name: DUANE Myers
Title: President

Mc INTYRE RISK MANAGEMENT, LLC,
t/a Mc INTYRE GROUP,

By: _____ Dated: 4/14/10
Name: Anthony McIntyre
Title: President

Mc CULLOM INSURANCE ABSTRACT
AND TITLE AGENCY, INC.,

By: _____ Dated: 4/6/10
Name: Lynda McCullom
Title: President

CAMDEN CITY BOARD OF EDUCATION

By: _____ Dated: 3/22/10
Name: DAVID SPENCER
Title: Pres. BOE

By: _____ Dated: 3/23/10
MICHAEL AZZARA

ALSTON-CALAF & ASSOCIATES

By: _____ Dated: 4-19-10
Name: E.F. Alston, Jr.
Title: President

THE GRAHAM COMPANY

By: _____ Dated: 2/4/2010

Name: A. Peter Prinsen

Title: Vice President and General Counsel

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STATE OF HAWAII
OFFICE OF ADMINISTRATIVE LAW

#531-10

OAL DKT. NO EDU 9230-10
AGENCY DKT. NO. 292-8/10

IN THE MATTER OF THE TENURE	:	
HEARING OF FAITH RICHARDSON,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF ORANGE, ESSEX 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.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/09/10
Date of Mailing: 12/09/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09230-10

AGENCY REF. NO. 292-8/10

IN THE MATTER OF THE TENURE HEARING OF FAITH RICHARDSON, SCHOOL DISTRICT OF THE TOWNSHIP OF ORANGE, ESSEX COUNTY.

Melvin C. Randall, Esq., for petitioner (Love and Randall, attorneys)

Faith Richardson, pro se

Record Closed: November 16, 2010 Decided: November 17, 2010

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

On August 4, 2010 the School District of the Township of Orange ("the District") certified tenure charges of conduct unbecoming against the respondent, Faith Richardson, a payroll bookkeeper employed by the District. On August 12, 2010 the District filed charges nunc pro tunc against Faith Richardson. Richardson filed an answer denying the charges on August 18, 2010. Having deemed the charges sufficient, if true, to warrant dismissal or reduction in salary, the New Jersey Department of Education transmitted the charges to the Office of Administrative Law ("OAL") on August 27, 2010.

On September 15, 2010 at the prehearing conference, the parties began settlement negotiation. Prior to the November 15, 2010 hearing date, the parties reached an agreement which was memorialized into a settlement document on October 29, 2010. Ms. Richardson and the Assistant Superintendent of the District and Mr. Randall the Attorney for the District approved the settlement terms.

Based upon a review of the attached settlement agreement, I **FIND** as follows:

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

2. Pursuant to the settlement agreement, Ms. Richardson will be terminated/laid off from her position immediately.

3. Ms. Richardson agrees not to seek further employment with the District. Mindful that the Orange School District is a "high poverty school district." N.J.A.C. 6A:13-3.1(a).[1] With stringent budget limitations, it is in the best interests of the parties and the public to resolve this matter without risking an uncertain conclusion after protracted and costly litigation. The settlement is financially prudent. The petitioner will be paid only from the date of her suspension to the date of the approval of the settlement by the Commissioner or for a period of up to 120 days whichever is sooner.

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

5. By the terms of the proposed settlement agreement, Ms. Richardson has entered into this agreement with a full understanding of his rights.

6. Since Ms. Richardson does not hold a "licensed position" no action will be required by the Board of Examiners.

[1] Orange was previously denoted as an "Abbott District" in accordance with the provisions of N.J.A.C. 6A:10A-1 et seq. and N.J.A.C. 6A:10-1 et seq.

7. The agreement does not contain any provisions which restrict public access under the Open Public Records Act.

I therefore **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of this settlement is in the public interest.

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

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

11/17/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: November 19, 2010

Date Mailed to Parties: NOV 19 2010

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

RESOLUTION

WHEREAS, Faith Richardson is a tenured payroll clerk with the Orange Township Board of Education; and

WHEREAS, tenure charges were filed against Faith Richardson due to excessive absenteeism, and among other things not properly using care and accuracy in the processing of payment for a substitute teacher and the negligent distribution of payroll checks; and

WHEREAS, after considerable deliberations, the parties agree that a settlement agreement would be in the best interest of the Orange Township Board of Education and Faith Richardson; and

WHEREAS, further litigation of these charges would necessitate extensive involvement and time for the School District's Administrative Staff; and

WHEREAS, settlement will avoid a prolonged trial and the uncertainties thereof; and

WHEREAS, the Orange School District (a former Abbott District) would incur substantial financial cost by continuing this litigation that would significantly exceed the cost of settlement; and

WHEREAS, the Board and Faith Richardson wish to amicably resolve their differences without the need for further litigation.

NOW, THEREFORE BE IT RESOLVED, in consideration of the aforementioned statements, covenants and understandings of the parties, the Orange Board of Education hereby approves the attached proposed settlement agreement between Orange Board of Education and Faith Richardson.

NOW, THEREFORE BE IT FURTHER RESOLVED, that Adekunle James, Board Secretary, hereby certifies that the Orange Township Board of Education at its Business Meeting of October 12, 2010 adopted the attached Resolution.

Attested to by: _____
School Business Administrator
Board Secretary

ADEKUNLE JAMES, BOARD SECRETARY
ORANGE TOWNSHIP BOARD OF EDUCATION

LOVE & RANDALL, ESQS.
57 Washington Street
East Orange, New Jersey 07017
(973) 674-6000
Attorneys for Petitioner

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Orange Township Board of Education	: State of New Jersey : Department of Education :
	: Agency Docket No.: 292-8/10
Petitioner,	: Docket No.: EDU 09230-10
vs.	:
	: Before the Commissioner of : Education
Faith Richardson	:
	: **Settlement Agreement**
Respondent.	:

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OFFICE OF ADMIN. LAW
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This matter having been opened to the Office of Administrative Law (Honorable Carol I. Cohen, A.L.J., presiding) pursuant to N.J.A.C. 1: 1-19.1, upon the joint application of Melvin C. Randall, Esq. (Love & Randall, Esqs., attorneys for the Petitioner), and Faith Richardson, Pro Se to issue a Final Decision incorporating and approving the terms of the settlement agreement annexed hereto.

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into on this 29th day of October 2010, by and between the Orange Township Board of Education with offices located at 451 Lincoln Avenue, Orange, New Jersey 07050 (hereinafter referred as the "Board")

and

Faith Richardson, whose address is 18 Kate Lane, Metuchen, New Jersey 08840

WHEREAS, Faith Richardson is a tenured payroll clerk with the Orange Township Board of Education. Said position is uncertified and hence, no action is required by the Board of Examiners; and

WHEREAS, tenure charges were filed against Faith Richardson due to excessive absenteeism, and among other things not properly using care and accuracy in the processing of payment for a substitute teacher and the negligent distribution of payroll checks; and

WHEREAS, after considerable deliberations, the parties agree that a settlement agreement would be in the best interest of the Orange Township Board of Education and Faith Richardson; and

WHEREAS, further litigation of these charges would necessitate extensive involvement and time for the School District's Administrative Staff; and

WHEREAS, settlement will avoid a prolonged trial and the uncertainties thereof; and

WHEREAS, the Orange School District (a former Abbott District) would incur substantial financial cost by continuing this litigation that would significantly exceed the cost of settlement; and

WHEREAS, the Board and Faith Richardson wish to amicably resolve their differences without the need for further litigation.

NOW, THEREFORE, in consideration of the aforementioned statements, covenants and understandings of the parties, the parties hereby agree as follows:

1. Faith Richardson shall be terminated/laid off effective immediately, subject to the approval of this agreement by the Administrative Law Judge, Carol I. Cohen, and the Commissioner of Education.
2. Faith Richardson hereby agrees not to seek future employment with the Orange Township Board of Education.
3. Faith Richardson hereby agrees to waive any and all claims either now or in the future she has or could have against the Board, its agents, employees and representatives including but not limited to claims for discrimination, contract, tort or constitutional violation contemporaneously with the execution of this agreement. This agreement shall also release and discharge the Board of Education and all other individuals from any and all claims, liabilities and expenses, including claims for tenure and any contractual or statutory benefits that may be subject to or which may have arisen from Faith Richardson's employment with the Board
4. Faith Richardson acknowledges and understands that the Commissioner of Education may reject, amend and/or modify the terms of this settlement agreement.
5. If this settlement agreement is approved by the Commissioner of Education, the Orange Township Board of Education agrees to rescind the suspension of Faith Richardson without pay and pay her full salary from the date of her suspension to the approval date of this agreement by Commissioner of Education or for a period up to One Hundred Twenty (120) days, which ever is sooner.

6. Should an inquiry be made by State of New Jersey, Department of Labor and Workforce, the Board agrees to advise that Faith Richardson was terminated/laid-off because her services were no longer needed by the Board.

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

10.21.10
Date

Faith Richardson

Witness

10/29/10
Date

Orange Township Board of Education

Patricia Arthur
Board President

Adekunle James
Board Secretary

MELVIN C. RANDALL, ESQ.
ATTORNEY FOR PETITIONER

STATE BOARD OF EXAMINERS DOCKET NO. 0405-252;
COMMISSIONER APPEAL NO. 6-10/10A

IN THE MATTER OF THE	:	COMMISSIONER OF EDUCATION
REVOCATION OF THE TEACHING	:	DECISION ON APPEAL FROM THE
CERTIFICATES OF TROY HYLICK.	:	STATE BOARD OF EXAMINERS

Decided by the New Jersey State Board of Examiners on December 11, 2006

For the Appellant, Michael A. Armstrong, Esq.

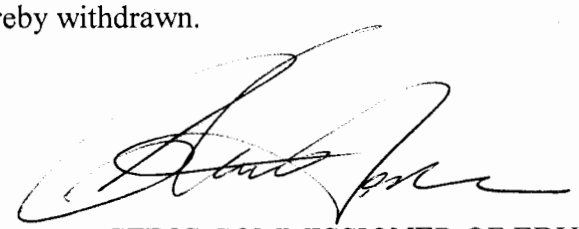
For the Respondent, New Jersey Attorney General (Shannon M. Ryan, D.A.G.)

On October 7, 2010, appellant filed with the Commissioner a notice of appeal from an order of the State Board of Examiners (the Board) revoking his teaching certificates/endorsements. By letter dated October 18, 2010, the Director of the Bureau of Controversies and Disputes (the Director) notified appellant that his notice of appeal was deficient because he failed to provide proof that he served it upon the Attorney General – counsel for the Board. An amended notice of appeal was submitted – with proof of service on the Attorney General – on October 21, 2010.

On November 4, 2010, counsel for the Board submitted a list of items comprising the record on appeal of this matter, and on November 30, 2010 an amended statement of items was filed. After reviewing same, the appellant concluded that he did not have some of the identified documents. He consequently asked for an extension of time until December 10, 2010 to file his brief in order that he might first acquire and examine said documents.

The extension was granted on November 10, 2010, but on December 8, 2010 – before appellant's brief was due – his counsel submitted a "letter in lieu of a more formal pleading," requesting that the appeal be withdrawn. Upon consideration, the Commissioner grants the request and the appeal is hereby withdrawn.

IT IS SO ORDERED.[1]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/28/10
Date of Mailing: 12/30/10

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

AGENCY DKT. NO. 614-10/10
SEC DKT. NO. C04-10

IN THE MATTER OF PAUL J. BIRCH, :
PROSPECT PARK BOARD OF :
EDUCATION, PASSAIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

This matter comes before the Commissioner to impose a sanction upon Respondent Paul J. Birch, member of the Prospect Park 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 (c) of the Code of Ethics for School Board Members – as set forth in a complaint against him. The record, the decision of the School Ethics Commission ("Commission") – including the recommended penalty of censure – and the parties' exceptions and reply thereto have been reviewed.

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. Because respondent did not file such an appeal, this decision is restricted solely to a review of the Commission's recommended penalty.[1]

Respondent argues that censure is too severe a penalty because "his actions were so attenuated from any objective impairment or interest (even if there were evidence supporting such a conclusion, which there was not) that such a distinction necessarily should be recognized by the Commissioner and the sanction reduced." The Commissioner disagrées.

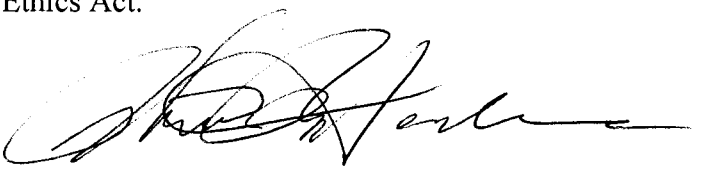
[1] Thus, the Commissioner will not consider respondent's request, in his exceptions, to amend the Commission's findings of fact.

First, prior cases – such as *In the Matter of Richard Filipek, Saddle Brook Board of Education, Bergen County,* C18-07 (June 24, 2008) – have not been decided based upon the actual potential for the respondent or his relatives to receive benefit from the respondent's actions. Thus, the distinction which respondent advocates is unsupported by precedent.

Second, the advisory opinions cited by the Commission clearly instruct that once administrators are hired, board officers with immediate family members employed by the district should not participate in discussions or actions relating to any supervising administrators – including the district Superintendent. *See, e.g.,* Advisory Opinions A30-05 (March 10, 2006); A10-00 (June 27, 2000); and A07-06 (July 31, 2006). It is undisputed that respondent participated in negotiating committee discussions, made motions at public meetings and even voted on issues relating to salaries for incumbent administrators.

The Commission found and the Commissioner concurs that the penalty of censure is congruent with penalties imposed in previously decided similar cases. Thus, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

IT IS HEREBY ORDERED that Paul J. Birch be censured as a school official found to have violated the School Ethics Act.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|13|10

Date of Mailing: 12|13|10

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL**
PAUL J. BIRCH	:	**ETHICS COMMISSION**
PROSPECT PARK BOARD OF	:	
EDUCATION	:	**Docket No. C04-10**
PASSAIC COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on February 19, 2010 alleging that Paul J. Birch, a member of the Prospect Park Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. On March 17, 2010, a Motion to Dismiss in Lieu of Answer and in Support of Claim that the Complaint is Frivolous was filed on behalf of the respondent. The complainant was accorded 20 days to respond to the motion and allegation of frivolousness. N.J.A.C. 6A:28-8.2(a). By letter dated April 12, 2010, for good cause shown, the Commission granted the complainant until April 16, 2010 to submit his responsive brief, and further advised the parties that this matter was scheduled for discussion by the Commission at its meeting on April 20, 2010 in order to make a determination regarding the respondent's Motion to Dismiss and allegation of frivolousness. N.J.A.C. 6A:28-8.3; N.J.A.C. 6A:28-10.4. The complainant submitted a reply brief on April 15, 2010.

At its meeting on April 20, 2010, the Commission voted to deny the respondent's Motion to Dismiss and further found that the complaint is not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. That decision was issued to the parties on May 26, 2010. By letter dated June 17, 2010, the complainant submitted a request to withdraw the complaint. At its meeting on June 22, 2010, the Commission considered the complainant's request, but voted to deny the request, pursuant to its discretion under N.J.A.C. 6A:28-10.6(b).

On July 6, 2010, an answer to the complaint was filed on behalf of the respondent. The complainant and respondent were notified by letter dated July 6, 2010 that the Commission would review this matter at its meeting on July 27, 2010 in order to make a probable cause determination, in accordance with procedures set forth at N.J.A.C. 6A:28-10.7.

At its July 27th meeting, the Commission found probable cause to credit Counts 1 through 6 of the complaint. A probable cause notice was issued to the complainant and respondent on September 1, 2010. Pursuant to N.J.A.C. 6A:28-7.1(c)1, because the respondent admitted the material facts in this matter, he was accorded 20 days to submit a statement setting forth the reasons he should not be found in violation of the Act, after which time the Commission would make a determination of violation on a summary basis. After obtaining an extension for good cause shown, a responsive statement was filed on September 24, 2010. The respondent does not challenge the facts set forth in the Commission's probable cause notice. In his affidavit, the respondent affirms that he did not willfully or knowingly violate the Act. (Respondent's Affidavit at p. 1) Rather, he argues that N.J.S.A. 18A:12-24(c) should not be interpreted so as to find a violation in this matter. The respondent further asserts that the Commission's prior advisories regarding N.J.S.A. 18A:12-24(c) "were somewhat confusing." (Responsive Brief at

p. 4). Referencing Advisory Opinion A10-00, (June 27, 2000) and Advisory Opinion A07-06, (July 31 2006), the respondent argues that:

> the purpose of the Commission's rulings and advisements with respect to recusal from certain employment issues and/or voting were based upon the premise that the public should not perceive that the board member's objectivity or independence of judgment was impaired due to the relationship between the administrator and the board member's employee spouse. Accordingly, the fact patterns of all of the opinions addressed substantive involvement on the part of the board member. *** However, the opinions do not advise those same board members to recuse themselves from participating in insignificant matters involving administrators, such as a vote to table a motion involving the administrator [sic] contract." (Id. at p. 6)

The respondent reasons that virtually every decision made by a member of the Board of Education will, in some way, affect its employees. Thus, unless the Commission proscribes the employment of any immediate family of any board member within the district, the respondent asserts that "only ethics violations which are clear, not speculative, and shown by a preponderance of the evidence to have impaired the objectivity of a member or clearly create some tangible to the school official [sic] or member of his immediate family should be found to be violations of the Ethics act. [sic]" (Id. at p. 7)

FINDINGS OF FACT

The following facts are deemed to be undisputed:

1. The respondent was at all relevant times a member of the Board.

2. Prospect Park is an elementary district which employs a Superintendent, Principal, Vice Principal and Business Administrator/Board Secretary as its sole administrators. http://www.prospectparknj.com/index.php?option=com_content&view=article&id=4&Itemid=14.

3. The respondent's wife is a Special Education classroom aide in the District. She has "extremely limited contact" with the Principal and Vice Principal and "virtually no contact" with the Superintendent. (Respondent's Affidavit, September 15, 2010 at p. 2.)

4. The respondent was a member of the Board's Negotiations Committee for the 2009-2010 school year. In July 2009, the Negotiations Committee met with the Superintendent to discuss 2009-2010 salaries for the non-affiliated staff, which includes the central office secretaries, the Business Administrator/Board Secretary, the Building Principal and the Vice Principal. The Committee determined to recommend a 3.5% salary increase across the board of all non-affiliated staff. At that meeting, there was also a recommendation to amend the Superintendent's employment contract for the 2009-2010 school year. (Ibid.)

5. The respondent attended the August 2009 meeting of the Negotiations Committee wherein he "listened [to] how the salary adjustment [for the Superintendent] was determined by coming to a desired annual salary and then determining the corresponding salary increase therefrom." (Id. at p. 3)

6. The Negotiations Committee gave its recommendations for the non-affiliated staff to the Board for inclusion on the September 8, 2009 Board Meeting Agenda, along with its recommendation for the amendment to the Superintendent's employment contract. (Certification of Respondent, March 16, 2010 at p. 2)

7. At the Board's meeting on September 8, 2009, while discussing the amendment to the Superintendent's contract, there were questions regarding the amendment. During the meeting, the respondent reminded the Board that the Superintendent's 2009-2010 salary increase was established by selecting a desired number and then converting same into a percentage. (Respondent's Affidavit, September 15, 2010 at pp. 3-4)

8. At the Board's meeting on September 8, 2009, the respondent voted "no" against a motion to table the amendment to the Superintendent's contract for further discussion. (Respondent's Answering Certification, June 30, 2010, at Exhibit A: Board Minutes from the September 8, 2009 Meeting at p. 10; Answer at p. 4)

9. At the Board's meeting on September 8, 2009, although the respondent abstained from the vote as to the Superintendent's 2009-2010 contract amendment, the Principal's 2009-2010 base annual salary and the Vice Principal's 2009-2010 base annual salary, he made the motions to approve the amendment to the Superintendent's contract, to approve the Principal's 2009-2010 compensation and to approve the Vice Principal's 2009-2010 compensation. (Respondent's Answering Certification, June 30, 2010, at Exhibit A: Board Minutes from the September 8, 2009 Meeting at pp. 10-11)

10. At the Board's meeting on November 17, 2009, the respondent voted "yes" to approve the revised amendment to the Superintendent's contract. (Board Minutes from November 17, 2009 at p. 13)[1]

ANALYSIS

The Commission previously found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) in connection with his actions, now set forth above in Factual Findings #4 through 10. N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business

[1] Although the respondent submitted a copy of the minutes from the Board's November 17, 2009 meeting as Exhibit D to his answering certification, that copy was incomplete. A complete copy of the minutes is appended to the complaint.

> organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

In order to find a violation of N.J.S.A. 18A:12-24(c), the Commission must find that the respondent has either: 1) taken action in his official capacity in a matter where he, or a member of his immediate family had a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment or 2) acted in his official capacity in a matter where he or a member of his immediate family had a personal involvement that is or creates some benefit to him or the member of his immediate family. The School Ethics Act at N.J.S.A. 18A:12-23 defines "member of the immediate family" as the spouse or dependent child of a school official residing in the same household. The Commission's regulations at N.J.A.C. 6A:28-1.2 define "spouse" as "the person to whom the school official is legally married under New Jersey law and also includes a partner in a civil union couple as established in N.J.S.A. 37:1-33." Thus, the respondent's spouse is a member of his immediate family.

Participation on the Negotiations Committee for District Administrators; Clarification Made at the September 8, 2009 Meeting; and Voting on November 17, 2009

There is no dispute that the respondent was a member of the Board's Negotiations Committee for the 2009-2010 school year which negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal. During the summer of 2009, the Negotiations Committee met with the Superintendent to discuss 2009-2010 salaries for the non-affiliated staff, which includes the central office secretaries, the Business Administrator/Board Secretary, the Building Principal and the Vice Principal. Thereafter, the Negotiations Committee gave its recommendations for salaries for the non-affiliated staff to the Board for inclusion in the September 8, 2009 Board Meeting Agenda, along with its recommendation for the amendment to the Superintendent's employment contract. At the Board's meeting on September 8, 2009, while discussing the amendment to the Superintendent's contract, there were questions regarding the amendment. During the meeting, the respondent reminded the Board that the Superintendent's 2009-2010 salary increase was established by selecting a desired number and then converting the same into a percentage; he abstained from voting on the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal.

Later, at the Board's meeting on November 17, 2009, the respondent voted "yes" to approve the revised amendment to the Superintendent's contract. As to this vote, the respondent states that he incorrectly believed that his prior abstention from voting on September 8, 2009, coupled with the approval granted by the Executive County Superintendent to the

Superintendent's contract rendered it "absolutely proper" that he participate in this vote. (Answer at p. 6).

Initially, the Commission reflects on the advisories referenced by the respondent in his responsive statement to the probable cause notice. In Advisory Opinion A10-00, (June 27, 2000), a board member's spouse was employed as a teacher in a K-8 district with 900 students; the Superintendent, Principal and Vice Principal were located in the same building as the board member's spouse. The question before the Commission was whether the board member may participate in discussions and votes involving the appointment of the Superintendent, Principal and Vice Principal or other employment issues regarding these positions. Although the Commission therein advised that, pursuant to N.J.S.A. 18A:12-24(c), the board member may participate in the *search* for a Superintendent, Assistant Principal and Principal, as well as *vote on the initial appointments*,[2] the Commission also advised that the board member "would violate N.J.S.A. 18A:12-24(c) of the Act if he were to participate in discussions and vote on employment issues concerning the administrators who supervise" his spouse after the administrators are appointed. A10-00 at p. 3.

In Advisory Opinion A07-06, (July 31 2006), a board member in a nine-school pre K-12 district had a spouse who worked as a teacher's assistant at the high school and was supervised by the Principal who was supervised by the Assistant Superintendent who was supervised by the Superintendent. Again, the questions before the Commission were whether the board member may participate in the hiring of the Superintendent and in any employment issues regarding the Superintendent. The Commission advised the board member that s/he would violate N.J.S.A. 18A:12-24(c) if s/he participated in the hiring of the Superintendent because the current Assistant Superintendent was a candidate to become Superintendent. Additionally, the Commission advised that the board member would violate the Act if s/he were "to participate in any employment issues regarding the Superintendent." A07-06 at page 3.

Thus, with respect to whether a board member with an immediate family member working in the District is permitted to participate in the *search, selection and vote to hire* the Superintendent (or other administrators), issues which are not specifically before the Commission in this matter, the Commission has considered whether the board member is familiar with any of the candidates for the position(s) to be filled. However, *once the administrators are hired*, the Commission has advised that the board member with an immediate family member employed in the District may not participate in any "employment issues" relative to the supervising administrators. Indeed, in Advisory Opinion A30-05 (March 10, 2006), the Commission advised that the board member identified as "B," whose spouse worked as a secretary in the High School nurse's office, must recuse himself **"from all discussions and votes"** with regard to the High School Principal and Superintendent. (A30-05 at p. 4; emphasis added) See also, Advisory Opinion A07-06 (July 31 2006) and Advisory Opinion A23-06 (November 15, 2006).

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[2]The Commission reasoned that although these administrators could all be considered supervisors of the board member's spouse, it would not be reasonable for the public to expect that a board member, with a spouse who teaches in the district, would choose to appoint administrators who are most likely to be financially favorable to teaching staff, especially since teachers are employed pursuant to a collective bargaining agreement. The Commission specifically cautioned that "[t]his may change if the selection is for someone who already knows the board member's spouse." A10-00 at page 2.

With respect to the within matter, the Commission further notes that the respondent's participation as a member of the Board's Negotiations Committee for the 2009-2010 school year which negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal could not plausibly be characterized as involvement in "insignificant matters involving administrators," as argued in his responsive brief. (Responsive Brief at p. 6) As such, the Commission finds that the respondent's participation on the Negotiations Committee, together with his participation in the September 8, 2009 discussions, was well within the clear proscriptions set forth in the above advisories. Similarly, the Commission finds that the respondent's vote on November 17, 2009 to approve the amendment to the Superintendent's contract was improper, in accordance with the Commission's above advisories and its recent decisions. See, I/M/O William Depsee, Woodland Park Board of Education, Passaic County, C30-09 (January 26, 2010), Commissioner of Education Decision No. 65-10SEC, decided March 11, 2010; I/M/O Charles Carey, Pennsauken Bd. of Ed., Camden County, C33-08 (March 23, 2010), Commissioner of Education Decision No. 168-10A, decided June 3, 2010; I/M/O Frank Minniti, Greenwich Twp Bd. of Ed., Gloucester County, C08-09 (May 25, 2010), Commissioner of Education Decision No. 208-10SEC, decided July 12, 2010; I/M/O Thomas Guarascio, Berkeley Township Bd. of Ed., Ocean County C40-08 (April 20, 2010), Commissioner of Ed. Decision No. 170-10SEC, decided June 4, 2010; and I/M/O Carey, Pennsauken Bd. of Ed., Camden County C27-09 (April 20, 2010), Commissioner of Education Decision No. 169-10SEC, decided June 4, 2010.

The Commission so finds, notwithstanding that the respondent's spouse has "extremely limited contact" with the Principal and Vice Principal and "virtually no contact" with the Superintendent. (Respondent's Affidavit, September 15, 2010 at p. 2.) As noted in I/M/O Charles Carey, Pennsauken Bd. of Ed., Camden County, C33-08 (March 23, 2010) Commissioner of Education Decision No. 168-10A, decided June 3, 2010, the Superintendent has general supervision over all aspects of the schools, N.J.S.A. 18A:17-20, which allows for a variety of managerial actions or decisions that could affect the employment of the respondent's spouse. See, Carey at p. 4.

Moreover, the decision to abstain from the votes pertaining to the Superintendent, Principal and Vice Principal does not necessarily shield the respondent where he had already, by his involvement on the Negotiations Committee, participated in discussions regarding the salaries of these administrators that were not open to the public. In I/M/O Richard Filipek, Saddle Brook Bd. of Ed., Bergen County, C18-07 (June 24, 2008) Commissioner of Education Decision No. 317-08SEC, decided July 23, 2008, the Commission found that the respondent Board member, whose spouse was employed in the District, violated N.J.S.A. 18A:12-24(c) by being present in his capacity as president of the Board and running two closed session meetings of the Board when the tenure appointment of the middle/high school principal, his wife's direct supervisor, was discussed, notwithstanding that he did not participate in the vote. The Commission found that the respondent had 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.

Thus, the Commission finds that the respondent was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c) when he: (1) participated on the Board's Negotiations Committee for the 2009-2010 school year and negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal; (2) made clarifying statements at the September 8, 2009 meeting as to the Superintendent's contract; and (3) voted to approve the revised amendment to the Superintendent's contract at the November 17, 2009 meeting.

Making Motions and Voting Against the Motion to Table

At the Board's meeting on September 8, 2009, the respondent voted "no" against a motion to table the amendment to the Superintendent's contract. Moreover, although he abstained from the vote as to the Superintendent's 2009-2010 contract amendment, the Principal's 2009-2010 base annual salary and the Vice Principal's 2009-2010 base annual salary, he made the motions to approve the amendment to the Superintendent's contract, to approve the Principal's 2009-1010 compensation and to approve the Vice Principal's 2009-1010 compensation.

The respondent argues that "[i]t would be an anomaly indeed for the [C]ommission to find that I was somehow currying favor with the [S]uperintendent for the benefit of my wife by substantially reducing his proposed stipend." (Answer at p. 4) The respondent further asserts that he was not advised to recuse himself from the motion to table the discussion of the contract (id.) and, in any event, characterizes his vote against tabling the motion on September 8, 2009 as an "insignificant matter" that could not be reasonably anticipated in the proscriptions set forth in the Commission's advisories. (Responsive Statement at p. 6)

In I/M/O Alexander Sipos, Garfield Bd. of Ed., Bergen County, C20-99 (May 23, 2000) Commissioner of Education Decision No. 221-00SEC, decided July 10, 2000, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) when he made motions to pass resolutions that resulted in the appointment of his wife to two positions with the Board. Although there was no information before the Commission to indicate that the respondent participated in the discussions or involved himself in the decision to hire his wife, and notwithstanding that the respondent argued he made the motion as the chairperson of the Personnel Committee, that the resolutions were en masse and he excused himself from the vote, the Commission nevertheless found that the respondent acted in his official capacity. The Commission explained,

> Making a motion that places a matter before the board for its vote is the way board business is conducted. Without the initial motion, no business takes place. Therefore, Mr. Sipos' moving the resolutions to hire his spouse on two instances was clearly acting in his official capacity. Pursuant to the Act, it is of no moment that he moved all the personnel committee recommendations or that he

> moved them en masse. The only question is whether Mr. Sipos acted in his official capacity, which he clearly did. Sipos at p. 3

The Commission finds that the respondent's actions, taken together, demonstrate that, after participating on the Negotiations Committee which negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal, the respondent advanced these arrangements by making motions, or voting against a motion to table, so as to bring these compensation decisions to the Board. Thus, the Commission finds that the respondent was acting in his official capacity in a matter where a member of his immediate family had an indirect financial involvement which a reasonable person could perceive to impair the respondent's objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c) when he: (1) voted "no" against a motion to table the amendment to the Superintendent's contract; and (2) made motions at the September 8, 2009 meeting to approve the Superintendent's 2009-2010 contract, the Principal's 2009-2010 compensation and the Vice Principal's 2009-2010 compensation.

DECISION

For the reasons set forth above, the Commission finds that Paul J. Birch violated N.J.S.A. 18A:12-24(c) when he: (1) participated on the Board's Negotiations Committee for the 2009-2010 school year and negotiated the amendment to the Superintendent's contract, as well as the salaries for the Vice Principal and Principal; (2) made clarifying statements at the September 8, 2009 meeting as to the Superintendent's contract; (3) voted to approve the revised amendment to the Superintendent's contract at the November 17, 2009 meeting; (4) voted "no" against a motion to table the amendment to the Superintendent's contract; and (5) made motions at the September 8, 2009 meeting to approve the Superintendent's 2009-2010 contract, the Principal's 2009-2010 compensation and the Vice Principal's 2009-2010 compensation.

PENALTY

The Commission recommends a penalty of censure. In weighing the appropriate penalty in this matter, the Commission has considered the respondent's statement in response to its probable cause notice as well as his repeated assertions in his answer that his actions were guided by counsel's advice.

In Guarascio, supra, the Commission recommended a penalty of censure for six violations of voting where the respondent was conflicted, notwithstanding that four of the violations occurred within minutes of the time that he was sworn in. The Commission therein noted that the fifth violation occurred during an Executive Session meeting when the respondent participated in a discussion concerning the automatic renewal of the Superintendent's contract, then when he voted in the affirmative in a 5-4 vote not to automatically renew the Superintendent's contract. Even after the Board member completed training in June 2008, there was a sixth violation on September 23, 2008 when he voted to reappoint his wife as club sponsor for the Scrapbook Club.

In Sipos, supra, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) when, after being elected to the Board in 1997, he made motions to pass resolutions in July

1998 and January 1999 that resulted in the appointment of his wife to two positions with the Board. The Commission recommended a penalty of censure and the Commissioner approved the penalty.

In Filipek, supra, the Commission recommended a penalty of censure for the Board member, notwithstanding that he did not participate in the vote and there was a single violation. The Commission therein cited to SEC v. Michael Kilmurray, Lacey Twp. Bd. of Ed., Ocean County, C12-94 (January 27, 1998), Commissioner of Education Decision No. 155-98 (April 15, 1998) where it found 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." (Kilmurray at p. 3) The Commission finds this case particularly applicable to the within matter, since the respondent engaged in negotiations and discussion regarding the compensation package for the Superintendent, Principal and Vice-Principal prior to these matters being brought before the full Board.

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.

Robert W. Bender
Chairperson

Mailing Date: October 27, 2010

Resolution Adopting Decision – C04-10

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

Whereas, at its meeting on July 27, 2010, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the respondent was so notified and accorded 20 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 September 28, 2010, the Commission determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended a penalty of censure; and

Whereas, at its meeting on October 26, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on October 26, 2010.

Joanne Boyle
Executive Director

534-10

AGENCY DKT. NO. 615-10/10
SEC DKT. NO. C02-10

FRANK DIGESERE,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN CAMPBELL, KEARNY BOARD OF EDUCATION, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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 John Campbell, member of the Kearny 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 (d) and (e) of the Code of Ethics for School Board Members as set forth in Count 1 against him.[1]

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 respondentl.

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

[1] Count 1 of the complaint alleges that Mr. Campbell visited the High School field house in September 2009 and verbally and physically harassed and intimidated employees whom he believed were being disrespectful to his position as a board member.

P.L. 2008,c. 36 and *N.J.A.C.* 6A:4 which did not happen here. 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 finds this penalty congruent with that imposed in previously decided similar cases. As such the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly IT IS hereby ORDERED that John Campbell be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|13|10

Date of Mailing: 12|13|10

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

FRANK DIGESERE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
JOHN CAMPBELL,	:	**Docket No. C02-10**
KEARNY BOARD OF EDUCATION	:	**DECISION**
HUDSON COUNTY	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on February 1, 2010 by Frank Digesere, Superintendent of the Kearny School District, alleging that John Campbell, a member of the Kearny Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. By notice dated February 1, 2010, the complainant was notified that the complaint was deficient and, therefore, not accepted. On February 16, 2010, the complainant submitted an amended complaint, which was also deficient; by letter dated February 17, 2010, the complainant was so notified. On March 10, 2010, another amended complaint was filed, which was accepted by the Commission. Therein, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(d), (e), (f), (g) and (i) of the Code of Ethics for School Board Members.

An answer was filed on behalf of the respondent on April 9, 2010. Thereafter, on April 15, 2010, a Motion to Dismiss was also filed on behalf of the respondent. The complainant was accorded 20 days to respond to the motion, which included an allegation that the complaint was frivolous. The complainant filed his response to the motion on April 29, 2010.

At its meeting on May 25, 2010, the Commission voted to grant the respondent's Motion to Dismiss Count 3 of the complaint[1], as well as the allegation that the respondent violated N.J.S.A. 18A:12-24.1(i) as alleged in Count 2. The Commission further found that the complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. Pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to retain this complaint for hearing at a later date.

By letter dated August 10, 2010, the parties were notified that the hearing in this matter would take place at the Commission's meeting on September 28, 2010. The parties were reminded that the complainant has the burden to factually establish a violation of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a) and that the hearing before the Commission shall be conducted in accordance with the rules of the Office of Administrative Law (OAL). N.J.A.C. 6A:28-10.8(c).

Both parties attended the meeting on September 28, 2010. The complainant appeared pro se. The respondent, John Campbell, appeared with counsel, Frederick Dunne, Esq. After

[1] In Count 3 of the complaint, the complainant alleges that the respondent entered a classroom at the High School on November 12, 2009 without authorization or permission, and proceeded to his niece's desk to give her a tee shirt, disrupting the classroom instructional session. The complainant asserts this is a violation of N.J.S.A. 18A:12-24.1(e) and (i). (Complaint at paragraph 3)

hearing all testimony, the Commission voted during the public portion of its meeting to find that the respondent violated N.J.S.A. 18A:12-24.1(d) and (e) and of the Code of Ethics for School Board Members and to recommend a penalty of censure, for the reasons set forth below.[2]

SUMMARY OF THE RECORD

The complainant called as his first witness Leonard Cuba, a member of the grounds crew for the Kearny School District. Mr. Cuba testified that one day at the beginning of the 2009-2010 school year, when he was on his lunch hour, the respondent walked into the field house garage and said, "You're just the man I'm looking for." Mr. Cuba asked the respondent what he could do for him and, according to Mr. Cuba, the respondent turned and poked him in the shoulder and said, "Who do you think you are, a wise guy?" Mr. Cuba asked the respondent what he was talking about and the respondent referred to an interaction they had the week before. According to Mr. Cuba, the week before he was summoned to the Board office for a "Board run;" that is, he was asked to deliver documents to Board members. He was, at the time, sitting on a bench when the respondent walked by and questioned Mr. Cuba; Mr. Cuba jokingly responded that he was "waiting for a bus." Mr. Cuba testified that when the respondent later came into the field house he said to him, "Who do you think you are being disrespectful?" Cuba responded that it [the bus stop comment] was a joke. The respondent said that he would be watching Mr. Cuba. Mr. Cuba said he felt intimidated; he stepped back when the respondent poked him. Mr. Cuba testified that he would have "put down" someone [other than a Board member] who said this to him.

On cross-examination, Mr. Cuba stated that there was no one else present in the field house that day. He said that he reported the incident to his supervisor, Mr. Bruscino, the next day. He also acknowledged that it was the Superintendent who asked him to "file a complaint." In response to questioning from the Commission, Mr. Cuba explained that the field house is a maintenance shed and the public has access to the building.

Brian Hohmann is a teacher and coach in the District. He testified that on the evening of October 16, 2009, after a football game, he went to the respondent's home to retrieve a jacket that belonged to him which the respondent had taken from the field house earlier that evening during the game. Mr. Hohmann explained that he secretly taped the conversation with the respondent that evening.

According to Mr. Hohmann, as he was leaving the respondent's house, the respondent revealed "insider information" about two football players involved in a disciplinary incident. Mr. Hohmann recalled the respondent saying that he disagreed with actions taken by the Board; that a majority of the board was in favor of taking a harder line with the boys, but he was a little more open to being lenient and open to allowing them back on the team. Mr. Hohmann stated that he was pretty surprised by the respondent's statements, as they were irrelevant to his purpose

[2] Although the complainant called Marcy Fisher, president of the local education association to testify, Mr. Dunne objected to her testimony in that she has no first-hand knowledge of any incidents in the remaining counts of the complaint. Accordingly, she was dismissed by the Commission as a witness.

for being there, but reasoned that the respondent made the statements because he is a coach and these were his best players. Mr. Hohmann testified that as to the Board's actions with respect to these students, he "had no idea what was going on."

When cross-examined, Mr. Hohmann testified that the respondent did not mention any names and did not disclose that there was discussion about the students in a closed session meeting. Mr. Hohmann could not recall that the respondent mentioned a vote coming up. As to whether the respondent told Mr. Hohmann anything about these students' activities that the witness did not know, Mr. Hohmann responded, "Not specifically." Mr. Hohmann acknowledged that the respondent said something to the effect that it must be tough on the team to not have the students able to play.

As to why Mr. Hohmann taped the conversation with the respondent, he explained that he had spoken to the respondent earlier that evening by telephone and "there was a conflict" about what exactly had happened with respect to Mr. Hohmann's jacket. Mr. Hohmann further explained that there was "already bad blood" between them and he believed that if the respondent saw him, there was a likelihood he would not tell the truth about the jacket. The witness explained that although he did not tell the respondent that he was taping, he did not "bate him" either. Mr. Hohmann further explained that the "bad blood" between them was because, upon an earlier resignation, the respondent tried to prevent him from being rehired as a coach. He also "had a healthy skepticism" about what transpired that night with respect to his jacket. Yet, according to the witness, he was congenial with the respondent that evening "with no ill feelings." According to Mr. Hohmann, his point in making the visit to the respondent's home was to establish boundaries with Board members. Mr. Hohmann acknowledged that he has taped other conversations with people before and has done so without disclosing to people that they are being taped.

Mr. Hohmann stated that when he left the respondent's home that evening, he believed everything was resolved. He testified that he shared the tape with the head coach. According to Mr. Hohmann, when the respondent "denied what happened," he thought it was in the community's best interest for the public to know. He then shared the tape with the Superintendent.

On redirect examination, Mr. Hohmann explained that he secretly taped the conversation because there were "detrimental issues that took place that night." He stated that he and the coach decided that Board members should not feel privileged about walking into the field house; he recorded the conversation because he did not think that the respondent would be honest when he showed up at his home to retrieve his jacket. According to Mr. Hohmann, the respondent's comment about the students was made as he was leaving the respondent's house, just "in passing reflecting on the game—if you had the [name] brothers you probably would have won." Mr. Hohmann stated that he was unaware that the Board was debating punishment and that the majority of the Board was against the students.

Alfred Somma was the Kearny High School Principal during the 2009-2010 school year. Mr. Somma testified that the respondent came to his office and questioned him about why his niece was not being called to substitute in the District. Mr. Somma explained to the respondent

that he does not call the substitutes, his secretary calls them. Mr. Somma stated that he told the respondent that he did not know that the respondent's niece was on the list. However, Mr. Somma stated that, after the respondent left, he inquired about the respondent's niece and learned that when she substituted in the past, she had received bad reports from the High School. According to Mr. Somma, the respondent then spoke with Mr. Somma's secretary, since she calls the substitutes. His secretary reported that the respondent questioned her about his niece.[3]

Mr. Somma also testified about a phone call that he received from Assistant Superintendent Robert Sprague. According to Mr. Somma, Mr. Sprague told him that the respondent had been questioning Mr. Sprague about Mr. Somma's alleged misuse of school funds and the respondent told Mr. Sprague "that he was out to get me." Mr. Somma stated that he was upset about the comment and he felt threatened.[4]

On cross-examination, Mr. Somma acknowledged that the respondent did not ask him to call his niece to substitute teach. Mr. Somma was not aware of the exact words that the respondent said to his secretary, but he stated that his secretary "felt uncomfortable about the conversation." Mr. Somma testified that the respondent did not tell his secretary to call his niece. In response to questioning from the Commission, Mr. Somma stated that "on occasion," members of the public also ask about procedures for selecting substitutes and he tells them he has a list which the secretary uses to obtain the needed substitutes. They try to maintain an accurate list. Mr. Somma further explained that sometimes the substitutes themselves ask about selection procedures and sometimes they get questions from relatives of the substitutes.

On cross-examination, Mr. Somma also explained that while he was the Vice Principal of Athletics, apparel was sold as a fundraiser. The funds went into the athletic account. Mr. Somma stated that it was brought to his attention that the respondent was questioning the use of the funds; these questions were directed to the Assistant Superintendent.

Assistant Superintendent Robert Sprague testified that he had a discussion with the respondent who indicated that he was pursuing an investigation into the alleged improper use of funds by Mr. Somma. According to Mr. Sprague, there were two points made by the respondent during this discussion: one had to do with the Superintendent's alleged involvement in the improper use of school funds and one had to do with Mr. Somma's alleged involvement in the improper use of school funds.

Pursuant to N.J.A.C. 6A:28-8.3(d), upon completion of complainant's case, and prior to the respondent's testimony, as set forth below, the respondent's counsel moved to dismiss the remaining counts in the complaint. After hearing arguments from the parties, the Commission asked the parties to leave the room so that it could deliberate. The Commission determined to deny the Motion to Dismiss. Upon resumption of the hearing, the respondent's counsel called his witnesses, as summarized below.

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[3] Although Mr. Somma did not provide a date when the incident occurred, the complaint states that it was January 19, 2010. (Complaint at Count 4)

[4] Although the witness did not provide a date when the incident occurred, the complaint states that the respondent telephoned the Assistant Superintendent on February 5, 2010. (Complaint at Count 5)

Mark Bruscino, Director of Facilities, testified as Mr. Cuba's supervisor. He stated that he talked with Mr. Cuba after the incident when Mr. Cuba told the respondent that he was waiting for a bus. Mr. Bruscino believed that the respondent thought that Mr. Cuba was being sarcastic and he was annoyed because there was "summer help" present who overheard the interaction. Mr. Bruscino stated that he asked Mr. Cuba not to be sarcastic. Mr. Bruscino testified that he is aware that the respondent later came into the field house, pointed at Mr. Cuba and spoke with him. Mr. Bruscino testified that he does not recall how the conversation between Cuba and the respondent ended.

On cross-examination, Mr. Bruscino stated that complaints should be taken to the Superintendent. He further testified that he has received complaints from Board members and he directed them to the personnel involved in order to determine whether they were valid. When appropriate, the staff person might be verbally reprimanded. Mr. Bruscino acknowledged that Mr. Cuba's statement to the respondent could have been in jest, but he advised Mr. Cuba to be cautious. There was no complaint made to the Superintendent about this matter.

In response to questions from the Commission, Mr. Bruscino explained that the building where the respondent entered to speak to Mr. Cuba is a maintenance shed on the bottom floor and the locker rooms are above the maintenance area. The witness explained that sometimes people walk around the track and, therefore, members of the public may be present. As for the maintenance area, Mr. Bruscino said there is a garage door that is usually left open, although they do not want the general public there. Members of the public are not supposed to be where the staff desks are located, which is about 40 feet from the entrance. The field crew uses this area to work.

The respondent, John Campbell, testified that the day after Mr. Cuba made the "waiting for a bus" comment, he went to Mr. Bruscino and told him what happened. Mr. Campbell told Mr. Bruscino that he thought the comment was disrespectful and that Mr. Bruscino should talk to Mr. Cuba. Mr. Campbell acknowledged that he entered the field house, "but not back 40 feet." He explained that he is a member of the Facilities Committee. The Committee had taken a previous tour of the field houses because there was work to be done on these buildings. According to the respondent, he went to the field houses again that day in September 2009 to "take a second look."

Mr. Campbell stated that he entered the field house and saw Mr. Cuba with his feet up on his desk watching television. Mr. Campbell stated, "You're just the guy I wanted to see." He told Mr. Cuba that he embarrassed him [with his bus stop comment] in front of the summer help and he should not have said that. Mr. Campbell affirms that he did not touch or threaten Mr. Cuba; neither did he tell Mr. Cuba that he would be watching him. The respondent felt this was a "man to man" talk; Mr. Cuba said that his earlier comment was a joke and it would not happen again. Mr. Campbell then looked at the exterior of the field house where work is needed.

Mr. Campbell testified about the night that Mr. Hohmann came to his house. That evening, the respondent had attended a football game, along with another Board member. It started raining and he borrowed a jacket. He did not ask Mr. Hohmann if he could borrow it. He intended to wear the jacket during the game, then give it back. He wore the jacket to get his car,

then took it home. Mr. Campbell testified that Mr. Hohmann called his house that night and said, "You have my jacket." The respondent replied that someone said he could borrow it and he did. Mr. Campbell stated that he told Mr. Hohmann he would return the jacket the next day, but Mr. Hohmann said he wanted it that night. Again, the respondent said he would return it the next day, but Mr. Hohmann said he wanted it immediately. The phone call ended; Mr. Hohmann called Mr. Campbell a second time and said that if the respondent did not give him the jacket that evening, he would call the police. Mr. Hohmann then "showed up at the door" and Mr. Campbell gave back the jacket.

Mr. Campbell stated that there were two students suspended for stealing laptop computers; this was common knowledge throughout the town. Mr. Campbell testified that he believed it was in the paper and talked about all over town. Mr. Campbell was shown a copy of a Kearny Police Department incident report; he affirmed that he did not say anything to Mr. Hohmann that was not in that report. He denied that he told Mr. Hohmann how members were going to vote, what they were going to do, or that he revealed anything that was said in closed session.

Mr. Campbell testified that he spoke with Mr. Somma and his secretary about the process for calling substitutes. He asked how they choose the substitutes and whether there was a list. Mr. Campbell testified that Mr. Somma said he did not handle that; he needed to speak to Mr. Somma's secretary. Mr. Campbell stated that the secretary explained the process to him, but it is known in the High School that only the "top names" on the list were being called. Mr. Campbell said that he raised the issue with Somma, but did not ask him or the secretary to hire his niece.

Mr. Campbell said he had "several discussions" with Mr. Sprague when he was the Principal of Franklin School. According to the respondent, he did not tell Mr. Sprague that he was "out to get" Mr. Somma. The respondent stated that there is an investigation underway and he made that information public at a Board meeting. Mr. Campbell attributes the within complaint to the fact that he reported funds being mishandled in the District.

On cross-examination, Mr. Campbell acknowledged that he entered the field house around 11:30 during the work day. He also acknowledged that he did not notify central office that he was going to look at facility. He did not bring the matter of Mr. Cuba's comment to him to the attention of central office staff. Mr. Campbell stated that he went to Mr. Cuba's supervisor; he reasoned that if Mr. Bruscino "thought it was worthy," then he would refer the matter to the Superintendent. Mr. Bruscino handled the matter by having a discussion with Mr. Cuba. The respondent reiterated that it was his intent that day to look at the field house, not talk to Mr. Cuba. He stated that he has "known Lenny for 30 years" and he was surprised he acted the way he did.

Mr. Campbell further testified that on the evening of the football game, he did not enter the locker room area, he entered the field house about 10 steps; he asked the equipment manager about the jacket. Mr. Campbell testified that the equipment manager did not say anything; he later borrowed a jacket.

Although Mr. Campbell acknowledged that the Board did discuss the discipline for the two students, he never stated to Mr. Hohmann that some board members were looking for a harsher penalty. He said that he was sure Mr. Hohmann missed the two boys and he said he did miss them.

Mr. Campbell testified that the reason he went to speak with Mr. Somma was to talk about the tape that Mr. Hohmann made and Mr. Somma said he did not know about it. When he was there, the respondent asked Mr. Somma about procedures for hiring substitutes. The Board was not aware that he was going to talk to Mr. Somma. Mr. Campbell denied speaking to Mr. Sprague about an investigation.

In response to questions from the Commission, Mr. Campbell stated that he believed that the names of the students who were suspended were in the paper because they were adults. He clarified that the Board's discussion of the students was prior to the time Hohmann came to his home. The Commission accepted the Kearny Police report into evidence as Exhibit R-1.

George King is Deputy Police Chief in Kearny. He is currently a member of the Board, but was not on the Board at the time of the incidents in question. Deputy Chief King testified about Exhibit R-1. He stated that the information in the report is available to the public. He provided a copy of the report to the respondent. Mr. King testified that the respondent approached him at the end of August or beginning of September in 2009 regarding the theft of the laptops and asked the Deputy what information he could tell him. The Deputy said that he was familiar with the investigation, but not sure about releasing information. Mr. King checked into the matter and determined that the students were both adults, so he told the respondent about the charges, the amount of bail and that the matter had been referred to the prosecutor's office.

On cross-examination, Deputy Chief King noted that there was nothing in the police report that would reveal or confirm any actions taken by the Board. The Board would administer its own discipline to the students. In response to questioning from the Commission, the witness explained that because Mr. Somma initiated the police complaint, the District was aware of the criminal action pending.

Respondent's Exhibit[5]

R-1	Kearny Police Department Incident Report #901702

FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witnesses and to judge their credibility. As such, the Commission found that the respondent was generally not a convincing witness. Additionally, while the Commission found Mr. Cuba, Mr. Somma and Mr. Sprague to be credible witnesses and the Commission has accepted their testimony, the Commission found that Mr. Hohmann's testimony was not trustworthy, for the reasons set forth in the analysis of Count 2, below. Thus, the Commission makes the following factual findings:

[5] The complainant did not offer any exhibits into evidence.

1. The respondent was at all times a member of the Board.

2. In late summer 2009, Leonard Cuba, who is a member the field crew in the District, was at the Board office waiting for documents that were to be part of a "Board run." When the respondent saw Mr. Cuba and inquired about why he was there that day, Mr. Cuba responded that he was "waiting for a bus."

3. The next day, Mr. Campbell spoke with Mark Bruscino, Mr. Cuba's supervisor, about Cuba's statement. Mr. Campbell told Mr. Bruscino that he thought the comment was disrespectful and that Mr. Bruscino should talk to Mr. Cuba.

4. In early September 2009, Mr. Campbell entered the field house in the middle of the work day and, seeing Mr. Cuba, stated, "You're just the guy I wanted to see." The respondent told Mr. Cuba that he embarrassed him by making an earlier comment to him about waiting at a bus stop in that the comment was made in the presence of the summer help.

5. On the evening of October 16, 2009, Brian Hohmann, a teacher and coach, went to the respondent's home in order to retrieve a jacket that Mr. Campbell had taken from the field house earlier that evening during the football game. Mr. Hohmann surreptitiously taped the conversation between himself and Mr. Campbell.

6. As Mr. Hohmann was leaving Mr. Campbell's house, talk turned to two students who had been on the football team, but had not played because they were suspended for disciplinary reasons. Mr. Campbell stated that Mr. Hohmann must be missing these players.

7. Mr. Campbell went to speak to Alfred Somma, Principal of the Kearny High School. It is not clear from the testimony what date this conversation took place. Mr. Campbell asked Mr. Somma about the procedures used by the school to contact substitutes, because Mr. Campbell's niece is a substitute. Mr. Somma informed Mr. Campbell that his secretary had a list and made the calls for substitutes.

8. Mr. Campbell then spoke to the secretary about the procedures for contacting substitutes.

9. Mr. Campbell did not ask Mr. Somma or his secretary to call his niece.

10. Mr. Campbell had a conversation with Assistant Superintendent Robert Sprague about the alleged involvement of the Superintendent and Mr. Somma in the improper use of school funds. It is not clear from the testimony when this conversation took place.

11. Mr. Somma received a telephone call from Mr. Sprague who reported to Mr. Somma that Mr. Campbell questioned Mr. Sprague about Mr. Somma's alleged misuse of school funds. It is not clear from the testimony when this conversation took place.

ANALYSIS

The complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). Here, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(d), (e), (f), (g) and (i). Each statutory provision is set forth below, together with the regulatory standard establishing the complainant's factual burden of proof.

Count 1

In Count 1 of the complaint, the complainant alleges that the respondent visited the High School field house in September 2009 and verbally and physically harassed and intimidated employees that he believed were being disrespectful to his position as a board member. The complainant asserts this is a violation of N.J.S.A. 18A:12-24.1(d), (e) and (i). (Complaint at paragraph 1) The Commission first considers N.J.S.A. 18A:12-24.1(d), which states:

> 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.

The Commission's regulations further provide:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became 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. N.J.A.C. 6A:28-6.4(a)4.

It is clear from this record that the respondent was embarrassed by Mr. Cuba's statement that he was "waiting for a bus," which was undisputedly made to the respondent about a week before their interaction in the field house. The Commission was not persuaded by the respondent's testimony that he returned to the field house the following week to take "a second look" at the facilities. Rather, the Commission is convinced that the respondent sought out Mr. Cuba during his work day in order to speak with him about a comment which the respondent believed to be disrespectful. Indeed, the respondent himself testified that he told Mr. Bruscino about the comment and also advised Mr. Bruscino that he should talk to Mr. Cuba. In so doing, the Commission finds that the respondent became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. It was not the respondent's place as a Board member to advise Mr. Bruscino to speak with Mr. Cuba and it was certainly not the respondent's place to confront Mr. Cuba in any manner regarding what he perceived to be a disrespectful comment. Thus, the Commission finds that the complainant has established that the respondent violated N.J.S.A. 18A:12-24.1(d).

The Commission next considers whether the respondent violated N.J.S.A. 18A:12-24.1(e), which states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission's regulations further provide:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

As noted above, the Commission is not persuaded by the respondent's testimony that he returned to the field house the following week to take "a second look" at the facilities. However, even assuming that this was the reason for his appearance at the field house that day, no other member of the Facilities Committee was present and the respondent did not let the administration know that he was going to be at the field house for this purpose. Thereafter, the respondent took it upon himself to interact with Mr. Cuba; the Commission finds this to be "private action," or action taken outside the scope of the respondent's duties as a Board member. The Commission further finds that the respondent's private action was of such a nature that it had the potential to compromise the Board as it may well have sparked an impulsive reaction from Mr. Cuba.

Finally, the complainant asserts that the respondent violated N.J.S.A. 18A:12-24.1(i), which states:

> I will support and protect school personnel in proper performance of their duties.

The Commission's regulations further provide:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)9.

The Commission has found violations of N.J.S.A. 18A:12-24.1(i) where the comments made to or about the school employee were direct, confrontational and intimidating. For instance, in I/M/O Charles Fischer, Eatontown Bd. of Ed., Monmouth County, C30-03 (February 24, 2004), Commissioner of Education Decision No. 157-04SEC, April 12, 2004, the Commission found that a Board member violated N.J.S.A. 18A:12-24.1(i) when he called an employee at home and became angry when she refused to provide him with the reports that he had requested. In I/M/O David Kanaby, Hillsborough Bd. of Ed., Somerset County, C53-05 (July 24, 2007),

Commissioner of Education Decision No. 350-07SEC, September 10, 2007, the Commission found that the respondent Board member violated N.J.S.A. 18A:12-24.1(i) when he sent an email to the Superintendent which was both "threatening and intimidating" in that it asked the Superintendent for an accounting of her personal leave. The Board member sent the email to all Board members, as well as the Business Administrator, the Assistant Superintendent and his subordinate. The Commission found the respondent's email to be "a personal and highly critical expression of his anger towards the superintendent in the proper performance of her duties." (Kanaby at slip op. page 3) Finally, in Brown et al. v. David Matthews, City of Englewood Board of Education, Bergen County, C13-07 (October 27, 2008), *aff'd,* Commissioner of Education Decision No. 123-09A, April 14, 2009, the Commission found the respondent in violation of N.J.S.A. 18A:12-24.1(i) when he refused to cooperate with the District's affirmative action officer (AAO) and, in so doing, engaged in offensive comments so upsetting to the employee that she resigned as the District's AAO. On this record, however, the Commission does not find that the respondent's limited communication with Mr. Cuba rises to the level of taking deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties, so as to violate N.J.S.A. 18A:12-24.1(i). Accordingly, the Commission finds that the complainant has failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(i).

Count 2

In Count 2 of the complaint, the complainant alleges that the respondent held a conversation with a teacher/coach on October 16, 2009 wherein he: (a) discussed another board of education employee; and (b) disclosed closed session information regarding two high school students involved in a disciplinary matter. (Complaint at paragraph 2) The complainant asserts this is a violation of N.J.S.A. 18A:12-24.1(g),[6] which states:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission's regulations require that:

> Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the

[6] As noted above, the Commission previously dismissed the complainant's allegation of a violation of N.J.S.A. 18A:12-24.1(i).

> information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7.

First, the Commission notes that there was no testimony with respect to a discussion about another Board employee. As to the closed session information regarding two high school students involved in a disciplinary matter that was allegedly revealed, the Commission initially finds that it cannot, in consideration of this claim, accord weight to Exhibit R-1, the Kearny Police Report, as proof that information as to the students' criminal charges was public, since this exhibit would not necessarily affect the disciplinary actions taken by the Board, nor would it shield the respondent from any culpability for revealing closed session Board discussions relative to the Board's actions.

Consequently, this allegation rests on the testimony that was presented by Mr. Hohmann and Mr. Campbell, the only two witnesses with first-hand knowledge of the conversation that took place on October 16, 2009. As noted above, the Commission generally found the respondent to be less than credible; on this claim, his direct testimony was wholly unenlightening as he flatly denied that any potentially confidential information may have been disclosed. On the other hand, Mr. Hohmann, whose testimony was crucial to this allegation, admittedly approached the respondent that evening with a history of "bad blood," as well as the expectation that he would not be honest about taking his jacket. Not only was it not the place of a coach/teacher to "establish boundaries" for Board members, as Mr. Hohmann testified was his intended purpose for the conversation that evening, but his insistence on going to the respondent's home after the football game to retrieve his jacket, together with his surreptitious taping of the respondent, takes the appearance of a coach/teacher attempting an amateur "sting" operation on a Board member whom he believed needed to be taught a lesson. Thus, the Commission is constrained to find that it cannot rely with any satisfaction on either account of the conversation. Because the complainant bears the burden of factually establishing a violation of N.J.S.A. 18A:12-24.1(g), the Commission must conclude that he has failed to meet his burden.

Count 4:

In Count 4 of the complaint, the complainant alleges that the respondent entered the High School on January 19, 2010 and confronted both the High School Principal and a Secretary about his perception that his niece was not being scheduled often enough as a substitute. (Complaint at paragraph 4) The complainant asserts this is a violation of N.J.S.A. 18A:12-24.1(d), as set forth above and (f), as set forth below. N.J.S.A. 18A:12-24.1(f), states:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(f) shall include evidence that the respondent(s) took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that the respondent(s) used the schools in order to acquire some benefit for the respondent(s), a member of his or her immediate family or a friend. N.J.A.C. 6A:28-6.4(a)6.

Both Mr. Somma and Mr. Campbell agree that a conversation took place wherein Mr. Campbell asked Mr. Somma about procedures that were used by the High School to contact substitute teachers. Mr. Somma acknowledged that at times, other members of the public have asked about such procedures. Notably, he stated that the respondent did not ask him or his secretary to contact his niece from the list of substitutes. The Commission does not find that the conversation which took place between the respondent and either Mr. Somma or his secretary establishes that the respondent gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district so as to constitute a violation of N.J.S.A. 18A:12-24.1(d). Likewise, the Commission can find no evidence that the respondent surrendered his independent judgment to special interest or partisan political groups or used the schools for personal gain or for the gain of his friends. Accordingly, the Commission finds that the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(d) and 24.1(f) as alleged in this count.

Count 5

In Count 5 of the complaint, the complainant alleges that on February 5, 2010, the respondent telephoned the Assistant Superintendent of Schools and told him he was "out to get" the High School Principal. (Complaint at paragraph 5) The complainant asserts this is a violation of N.J.S.A. 18A:12-24.1(e) as set forth above and (i), as set forth above.

Mr. Somma testified that Mr. Sprague relayed the message to him that Mr. Campbell stated he was "out to get" Mr. Somma. Notably, however, Mr. Sprague did *not* testify that these specific words were spoken by Mr. Campbell. Because Mr. Sprague was a party to the conversation with the respondent and was found to be a credible witness, the Commission accepts his account of the conversation as fact. In so doing, the Commission finds that the complainant has, therefore, failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e) by failing to recognize that authority rests with the board of education and making a personal promise or taking private action that was of such a nature that it might compromise the board. Similarly, the Commission finds insufficient evidence on the record to conclude that the respondent took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties so as to violate N.J.S.A. 18A:12-24.1(i). Accordingly, the Commission finds that the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(e) and 24.1(i) as alleged in this count.

DECISION

The Commission finds that respondent John Campbell violated N.J.S.A. 18A:12-24.1(d) and (e) and of the Code of Ethics for School Board Members as set forth in Count 1 and dismisses the remaining allegations in the complaint.

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of censure. In I/M/O Doris Graves, Pleasantville Board of Education, Atlantic County, C47-05 (May 27, 2008), Commissioner of Education Decision No. 301-08SEC, decided July 10, 2008, the Commission recommended a penalty of censure where the Board member was found to have violated 18A:12-24.1(d) on two occasions: first when she spoke with the district's facilities coordinator about a proposed personnel action involving her cousin by marriage, rather than bringing her concerns to the Superintendent, and second when she appeared at a Board Personnel meeting regarding a personnel action affecting the same person.

In Jennifer Dericks et al., v. Michael Schiavoni, Sparta Township Board of Education, Sussex County, C45-07 (April 28, 2009), aff'd Commissioner of Education Decision No. 294-09SEC, decided September 15, 2009, the Commissioner agreed that censure was an appropriate penalty for a former Board member found to be in violation of N.J.S.A. 18A:12-24.1(c) and (d). The Commission found that the respondent administered the schools and became directly involved in a function that was the responsibility of the Superintendent by controlling the hiring process for a Principal's position. In another matter, the same respondent was censured by the Commission for sending a letter to the editor without the full knowledge and consent of the Board in violation of N.J.S.A. 18A:12-24.1(e). Jennifer Dericks et. al v. Michael Schiavoni, Sparta Board of Education, Sussex County, C41-07 (February 24, 2009) aff'd Commissioner of Education Decision No. 260-09SEC, decided August 18, 2009. Thus, the Commission finds that, on balance, a penalty of censure is appropriate given the findings in this decision.

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.

Robert W. Bender
Chairperson

Mailing Date: October 27, 2010

Resolution Adopting Decision – C02-10

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 from its hearing on September 28, 2010; and

Whereas, at its meeting on September 28, 2010, the Commission found that the respondent, John Campbell, violated N.J.S.A. 18A:12-24.1(d) and (e) of the Code of Ethics for School Board Members as alleged in Count 1 of the complaint, and the Commission dismissed all other allegations; and

Whereas, at its meeting on October 26, 2010, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on October 26, 2010.

Joanne Boyle, Executive Director

535-10ML

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

ROCHELLE R. HENDRICKS
Acting Commissioner

December 13, 2010

William J. Donahue, *Pro Se*
139 Heritage Road
Sewell, NJ 08080

Dear Mr. Donahue:

I have reviewed your recent letter wherein you express disagreement with my decision on your petition of appeal entitled *W.J.D., on behalf of minor child, C.D. v. New Jersey State Interscholastic Athletic Association,* Commissioner's decision #504-10L, decided November 22, 2010. In this decision, I dismissed your petition wherein you were seeking to have me enjoin the NJSIAA from applying its 30-day rule set forth in its Bylaws at Article V, Section 4.K(2) to your son, C.D., declaring him – as a consequence of a transfer from St. Augustine Prep to the Clearview Regional School District – ineligible to participate in interscholastic sports for the first 30 days of the season or one half of the maximum number of games allowed by NJSIAA rules in those sports where he has attained varsity status, *i.e.*, wrestling. Dismissal of your petition was mandated because the NJSIAA rule governing this situation is clear on its face in precluding waiver or appeal of the ineligibility period resulting from student transfers for any reason other than a bona fide change in residence, and your submitted materials clearly conceded that a bona fide change in residence was not the reason for the transfer of your son to the Clearview Regional School District from St. Augustine Prep. I am viewing your letter in this regard as a Motion for Reconsideration of my decision, pursuant to *N.J.A.C.* 6A:3-1.15(b).

Motions for reconsideration are considered based on the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation or misconduct could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

A full review of the arguments advanced in your letter indicates that you have failed to satisfy any of the necessary requisites which might allow me to reconsider this decision. Therefore, your request for reconsideration of my decision is hereby denied. You are, however, again reminded that my November 22, 2010 decision is appealable to the Superior Court, Appellate Division, pursuant to *N.J.S.A.* 18A:11-3.

Sincerely,

Rochelle R. Hendricks
Acting Commissioner

RRH/MKD/MH
c: County Superintendent
Michael J. Herbert, Esq.
Herbert, VanNess, Cayci & Goodell
22 Chambers Street
Princeton, New Jersey 08542

Rochelle R. Hendricks
Acting Commissioner
Dept. Of Education
PO Box 500
Trenton, NJ 08625

RECEIVED BY C&D
2010 DEC -8 A 10:37
CONTROVERSIES & DISPUTES

Ref #504-10L

Commissioner Hendricks,

Thank you for your response to our appeal. However, I believe that the facts of this case were not looked at close enough. Clearview High Schools's letter to NJSIAA clearly asked for exception for extraordinary circumstances siting my new home in the school district. Your interpretation of the rule would make any Catholic school to public school transfer student ineligible because you can attend any Catholic school while living in any school district. How about a student with separated parents in two school districts. That would be a address change for one parent. The student would transfer because of the separation more then the address change. I was trying to point out another flaw in the rule. I realize that your office is not the avenue to attempt to get a NJSIAA rule changed. Regardless, the rule does not define bona fide address change or set limitations. **The facts are that we have a bona fide address change**. The NJSIAA has no exception for transfer students and are not willing to investigate why a student transfers. The rule is clear and agreed upon. They also make it clear that with a bona fide address change, a student athlete is eligible. I may have made a mistake in my initial approach to request for eligibility. I thought I had to explain the reason for the address change in, out and back into Clearview school district because the situation is extraordinary. I did not want to give the appearance that we were attempting to circumvent the rules. Please review the rule and facts again carefully. I believe that there have been pass student-athletes with similar bona fide address changes that were determined to be eligible.

William Donahue
139 Heritage Rd.
Sewell, NJ 08080

Clearview Regional High School

625 Breakneck Road
Mullica Hill, NJ 08062
(856) 223-2790
Fax: (856) 478-6705

www.clearviewregional.edu

Keith M. Brook
Principal

Dawn F. Scalfaro
Assistant Principal

Kathleen L. McKinney
Assistant Principal

Michael J. Holm
Assistant Principal

Mr. Robert Baly
NJSIAA
Route 103 North
Robbinsville, NJ 08691

September 10, 2010

RECEIVED BY C&D
2010 DEC -8 A 10:31
CONTROVERSIES & DISPUTES

Dear Mr. Baly:

We are writing concerning one of our students, Connor Donahue, and the 30 day state mandated waiting period for the upcoming 2010–2011 Varsity Wrestling Season. During the 2009-2010 academic year, Connor was a member of St. Augustine Preparatory School's wrestling team for which he lettered as a freshman. At this time, Connor and his family are requesting a waiver for Connor to be eligible to participate for the entire wrestling season due to extraordinary circumstances. Connor's family recently purchased a new home within our sending district and due to economic hardship and the many issues beyond the Donahues' control; we do not feel that Connor should be punished as a result. Connor did not enroll in Clearview for any athletic advantage and would have continued at St. Augustine Preparatory School if the Donahues would have been able to afford tuition. However, according to the NJSIAA eligibility bylaws, Connor is not eligible for 30 days because of his prior Varsity letter and participation.

Both Keith Brook and I are in favor of allowing Connor to participate fully in Clearview's wrestling program due to extraordinary circumstances beyond Connor's control.

Thank you for your attention in this matter and please see the attached letter from Mr. William Donahue, Connor's father, outlining the circumstances beyond his control. Please contact us immediately if you need any additional information to support Connor's eligibility waiver.

Sincerely,

Gregory W. Horton
Athletic Director
Clearview Regional High School

Keith Brook
Principal
Clearview Regional High School

Cc: Mr. John Horchak, Superintendent

OAL DKT. NO. EDU 872-10
AGENCY DKT. NO. 33-2/10

P.L.DeJ. and M.DeJ., on behalf of minor child, E.DeJ.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|15|10
Date of Mailing: 12|15|10

* Petitioner P.L.DeJ. did not appear for any proceedings at the Office of Administrative Law, and is not a party to the settlement agreement. Petitioner M.DeJ. has agreed to reimburse the Board for the cost of the tuition that the Board is seeking for the 2009-2010 school year; therefore, there are no additional issues in dispute.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-SETTLEMENT AND
INITIAL DECISION FAILURE TO APPEAR
AS TO PETITIONER P.L. DeJ., ONLY
OAL DKT NO. EDU 872-10
AGENCY REF. NO. 33-2/10

P.L. DeJ. AND M. DeJ.
O/B/O E. DeJ.,
Petitioners,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF FREEHOLD,
MONMOUTH COUNTY.

P.L. DeJ., petitioner, pro se

M. DeJ., petitioner, pro se

Robin T. McMahon, Esq., for respondent, (Scarinci Hollenbeck, attorneys)

Record Closed: October 15, 2010 Decided: November 8, 2010

BEFORE **ANA C. VISCOMI**, ALJ

This matter, involving petitioners' challenge to the board of education's residency determination as to their child, E. DeJ., and the board's counterclaim for tuition reimbursement, was transmitted to the Office of Administrative Law (OAL) on March 17, 2010, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and

N.J.S.A. 52:14B-1 to -15. A pre-hearing conference was scheduled for May 19, 2010, and notices were mailed to the parties at the addresses they provided in their respective pleadings. On May 19, 2010, petitioner P.L. DeJ. failed to appear and in accordance with the requirements of N.J.A.C. 1:1-14.4, petitioner P.L. DeJ. was afforded an opportunity to explain his non-appearance. No explanation having ever been received, his petition seeking a hearing on the merits was deemed abandoned for failure to appear in accordance with N.J.A.C. 1:1-14.4. However, co-petitioner M. DeJ., sought to resolve her request for a hearing by negotiating a settlement with the respondent. As a result of a series of discussions held with me, the parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1).

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures. (J-1). Additionally, the respondent Board of Education passed a resolution accepting the settlement at its meeting of October 12, 2010, as reflected in the extract of the meeting minutes and as attested to by Business Administrator/Board Secretary, Patrick DeGeorge, who was authorized by the board to execute the settlement agreement (R-1a), and as further reflected in the correspondence from respondent's counsel. (R-1b). It should be noted that although the extract of the Board resolution identifies the former student by number only, (R-1a), the correspondence from respondent's counsel, which forwarded that document, clarifies that the resolution reflects a settlement of the within matter. (R-1b).

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.

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

November 8, 2010
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency: NOV - 9 2010

Date Mailed to Parties: NOV - 9 2010

lam

BOROUGH OF FREEHOLD BOARD OF EDUCATION
280 PARK AVENUE
FREEHOLD, NEW JERSEY 07728
732.761.2100

RECEIVED
2010 OCT 15 P 12:39
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STATE OF NEW JERSEY)
) SS:
COUNTY OF MONMOUTH)

Patrick S. DeGeorge, being first duly sworn on oath, deposes and says:

That the deponent is the Business Administrator/Board Secretary of the School District and the Board of Education of Freehold Borough, in the County and State aforesaid, and that the annexed extract is a true and exact copy of the Minutes of a meeting of the Borough of Freehold Board of Education held on October 12, 2010.

Moved by Mrs. MacCutcheon and seconded by Mr. Tennant that the Board approve the following resolution: 1.2.:

Tuition Payment Plan
Recommend the Board formally accept the tuition payment proposed plan for former student #1541068706 whose names are on file in the office of the Business Administrator and in the hands of the members of the Board as discussed at the meeting held on May 24, 2010; and authorize the district's Business Administrator Mr. DeGeorge to execute the related agreement on behalf of the Board.

Unanimously approved

Patrick S. DeGeorge
Business Administrator/Board Secretary

R-1a

ROBIN T. McMAHON, Counsel
rmcmahon@scarincihollenbeck.com
Direct Phone: 732-780-5590 Direct Fax: 732-462-0385

October 13, 2010

RECEIVED
2010 OCT 15 P 12:39
STATE OF N.J.
OFFICE OF ADMIN LAW

Hon. Ana C. Viscomi, Administrative Law Judge
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road, P.O. Box 049
Mercerville, New Jersey 08625-0049

Re: **P.L. DeJ and M. DeJ. o/b/o E.L. DeJ. v. Board of Education of Borough of Freehold, Monmouth County**
OAL Docket No. EDU 872-2010S, Agency No. 33-2/10
Our File No. 10601.2000

Dear Judge Viscomi:

As you may recall, I represent the Freehold Borough Board of Education in the above-reference residency appeal. By letter dated September 17, 2010, I forwarded to Your Honor the executed settlement agreement between the parties. In furtherance of my request that Your Honor approve the settlement agreement and issue an initial decision, please find enclosed the Board Resolution approving the settlement agreement and authorizing the Business Administrator to execute it on the Board's behalf.

Kindly advise whether there is anything further that you require in order to issue an initial decision. By copy of this letter to Ms. DeJesus I am providing her this information and the enclosure.

Respectfully yours,

ROBIN T. MCMAHON
For the Firm

RTM/tv
Enclosure
cc: Miesha Hill-DeJesus, *Pro Se*
Patrick DeGeorge, Business Administrator (letter only)

{00591966.DOC}

R-16

SCARINCI & HOLLENBECK, LLC
3499 Route 9 North, Suite 1M
Freehold, New Jersey 07728
(732) 780-5590
Attorneys for Respondent

2010 SEP 21 P 1:04
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

P.DeJ. and M.DeJ. on behalf of minor child, E.DeJ,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	Agency Dkt. No.: 122-6/08 OAL Dkt. No.: EDU 872-2010S
-vs.-	
BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY,	AGREEMENT & RELEASE
Respondent.	

THIS AGREEMENT is made this 30th day of August, 2010 between Miesha DeJesus (hereinafter "DeJesus"), residing at 415 Meadowood Road, Jackson Township, New Jersey 08527 and the Board of Education of the Borough of Freehold, Monmouth County ("Board").

WHEREAS, DeJesus is the mother of E.D.; and

WHEREAS, E.D. was enrolled as a student in the Freehold Public Schools; and

WHEREAS, the Board determined that E.D. was not entitled to a free public education in the Freehold Public Schools pursuant to N.J.S.A. 18A:38-1; and

WHEREAS, E.D.'s parents filed a petition of appeal with the Commissioner of Education contesting the determination; and

WHEREAS, the Board filed an answer to the petition and a counterclaim for tuition for the period of E.D.'s ineligible attendance pursuant to N.J.S.A. 18A:38-1 and N.J.A.C. 6A:3-8.1 and 6A:22-6.2; and

WHEREAS, E.D.'s father abandoned the appeal and E.D.'s mother notified the Department of Education's Bureau of Controversies and Disputes that she was withdrawing her appeal and informed the Administrative Law Judge that she is enrolling E.D. in the Jackson School District for the upcoming school year; and

WHEREAS, DeJesus and the Board now desire to resolve all issues relative to the Board's counterclaim;

NOW THEREFORE, in consideration of the mutual covenants contained herein, the Board and DeJesus agree as follows:

1. DeJesus shall pay the Board the amount of $11,779.48 as tuition for E.D. for the 2009-10 school year.

2. The payment referenced above shall be made in monthly installments in the amount of $321.00, with the first monthly installment due upon the signing of this agreement, a second monthly payment on October 1, 2010, and each monthly payment thereafter due on the first of each subsequent month, together with a payment of $3500.00 upon DeJesus' receipt of her federal and if necessary state income tax refund in 2011, but in no event later than June 30, 2011, with a final payment of 896.48 due no later than June 30, 2012. This final payment is in addition to the monthly payment of $321.00 due on June 1, 2012. An illustrative payment schedule is attached to this Agreement.

3. Notwithstanding the foregoing, should DeJesus receive a tax refund in 2012 but prior to June 30, 2012, she shall pay half of the refund to the Board upon receipt of the refund, and at that time, the payment schedule shall be recalculated to determine the amount of the monthly payments then necessary in order for DeJesus to pay the balance due no later than June 30, 2012. The Business Administrator shall notify DeJesus of the new payment schedule. The purpose of the payment of the refund is to both accelerate the payment of the tuition to the Board and to avoid the necessity of DeJesus from having to make a final payment on June 30, 2012 in the amount of $896.48.

3. All payments shall be made to the Office of the Business Administrator, Borough of Freehold Public Schools, 280 Park Avenue, Freehold, New Jersey 07728.

4. If any payment required hereunder is not made within 15 days of the due date, then the Business Administrator shall notify DeJesus in writing of the delinquency and provide her a 7 day period in which to cure it. If DeJesus does not cure the delinquency within that time, the Board shall have the right, on notice to DeJesus, to file this agreement as a consent judgment for the balance then due in the Superior Court of New Jersey, with venue being in the Monmouth County vicinage. At its option, the Board may instead request the Commissioner of Education to seek entry of the unsatisfied portion of the tuition assessment on the judgment docket of the Superior Court pursuant to N.J.S.A. 2A:58-10.

5. DeJesus represents that she has enrolled E.D. in the Jackson Township School District, the district in which she and E.D. are domiciled.

6. Except for the payments to be made pursuant to this agreement, and subject to DeJesus' compliance with the terms of this agreement, the Board agrees to irrevocably waive and surrender any claim it has or may have against DeJesus for tuition reimbursement, related service fees, and/or attorneys' fees for any period during which E.D. was enrolled in the Freehold Public Schools prior to the execution of this agreement. In exchange, DeJesus agrees to irrevocably waive and release the Board from any and all claims related to the education of E.D. prior to the execution of this agreement.

7. DeJesus acknowledges that she has been provided sufficient opportunity to consult an attorney with respect to this Agreement.

8. This Agreement contains the entire agreement between DeJesus and the Board 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 to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of New Jersey.

9. No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged. The adjusted payment schedule referenced in Paragraph 3 shall not be considered a modification or amendment of this Agreement.

10. DeJesus represents and warrants that she has carefully read each and every provision of this Agreement, and that she fully understands all of the terms and conditions contained in each provision of this Agreement. DeJesus further represents and warrants that she enters into this Agreement voluntarily, of her own free will, without any pressure or coercion from any person or entity including, but not limited to, the Board of Education.

11. This agreement shall be subject to the approval of the Board.

12. The Board will dismiss its counterclaim as to DeJesus after it has approved the Agreement and received a signed original from DeJesus. The dismissal shall be without prejudice, meaning that the Board may file another action or proceeding based on the subject matter of the counterclaim, until the payment due hereunder has been paid in full. At that time, the dismissal shall be considered with prejudice, meaning that the Board may not file another claim against DeJesus based on the subject matter of the counterclaim.

13. This Agreement may be signed in counterparts, one by each party, and when so signed and delivered, shall constitute an original, fully enforceable counterpart for all purposes.

In Witness Whereof, the parties have executed this Agreement on the day first above written.

FOR THE BOARD:

Miesha Dejesus

MIESHA DEJESUS

By: _____

PATRICK S. DEGEORGE, CPA
Business Admin./Board Secretary

Sworn and Subscribed to before me
this 16 day of September 2010

_____
Attorney or Notary Public, State of NJ

Kishor Patel
Notary Public of New Jersey
Commission Exp. on 5-16-2012

DE JESUS / FREEHOLD BOE
File No.: 10601.2000

Date	Amount paid	Balance of $11,779.48
9/1/10*	$321.00	$11,458.48
10/1/10	$321.00	$11,137.48
11/1/10	$321.00	$10,816.48
12/1/10	$321.00	$10,495.48
1/1/11	$321.00	$10,174.48
2/1/11	$321.00	$9,853.48
3/1/11	$321.00	$9,532.48
4/1/11	$321.00	$9,211.48
5/1/11	$321.00	$8,890.48
6/1/11	$321.00	$8,569.48
6/30/11**	$3,500.00	$5,069.48
7/1/11	$321.00	$4,748.48
8/1/11	$321.00	$4,427.48
9/1/11	$321.00	$4,106.48
10/1/11	$321.00	$3,785.48
11/1/11	$321.00	$3,464.48
12/1/11	$321.00	$3,143.48
1/1/12	$321.00	$2,822.48
2/1/12	$321.00	$2,501.48
3/1/12	$321.00	$2,180.48
4/1/12	$321.00	$1,859.48
5/1/12	$321.00	$1,538.48
6/1/12	$321.00	$1,217.48
6/30/12***	$896.48	$896.48
		0

*Or upon signing of Agreement
**Payment is due upon receipt of income tax refund, but in no event later than June 30, 2011.
***Payment that will be due if DeJesus does not also apply part of her tax refund received in 2012.

RECEIVED
DEC 21 P 1:11
OFFICE OF ATTORNEY GENERAL
LAW

537-10

OAL DKT. NO. EDU 02458-10
AGENCY DKT. NO. 28-2/10

ANTHONY PETROCELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/15/10

Date of Mailing: 12/15/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02458-10

AGENCY DKT. NO. 28-2/10

ANTHONY PETROCELLI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky & Hunter, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: November 4, 2010 Decided: November 4, 2010

BEFORE **LAURA SANDERS,** ACTING DIRECTOR AND CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law on April 6, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

November 4, 2010
DATE

Laura Sanders
LAURA SANDERS
ACTING DIRECTOR AND CHIEF ALJ

Date Received at Agency: NOV 5 2010

Date Mailed to Parties: NOV 5 2010

caa
Attachment

DETZKY & HUNTER, LLC
33 North Bridge Street
Somerville, N.J. 08876
(908) 707-4560
Attorneys for Petitioner

RECEIVED
2010 NOV -4 A 8:03
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ANTHONY PETROCELLI,	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:
vs.	: DOCKET NO. EDU-02458-2010S AGENCY REFERENCE NO. 28-2/10
ASBURY PARK BOARD OF EDUCATION,	:
Respondent.	: STIPULATION OF SETTLEMENT AND DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, with Petitioner Anthony Petrocelli receiving the sum of **$6,500.00** in full resolution of the above referenced matter, it is hereby stipulated and agreed that this case be dismissed with prejudice.

Michael Gross, Esq., Attorneys for Respondent

Dated:

Stephen B. Hunter, Esq., Attorneys for Petitioner

Dated: 9/29/10

Asbury Park Board of Education

603 Mattison Avenue, 3rd Floor
Asbury Park, NJ 07712
(732) 776-2608, Ext. 2437
Fax: (732) 988-7315

CERTIFICATE

I Geoffrey Hastings, Assistant Business Administrator of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on October 27, 2010 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

11. Petitions of Appeal

The Superintendent recommends that the Petitions of Appeal, Office of Administrative Law Docket Nos. EDU 02459-2010S; EDU 02458-2010S; EDU 06270-2009; and EDU -4691-2010S be resolved consistent with the terms set forth in their corresponding Stipulations of Settlement and Dismissal, which are on file in the Office of the Board Secretary.

Motion to approve: Mr. Brewington **Second**: Ms. Breech
Aye: 6 **Nay**: 0 **Abs**: 1 Upon roll call the motion was adopted. With Mr. Palmer abstaining.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 28th day of October 2010.

Geoffrey Hastings, Assistant Business Administrator

11/02/2010 16:16 9089708899 DEIZKY HUNTER PAGE 04

OAL DKT. NOS. EDU 7091-10 AND 11115-10 (CONSOLIDATED)
AGENCY DKT. NOS. 124-6/10 AND 552-9/10

IN THE MATTER OF THE TENURE HEARING OF STEVE GALLON, III, SCHOOL DISTRICT OF THE CITY OF PLAINFIELD, UNION COUNTY.	:	
	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF STEVE GALLON, III, SCHOOL DISTRICT OF THE CITY OF PLAINFIELD, UNION COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms as compliant with the standards set forth in *In re Cardonick,* 1990 *S.L.D.* 842 (State Board 1983). However, Section 1a of the Agreement makes reference to an immediate resignation date, which occurred prior to consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation is not binding until the Commissioner approves same.

The foregoing notwithstanding, and in light of the parties' acknowledgment that the Commissioner is obliged to refer this matter to the State Board of Examiners for review and possible action regarding respondent's certificates, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/15/10

Date of Mailing: 12/15/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

CONSOLIDATED

IN THE MATTER OF THE TENURE HEARING OF STEVE GALLON III, SCHOOL DISTRICT OF THE BOROUGH OF PLAINFIELD, UNION COUNTY	OAL DOCKET NO. EDU 07091-10 Agency Ref. No. 124-6/10
IN THE MATTER OF THE TENURE HEARING OF STEVE GALLON III, SCHOOL DISTRICT OF THE BOROUGH OF PLAINFIELD, UNION COUNTY	OAL DOCKET NO. EDU 11115-10 Agency Ref. No. 552-9/10

Robert T. Pickett, Esq., for petitioner (Pickett & Craig, attorneys)

Thomas R. Ashley, Esq., for respondent, Steven Gallon III

Record Closed: October 25, 2010 Decided: November 3, 2010

BEFORE **J. HOWARD SOLOMON,** ALJ:

Petitioner, School District of the Borough of Plainfield, Union County, initially filed tenure charges against respondent, Steven Gallon III (respondent or Gallon) on June 18, 2010 with the Department of Education, Controversies and Disputes, for conduct unbecoming by permitting his home address to be used in order to allow certain children to be enrolled in the school district of respondent for the purpose of obtaining a free

public education knowing that said children were not domiciled in the school district nor residing with him.

On September 17, 2010, additional tenure charges were filed by petitioner against respondent for conduct unbecoming alleging that he knowingly misrepresented the qualifications of two individuals to petitioner who were hired for administrative positions; that he retaliated against certain district employees, such as by demoting and/or downgrading their positions, contrary to petitioner's "hiring, promotional and personnel policies"; that he failed to post employment and position vacancies "as required by [p]etitioner's policy and its contract with [the] Plainfield Education Association"; that he "misused [p]etitioner's property, an authorized cell phone, by giving the phone to his college age son which resulted in a very large phone bill" which petitioner paid; that he unilaterally breached contracts with certain unions "without consulting with or obtaining authorization from the [p]etitioner."

Respondent filed his answer to the initial charges on July 2, 2010 and to the subsequent charges on October 6, 2010, denying in both instances the charges alleged.

By Order of the undersigned dated October 25, 2010, and with the consent of the parties, both matters were consolidated for hearing.

Prior to October 25, 2010, which was the initial hearing date of several dates scheduled before the undersigned, both parties agreed to a proposed settlement, which was signed by the president of the Plainfield Board of Education and its attorney on September 8, 2010 and by respondent and his attorney on September 30, 2010, subject to approval by the Commissioner of Education, which is attached to and fully incorporated in this decision. 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 . . . employment, circumstances justifying the settlement, consent or authorization by the Board of Education

> and the [educator] to the proposed agreement, the administrative law judge's finding that the [educator] 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 October 25, 2010, the undersigned held a 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 the settlement would be in the public interest. Respondent testified that he fully understood and voluntarily agreed to the terms of the settlement. The Plainfield Board of Education (Board) approved the settlement, as evidenced by the attached resolution, dated September 8, 2010. In addition, respondent produced Gary Ottmann, Secretary to the Plainfield Board of Education, who testified under oath that the additional charges filed against respondent were intended to be included in the resolution.

Based upon my review of the record, the testimony of respondent, the representations of Mr. Ottmann and both counsel, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Respondent's employment as superintendent with petitioner was under a four year contract, commencing July 1, 2008 and ending June 30, 2012.

2. It is anticipated that the hearing in this matter would be protracted and costly.

3. Litigation of all charges would lead to the disruption of petitioner's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the occurrences which led to the filing of the tenure charges.

4. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing and any appeals involved.

5. Petitioner and respondent have agreed that respondent's employment with the district is immediately terminated upon the approval of the Settlement Agreement by the Commissioner of Education.

6. Before entering into this agreement, respondent fully understood his rights and had adequate opportunity to consult with legal counsel.

7. Respondent acknowledged 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. In fact, proceedings have already been instituted against respondent under OAL Docket No. EDE 10591-10 (Agency Reference No. 0910-209).

8. The settlement fully disposes of all issues in controversy in regard to the above consolidated matters.

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.

November 3, 2010

DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 11-5-10

Mailed to Parties:

NOV 5 2010

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

PICKETT & CRAIG, ESQS.
Attorneys At Law
80 Main Street Ste 430
West Orange, New Jersey 07079
(973) 762-0613
ATTORNEY FOR PETITIONER
Plainfield Board of Education

Docket No. OAL EDU-07091-2010N &
OAL EDU-11115-2010N
Agency Docket No. 124-6/10 & 552-9/10
Tenure Hearing Proceeding

THE CITY OF PLAINFIELD BOARD OF EDUCATION,

Petitioner,

VS.

STEVE GALLON, III,

Respondent.

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made by and between the Plainfield Board of Education ("Petitioner District") and Steven Gallon, individually ("Respondent") on the date or dates indicated below.

WHEREAS, on or about June 15, 2010, Petitioner District commenced tenure proceedings an against Petitioner by way of Petition filed with the Commissioner of Education, the Department of Education for the State of New Jersey, pursuant to *N.J.S.A.* 18A:6-11, *entitled Plainfield Board of Education vs. Steven Gallon, III, Docket Nos. OAL EDU-07091-2010N & OAL EDU-11115-2010N* (the "Tenure Charges").

WHEREAS, Respondent has denied, and continue to deny, the material tenure charges filed against him by the Petitioner District in the Action; and

WHEREAS, Petitioner District and Respondent desire to avoid the expense and disruption of further litigation with respect to the subject matter of the Action; and

WHEREAS, Petitioner District and Respondent understand that the Respondent is entitled to continue to receive his salary from Petitioner District after 120 days of any suspended salary payments from the Petitioner District until the Commissioner of Education has made a final decision in the Action herein pursuant to *N.J.S.A.* 18A:6-14; and

WHEREAS, Petitioner District and Respondent, upon consultation with their respective counsel, have independently concluded that it is in their respective best interests to settle and resolve any and all disputes and controversies which have been, or could have been, raised between them, with each party to bear their own counsel fees, costs and disbursements.

NOW, THEREFORE, in consideration of the mutual promises exchanged herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Petitioner District and Respondent hereby memorialize their agreement as follows:

1. **Settlement of Claim** – The Petitioner District and the Respondent agree to settle this Action as follows:

   a. By the Respondent's ~~submission of his Resignation~~ agreement to the termination from his position with the GCC School District as Superintendent upon the execution of this Agreement; and

   b. By the payment in the amount of six (6) months of his salary and other salary entitlements for the school year commencing as of July 1, 2009, by the Petitioner within thirty (30) days from the date of the approval of the settlement herein by the Commissioner of Education; and

   c. Release of the search firm Hazard Young Attea from its agreement not to place

Respondent with another school district during the term of Respondent's contract with the Petitioner District; and

d. All proceedings in this matter will remain confidential as required by the applicable statute and law and subject to the Open Public Records Act; and

e. In the event Respondent is required to testify in any Commissioner of Education, civil or criminal proceeding involving the Petitioner District, the Respondent agrees:

   i. To cooperate with the Petitioner and will make himself available to offer testimony in support of the Petitioner in the aforementioned proceedings; and

   ii. For his assistance, the Petitioner will reimburse Respondent's travel expenses, if any, and pay him a per diem dollar amount based on his salary for the school year commencing July 1, 2009 and ending as June 30, 2010; and

f. Petitioner District agrees to provide a letter to the Pretrial Intervention Program of Middlesex County indicating that it has no objection to the Respondent's admission into its Pretrial Intervention Program without a guilty plea.

2. **Dismissal of Tenure Charges and Approval of Settlement By Commissioner Of Education** – Petitioner District and Respondent shall cause the tenure charges in the Action to be dismissed as to Respondent with prejudice and without costs and both parties understand that the dismissal of the proceedings and settlement herein are subject to the approval of the Commissioner of Education.

3. **Confidentiality** - No party shall issue or cause to be issued any statement regarding the Action which contradicts the terms of the settlement herein.

4. **No Admission** - It is specifically acknowledged and understood by the parties that this Agreement is not an indication or admission of any violation of any law, statute or regulation or a breach of any duty by Respondent. It is further acknowledged that the payments referenced herein or made hereunder are not indicative of any action or inaction taken by Petitioner District and/or Respondent, their past and present Board members, administrators, agents, employees or attorneys, with respect to the filed and approved tenure charges in this proceeding. It is understood and agreed by the parties that the settlement is being made solely to alleviate the necessary time and expense of a hearing, preparation therefore and/or further proceedings and continued payment of any salary entitlements to Respondent. This Agreement and compliance with this Agreement shall not be construed as an admission by any party of any liability or improper filing of tenure charges whatsoever with respect to any matter in this proceeding. This Agreement may not be introduced into evidence or used in any other way in any other legal or administrative proceeding other than a proceeding seeking enforcement of the terms of this Agreement.

5. **Mutual Releases** – The Petitioner District and the Respondent herein, by mutual agreement and consideration, hereby release each other from any and all obligations in the matter styled, *Plainfield Board of Education vs. Steven Gallon, III, Docket Nos. OAL EDU-07091-2010N & OAL EDU-11115-2010N.* Whereas, Petitioner District and the Respondent have accepted the terms of the settlement in the aforementioned administrative proceeding as set forth herein; and Whereas, Petitioner District and the Respondent agree, by further mutual agreement and consideration, to release and discharge each other, their representatives, attorneys, successors and assigns and employees, if any, from any and all actions, causes of action of any kind, suits, charges and obligations, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, sales and purchases, deed of conveyance(s), title deficiencies, controversies, agreements, promises, variances, trespasses, damages, judgments,

extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against their heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of time to the date of this release and agreement.

6. **Representation and Negotiation by Counsel** - The parties acknowledge that this Agreement is the result of arms length negotiations between the parties, all of whom are represented by counsel. The parties have consulted with their attorneys throughout the negotiations and have been fully advised of all of the ramifications of this Agreement, including the claims and rights they are waiving herein and the affirmative obligations they are agreeing to undertake. The parties 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.

7. **Entire Agreement** - This Agreement represents the entire agreement and understanding between the parties with respect to the subject matter hereof.

This Agreement may not be modified unless same is in writing, authorized, approved and signed by all parties.

Each party agrees to execute such further and additional documents, instruments and writings as may be reasonably necessary, proper, required, desirable or convenient for the purpose of fully effectuating the terms and provisions of this Agreement.

8. **Severability** - If any provision of this Agreement or the application thereof is held invalid, such invalidity shall not affect any other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

9. **Law Governing** - This Agreement and all of its terms and conditions shall be governed by and construed in accordance with the laws of the State of New Jersey. The Commissioner of Education, the Department of Education of the State of New Jersey, shall have

exclusive jurisdiction over any and all actions or assignments related to or arising out of this Agreement.

10. This Agreement may be executed in counterparts, each of which shall constitute an original, but all of which shall constitute one and the same agreement.

11. This Agreement is for the benefit of the parties hereto and their successors and assigns.

12. This Agreement constitutes the entire Agreement among the parties hereto, and supersedes any prior understandings, agreements or representations by or between the parties, written or oral, which may have related to the subject matter hereof.

13. This Agreement cannot be amended or waived except in writing signed by all of the parties hereto. No waiver of any provision hereunder or any breach or default shall extend to or affect in any way any other provision of this Agreement or any prior or subsequent breach or default.

14. This Agreement shall be binding on any successor or assignee of the parties hereto.

15. The parties' agreement to the settlement contained herein and their execution of this Agreement shall not be deemed an admission of liability or wrongdoing.

16. **Execution** - This Agreement may be signed in several counterparts, all of which when taken together shall constitute a single document.

IN WITNESS WHEREOF, the parties and/or their representative(s) hereto have duly executed this Agreement as of the date first written above.

Pickett & Craig, Esqs.
Attorneys for Petitioner
Plainfield Board of Education

By: _____
Robert T. Pickett, Esq.
Authorized to Sign On Behalf of the
Petitioner Plainfield Board of Education

Dated: September 8th, 2010

Law Office Of Thomas Ashley
Attorney for Respondent
Steve Gallon, III

By: _____
Thomas Ashley, Esq.
Authorized to Sign On Behalf of the
Dr. Steve Gallon

Dated: September 30, 2010

Plainfield Board of Education

By: Lisa Logan-Leach
Lisa Logan-Leach, President
Plainfield Board of Education

Dated: September 8th, 2010

By: Steve Gallon
Steve Gallon
Respondent

Dated: September 30, 2010

Resolution Authorizing Settlement of
Dr. Steve Gallon Tenure Charges
Before The Commissioner of Education

WHEREAS, pursuant to *N.J.S.A. 18A: 6-11*, the Plainfield Board of Education has filed Tenure Charges against the former School Superintendent, Dr. Steve Gallon, III, (hereinafter "Dr. Gallon"), approved and authorized on June 15, 2010 and September 7, 2010, for his conduct during the period of his employment with the Board; and

WHEREAS, Board Counsel has advised the Plainfield Board of Education that Dr. Gallon wishes to settle any and all claims he may have against the Board arising out of the Tenure Charges filed against him by resigning from his former position with the District; and

WHEREAS, Board Counsel has advised the Plainfield Board of Education the Tenure Charges currently pending against Dr. Gallon will likely take more than six months to adjudicate before the Commissioner of Education and the Office of Administrative Law during the period that Dr. Gallon will have returned to the School District's payroll in accordance *N.J.S.A.* 18A:6-14 and regulations; and

WHEREAS, Board Counsel has recommended that the Board enter into a settlement with Dr. Gallon that will terminate his employment with the School District upon his resignation, the payment of six months salary thereafter and subject to the approval of the Commissioner of Education in accordance with the attached Settlement Agreement between the parties; and

THEREFORE, BE IT RESOLVED that Board hereby approves Board Counsel's recommendation on the settlement of the Tenure Charges with Dr. Gallon as set forth in the attached Settlement Agreement with, if required, any minor changes Board Counsel thinks necessary and appropriate to effectuate the resignation and termination of Dr. Gallon's employment with the District.

Approved on
September 8, 2010
Certified by

Gary Ottman/Board Secretary

Dated: September 8, 2010

Resp. J-2

September 30, 2010

Lisa Logan-Leach
President
Plainfield Board of Education
1200 Myrtle Avenue
Plainfield, New Jersey 07063-1139

Re: ~~Resignation~~ Mutual Separation Agreement between myself

Dear Madam President:

TRA

I hereby ~~submit my resignation as Superintendant of~~ agree to the Mutual Separation Agreement between myself and the Plainfield School District effectively on this date subject to the terms of Settlement Agreement we have entered into pertaining to the Tenure Hearing proceeding before the Commissioner of Education and upon the approval of that Agreement by the Commissioner of Education.

Thank you for your kind consideration. If there are any questions, please call.

Very truly yours,

Steve Gallon III

Dictated bnr

Exhibit J-3

540-10

BRIDGEWATER-RARITAN EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner asserted that the Board improperly disavowed and repudiated its policy of crediting employment as a maternity leave replacement teacher toward the acquisition of tenure, specifically referencing eighteen teachers who received a letter in September 2009 from the district superintendent which stated that only time worked in a permanent position can be counted toward the three years required to earn tenure. The Board sought dismissal of the petition, contending that its claims were not ripe for adjudication, and filed a motion for summary judgment.

The ALJ found that: there are no disputed material facts in this matter, and the Board is entitled to judgment as a matter of law; for a matter to be adjudicated, a party must have suffered a distinct injury or harm that was caused by the adverse party and can be remedied by the court; in this case, the petition asserts no loss of pay, rank, position, or any other benefit by the staff members who received the controverted letter from the district superintendent; subsequent to the filing of the petition, three of the teachers referenced therein were terminated for financial reasons, but even considering the changes in their status, the petition is still not ripe for adjudication; and the petition cannot properly be viewed as one for a declaratory ruling in accordance with *N.J.A.C.* 6:3-2.1. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons comprehensively presented in her recommended decision, 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.

Mailed 12/15/10

OAL DKT. NO. EDU 1199-10
AGENCY DKT. NO. 358-12/09

BRIDGEWATER-RARITAN EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET 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 full consideration, the Commissioner concurs with the Administrative Law Judge that summary decision is appropriately granted to the Board as the claims advanced in the instant petition of appeal are not ripe for adjudication, necessitating their dismissal.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter – for the reasons clearly articulated therein – and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/15/10
Date of Mailing: 12/15/10

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 01199-10

AGENCY DKT. NO. 358-12/09

BRIDGEWATER–RARITAN EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

Sanford Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Nicholas Celso, Esq., for respondent (Schwartz, Simon, Edelstein and Celso, attorneys)

Record Closed: October 15, 2010 Decided: November 8, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Bridgewater-Raritan Education Association (the Association), asserts that respondent, the Bridgewater-Raritan Board of Education (the Board), has

improperly disavowed and repudiated its policy of crediting employment as a maternity leave replacement teacher toward tenure acquisition. The Board seeks dismissal of the petition, urging that its claims are not ripe for adjudication. In the alternative, the Board seeks summary decision, contending that there are no material facts in dispute and that it is entitled to judgment as a matter of law.

PROCEDURAL HISTORY

The Association filed its appeal before the Commissioner of Education (the Commissioner) on December 14, 2009. The Board filed an answer and the contested case was transmitted to the Office of Administrative Law (OAL) on December 22, 2009. The Board filed a Motion to Dismiss or in the Alternative for Summary Decision on July 21, 2010. The Board supported its application with a brief and with the certifications of counsel and Gerard Nazzaretto, manager of human resources, for the school district. On August 30, 2010, the Association filed a brief and the certification of Association president, Steven Beatty, in opposition to the Board's motion. The Board replied on September 9, 2010.

I heard oral argument on October 6, 2010. At my request, on October 14, 2010, the Board submitted a supplemental certification in which Nazzaretto outlined the employment history of several district teachers. Via email dated October 15, 2010, counsel for the Association confirmed that this supplemental certification was factually accurate, and the record closed.

FINDINGS OF FACT

The material facts are not in dispute, and I **FIND**:

On September 14, 2009, the Bridgewater-Raritan Superintendent of Schools Michael Schilder sent a letter to thirty-four teachers employed by the district. Although not named as party petitioners, eighteen of these teachers are referenced in the petition. The letter stated, in pertinent part, as follows:

> This is to provide you with information on your current status with regard to earning tenure in your current teaching position with the District.
>
> Please be aware that under New Jersey Education statute 18A:28-4 only time worked in **a permanent position** can be counted toward the three years required to earn tenure. Therefore, any time worked in a position in which the prior incumbent is or was on leave of absence cannot count toward tenure under the NJ Education tenure statute.
>
> [(Emphasis in original.)]

It is uncontroverted that the information contained in Schilder's correspondence was at odds with the recipients' view of their tenure rights, and at odds with representations previously made to them by school district administration. Indeed, an email sent to Mary Gruber from Gerard Nazzaretto is representative, and states:

> Our district has chosen to grant credit towards tenure to anyone who is hired in a contract teaching position whether it is a leave replacement or not. In your case what this means is that you will receive one year of credit towards tenure for the 2007-2008 school year even though you were replacing Erin Hughes who was on leave.

There was no formal Board policy recognizing the right of leave-replacement teachers to accrue tenure. Nazzaretto states in his certification that Schilder's letter was sent to staff members to "[correct] a misunderstanding that previously existed relative to the state of the tenure law."

At the time of the filing of the petition, all of the referenced teachers continued to be employed by the district. In or about June 2010, however, seventy-six instructional positions were abolished by the Board due to a loss of State aid. Of the eighteen teachers mentioned in the petition, three were the subject of a Reduction in Force (RIF): Mary Gruber, Michelle Kirchofer, and Tamara Manzur. Gruber's employment commenced on September 1, 2007, and she worked continuously until she was not re-employed for the 2010-2011 school year due to budget constraints. Although at the time Nazzaretto filed his initial certification on July 21, 2010, Manzur also had been laid-

off, she has since been rehired, effective September 1, 2010. Thus, there was no break in her service to the district.

As to Kirchofer, Nazzaretto writes in his certification:

> Michelle Kirchofer was hired on May 15, 2006 and worked for one month as a part-time Special Education Teacher. She had a break in service during the 2006-2007 school year and returned to the District on September 1, [2007] as a maternity leave replacement. She worked through the end of the 2009-2010 school year. Based on her prior one month of service and considering, for argument sake, that this leave replacement time counted toward her tenure, Ms. Kirchofer would have attained tenure on May 16, 2010, having three (3) years and (1) month of seniority a the time of the RIF making her the least senior person on her seniority list.
>
> [(Emphasis in original.)]

The Association agrees that Kirchofer's employment history was accurately set forth by Nazzaretto in his supplemental certification, as follows:

2005-2006	Employed from May 15, 2006 through June 22, 2006
2006-2007	Break in service for entire year (not re-employed due to layoff)
2007-2008	Employed for entire school year (leave replacement teacher)
2008-2009	Employed for entire school year (regular contract)
2009-2010	Employed for entire school year (regular contract)
2010-2011	Not re-employed due to RIF

It is uncontroverted that even if credited for her year as a replacement teacher, Kirchofer was the least senior teacher in her category of employment, and there is no challenge to the decision to RIF her. The remaining fifteen staff members mentioned in

the petition continue to be employed by the district and there is no allegation that their employment status changed in any way subsequent to receipt of Schilder's letter.

CONCLUSIONS OF LAW

The Board seeks dismissal of the petition, but includes certifications and other documents outside the pleadings in support of its motion. Accordingly, its application is properly considered in accordance with N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate

to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the Board is entitled to judgment as a matter of law. The Board correctly asserts that for a matter to be justiciable, a party must have suffered a distinct injury or harm that was caused by the adverse party, and that can be remedied by the court. New Jersey Turnpike Auth. v Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988). It is not generally the role of the courts to enter rulings that are advisory or abstract. N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v Realty Eq. Corp. of New York, 58 N.J. 98.107.

The Commissioner likewise requires that a controversy or dispute be ripe for adjudication. Milano v Franklin Bd. of Educ., EDU 08206-08, Initial Decision (February 24, 2009), <http://lawlibrary.rutgers.edu/oal/search.html> (citing Bott v. Middletown Bd. of Educ., EDU 4124-81, Initial Decision (October 30, 1981), Comm'r's Decision (December 21, 1981)). Consistent with this requirement, it is well-established that the rights flowing from claimed or actual tenure rights remain inchoate until an employee suffers an adverse action in alleged violation of such rights. Where a petitioner seeks no relief beyond a declaration that he or she has acquired tenure in the school district, and alleges no loss of pay, reduction in employment or deprivation of any other specific benefit as a result of the facts pleaded, the matter is not properly before the Commissioner for adjudication. See Milano v Bd. of Educ. of Franklin Twp., EDU 6797-06, Comm'r's Decision (July 25, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>; Barca v Bd. of Educ. of Holmdel, EDU 2192-00, Initial Decision (May 11, 2001), Comm'r's Decision (June 22, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>.

Here, the petition asserts no loss of pay, rank, position, or any other benefit or emolument of employment by the staff members who received the controverted letter from the Superintendent of Schools.[1] The Association urges that its members promptly

[1] Schilder's letter incorrectly cites to N.J.S.A. 18A:28-4. The correct citation is N.J.S.A. 18:16-1.1, as noted in the brief submitted by the Board.

contested the changed interpretation of their tenure rights, fearing that a failure to do so would be viewed as a waiver. This is an understandable but nonetheless baseless concern. These employees certainly can challenge any future adverse employment action by the Board, including but not limited to action taken because their appointments were as replacement teachers. Such claims will be ripe when the adverse action is taken, and timely if filed within ninety days thereof. See N.J.A.C. 6A:3-1.3(i).

Subsequent to the filing of the petition, three staff members mentioned in the petition were terminated due to financial exigencies. These individuals are not named as party petitioners, and the petition itself was never amended to assert that their employment status changed as a result of the Board's revised view of their tenure entitlements. Technically, the petition should have been amended. But our regulations permit me to relax or disregard any procedural rule if adherence to that rule "would result in unfairness or injustice." N.J.A.C. 1:1-1.3(b). OAL rules are intended to "achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." N.J.A.C. 1:1-1.3(a). In this spirit, I **CONCLUDE** that it is appropriate that I consider the changed circumstances of staff members Gruber, Kirchofer, and Manzur, and determine whether these changes in their status render the petition ripe for adjudication.

There is no dispute that Gruber's employment was unaffected by the actions alleged in the petition. Having commenced employment on September 1, 2007, she would not have earned tenure under any theory of her rights unless and until she was re-employed in September 2010. N.J.S.A. 18A; 28-5(b). Similarly, while Manzur was initially advised that her employment was terminated due to a RIF, she was re-employed before there was any break in her service. Clearly, the changed circumstances of these two employees do not render the petition ripe for adjudication. Their employment was not adversely affected by the Board's change in practice relative to tenure acquisition.

The Association urges that the Board's actions have adversely affected the rights of Michelle Kirchofer, and that the issue of Kirchofer's entitlement to placement on a

preferred eligibility list is properly before the Commissioner. N.J.S.A. 18A:28-12. Indeed, both parties appear to believe that Kirchofer would have earned tenure prior to her RIF if credited for the year she replaced a teacher on maternity leave. Were that the case, I would concur that the issue of Kirchofer's right to placement on the list might then be ripe for adjudication.[2] Indeed, her entitlement to recall is statutory and inclusion on the preferred-eligibility list is her assurance that her re-employment rights are respected.

But both parties misapprehend Kirchofer's rights under the tenure laws. Just like Gruber, Kirchofer did not have tenure at the time of her layoff, nor would she have even if credited for her service during 2007-2008 as a replacement for a teacher on maternity leave. Tenure is a legislative status, not a contractual one, and in to order to be protected by that status, a teaching staff member must have met the precise conditions articulated in the statute. Howley v Ewing Bd. of Educ., 6 N.J.A.R. 509, 516 (EDU). N.J.S.A. 18A: 28-5 provides for the acquisition of tenure upon employment in a district 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 making his determination that Kirchofer would have earned tenure if credited for all of her service to the district, Nazzaretto counts her time in-district without considering her break in service during 2006-2007, and without reference to the clear statutory requirement that service take place in "consecutive" years. Although she worked for three consecutive academic years (2007-2010), Kirchofer was not re-employed at the beginning of the next succeeding academic year, as required by N.J.S.A. 18A: 28-5(b). Nor did she serve the district for "the equivalent of more than

[2] Per the holding in Barca, supra, EDU 2192-00, Kirchofer's right to actual re-employment would remain inchoate until an opening occurred and she was not invited to fill that opening.

three academic years within a period of any four consecutive academic years," because she only worked for one month prior to her year-long break in service. N.J.S.A. 18A: 28-5(c). A review of Kirchofer's employment history reflects that there are no four consecutive academic years in which she served for more than thirty months.

Accordingly, Manzur, Kirchofer, and Gruber's rights were unaffected by the Board's repudiation of its policy of crediting service as a replacement teacher toward tenure. Manzur remains employed; Gruber and Kirchofer would not have acquired tenure prior to the 2010 RIF even if the Board had credited them for their leave replacement service. I **CONCLUDE** that the RIF of Gruber, Kirchofer, and Manzur notwithstanding, the claims raised by the petition are not ripe for adjudication.

The Association's argument that I should reach a determination on the merits of its claims because it seeks declaratory relief under N.J.A.C. 6A:3-2.1 is unavailing. The petition was filed as a contested case and not as a petition for a declaratory ruling in accordance with the requirements of N.J.A.C. 6A:3-2.2. More importantly, the claims of the petition do not meet the express regulatory criteria for entertaining a request for declaratory relief. The rule states:

> A request for a declaratory ruling shall reflect adverse positions on the statute or rule in question by the parties and may not seek consequential relief beyond a declaration as to the meaning of the statute or rule, and may not be based on underlying facts which are future, contingent, uncertain or disputed.
>
> [Emphasis supplied.]

The Association urges that its members relied to their detriment on administrative representations that their service was tenure eligible. The petition asserts, as does the brief submitted in opposition to the motion, that Association members declined alternative job opportunities or made other critical life choices based on the misinformation received from Nazzaretto. But even counsel for the Association concedes that its equitable estoppel argument "create[s] a triable issue of fact not appropriate for summary judgment." The Association clearly alleges facts which are "uncertain or disputed." Moreover, it is plain that the petition seeks well more than a

clarification of the meaning of a statute or rule. Rather, a full exploration of the claims in the petition requires an analysis of both parties' conduct and its legal implications. Accordingly, I **CONCLUDE** that the petition is not properly viewed as one for a declaratory ruling in accordance with N.J.A.C. 6:3-2.1.

Having determined that this matter is not ripe for adjudication, it is unnecessary to reach the Board's arguments on the merits of the Association's claims. I **CONCLUDE** that the petition should be dismissed.

ORDER

Based on the foregoing, I **ORDER** that the claims raised by the petition of appeal are not ripe for adjudication and 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.

November 8, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 11/8/2010

Date Mailed to Parties: NOV 9 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

541-10R

OAL DKT. NO. EDU 14046-09
AGENCY DKT. NO. 143-5/08
(EDU 6162-08 on remand)

KATHLEEN PARTE-WILLBERGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Settlement Agreement 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. The Agreement is approved with the following *proviso*.

Section 6 states that the Agreement shall be effective upon the execution by all parties – which execution transpired before consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation is not binding until the Commissioner approves it.

The foregoing notwithstanding, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|15|10

Date of Mailing: 12|15|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14046-09
AGENCY DKT. NO. 143-5/08
(ON REMAND OAL DKT. NO. EDU 6162-08)

KATHLEEN PARTE-WILLBERGH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: October 14, 2010 Decided: October 29, 2010

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Kathleen Parte-Willbergh, filed a petition and hearing request alleging that she acquired tenure as a guidance counselor and that the school district's failure to hire her as a guidance counselor after the elimination of her substance abuse coordinator position was a violation of her tenure/seniority rights. This matter was originally transmitted to the Office of Administrative Law (OAL) on July 10, 2008, for hearing as a contested case. After a hearing, an initial decision was issued on November 2, 2009, concluding that the school district did not violate petitioner's tenure and seniority rights and dismissing the petition. On December 15, 2009, the case was remanded to the OAL for further proceedings based on the Commissioner's determination the initial decision failed to address petitioner's claim that since she is the holder of an Educational Services certificate and she achieved tenure under an endorsement to that certificate, she has a right to the guidance counselor position over a non-tenured individual based on Ellicot v. Bd. of Educ. of Frankford, 251, N.J. Super. 342 (App. Div. 1991) and Dennery v. Bd. of Educ. of the Passaic County Reg. H. S. Dist., 131 N.J. 626 (1993).

Following the remand, I conducted a telephone prehearing conference on January 20, 2010, followed by a telephone settlement conference on February 3, 2010. At that time, counsel reported to me that they had discussed the outlines of a settlement and they requested additional time to resolve the details. Following a series of additional telephone conferences, counsel reported to me on July 29, 2010, that they had reached a settlement and they anticipated the submission of a fully executed Settlement Agreement within four weeks.

On October 6, 2010, a fully executed Settlement Agreement was submitted and on October 14, 2010, a certified copy of the motion to approve the Settlement Agreement was provided.

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 their signatures and the execution thereof by the president and secretary/business administrator of the Board of Education and the submission of a certified and sealed copy of the minutes 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.

October 29, 2010
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Date Received at Agency:

Date Mailed to Parties: NOV - 3 2010

mph

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT and Mutual Release ("Settlement Agreement" or "Agreement") is made on this _____day of _____, 2010, by and between the Wall Township Board of Education ("the District"), and Kathleen Parte-Willbergh ("Parte-Willbergh") in effort to resolve OAL Docket No. EDU-14046-2009S in an amicable and mutually satisfactory manner. The Parties hereby set forth their full and complete agreement as follows;

WHEREAS, the Wall Township Board of Education is charged with the operations of the public schools of the Wall Township School District, County of Monmouth, a K-12 school system, pursuant to Title 18A of the New Jersey Statutes; and

WHEREAS, Parte-Willbergh was employed by the District as a certified staff member until a reduction in force in June 2008; and

WHEREAS, on December 11, 2009, the Commissioner of Education determined that Parte-Willbergh was entitled to a Guidance Counselor position in the District as of September 2008, and ordered a remand for a hearing before the Office of Administrative Law to determine Parte-Willbergh's actual damages and claims; and

WHEREAS, the Parties desire to amicably settle this matter, rather than conduct a prolonged hearing and continued litigation to determine Parte-Willbergh's rights to any position in the District, as well as Parte-Willbergh's right to compensation and to the relief sought in the Petition,

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties hereby agree as follows:

RECEIVED
2010 OCT -6 P 1:28

1. **Payment on Claim.**

The District agrees to pay and Parte-Willbergh agrees to accept the total sum of $73,927.90, to be paid in two (2) equal installments, which is less than Parte-Willbergh's contractual salary for the 2008-2009 school year, as full and total satisfaction for all claims made in the Petition of Appeal, and for any and all claims that Parte-Willbergh may have against the District. The first payment shall be made by December 15, 2010, and the second payment shall be made on January 2, 2011.

The payments constitute compensation for back pay, *i.e.*, monies that Parte-Willbergh would have earned had she remained employed by the District for 2008-2009 school year, minus unemployment benefits received, compensation for costs of COBRA insurance and any other applicable benefits, and compensation for Parte-Willbergh's agreement not to seek reinstatement to her position following 2008-2009 school year and for waiving her tenure and seniority rights, thereafter.

The Parties understand and agree that, by entering into this Settlement Agreement, Parte-Willbergh has given the Board a credit for unemployment benefits that she received; and as a result, if the State of New Jersey or any State agency or authority seeks reimbursement of any unemployment benefits paid to Parte-Willbergh, the Board of Education shall reimburse Parte-Willbergh for all monies that she must reimburse the State or any State agency or authority.

The Parties recognize that Parte-Willbergh is presently receiving a pension and retirement allowance from the Teachers' Pension Annuity Fund, and that no part of the monies paid to her are for any period of time covered by that Pension or Retirement allowance.

2. **General Release of Claims.**

In entering this Settlement Agreement, the representatives of the parties represent that they are fully authorized to consent to all terms on behalf of their respective clients. The terms of this agreement have been approved by public action by the District on September 21, 2010.

In entering this Agreement, the parties hereby waive and release as against each other all claims, defenses and reservations whatsoever arising out of this matter in any jurisdiction, and it is the intention of the parties' authorized representatives to hereby resolve litigation, all related litigation, and any and all other matters arising out of the Office of Administrative law case referenced above, finally and with prejudice.

All parties shall bear their own respective professional fees and costs arising out of this litigation.

3. **Dismissal of Appeal**

In further consideration of the mutual promises, all Parties consent and agree to the withdrawal/dismissal of the Petition of Appeal, OAL Docket No. EDU-14046-2009S with prejudice and without costs to any Party, and provided further that if the Commissioner of Education does not approve this Settlement Agreement or any part thereof, subject to the Parties' right to enter into a new or modified Agreement subject to approval by the Commissioner of Education, this matter shall be returned to the Office of Administrative Law for further proceedings without reference to this Settlement Agreement.

4. **No Admission of Liability**

The Parties understand and agree that this Settlement Agreement is the compromise of disputed claims and that the payment and consideration set forth herein is not to be construed as an admission of liability on the part of any Party hereto. All Parties deny liability and have agreed to settle this matter and pay the amount referenced herein solely to avoid the expense and burden of litigation.

5. **Execution of Release**

All Parties have consulted with their respective attorneys regarding the terms and conditions of this Settlement Agreement, have carefully read the same and know and understand its contents. The Parties expressly acknowledge that they execute this Settlement Agreement of their own free will.

6. **Effective Date**

This Settlement Agreement shall be effective when the last Party shall have executed the same and provided a copy to all other Parties.

7. **Counterparts**

This Settlement Agreement may be executed in one or more counterparts, all of which shall be one instrument, and all of which shall be considered duplicate originals.

8. **Full and Complete Agreement**

This Settlement Agreement constitutes the full and complete agreement between the Parties with respect to its subject matter. Except as otherwise expressly provided herein, this Settlement Agreement supercedes all prior agreements, understandings, and discussions relating to the claims raised. There are no representations, agreements, arrangements or understandings, oral or written, concerning the subject matter between the Parties which are not fully expressed

or incorporated by reference herein. This Settlement Agreement may be amended, modified or waived only by an agreement in writing signed by all Parties hereto.

9. Authority to execute agreement

All signatories hereto state and affirm that they have the authority to execute this Settlement Agreement and Release and do hereby bind the Party which they represent.

10. Severability

If any term, provision or section of this Settlement Agreement is unlawful, invalid or unenforceable, the remainder of this Settlement Agreement shall remain in full force and effect and shall remain binding on the Parties to this Settlement Agreement.

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

WALL TOWNSHIP BOARD OF EDUCATION

Witness: _____

Date: 9/24/10

By: _____
Deidre Kukucka, Board of Education President

Witness: _____

Date: 9/23/10

By: _____
Brian Smyth, Board Secretary
Business Administrator

PETITIONER

Witness: _____

Date: 9/3/10

By: _____
Kathleen Parte-Willbergh

WALL TOWNSHIP PUBLIC SCHOOLS

OFFICE OF THE BUSINESS ADMINISTRATOR
P.O. BOX 1199 • 18TH AVENUE
WALL, N.J. 07719-1199

BRIAN J. SMYTH, P.E.
BUSINESS ADMINISTRATOR/BOARD SECRETARY

Voice: 732.556.2016
Fax: 732.556.2102
Email: bsmyth@wall.k12.nj.us

October 4, 2010

The following is an excerpt from the minutes of the Wall Township Board of Education Meeting held on **September 21, 2010**; Motion by **Mrs. Applegate** and seconded by **Mr. Carhart** to approve the following:

Approval of Settlement Agreement with KWP as prepared by Kenney, Gross,Kovats, & Parton

I, Brian J. Smyth, Business Administrator/Board Secretary, hereby certify that the foregoing is a true copy of an approved Agenda Item of the Wall Township Board of Education at its Combined Workshop/ Regular Meeting of September 21, 2010.

Brian J. Smyth

Board Seal

Business Administrator/Board Secretary

OAL DKT. NO. EDU 2459-10
AGENCY DKT. NO. 29-2/10

BARRY BAITY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Stipulation of Settlement and Dismissal" (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 Stipulation 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|20|10

Date of Mailing: 12|20|10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2459-10

AGENCY DKT. NO. 29-2/10

BARRY BAITY,

Petitioner,

v.

ASBURY PARK

BOARD OF EDUCATION,

Respondent.

Stephen B. Huner, Esq., for petitioner (Detzky & Hunter, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: November 4, 2010 Decided: November 5, 2010

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 6, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, as well as the resolution of respondent Board of Education approving same.

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

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

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

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

11/5/10
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

NOV - 9 2010
Date Received at Agency:

NOV - 9 2010
Date Mailed to Parties:

/mev

Detzky & Hunter, LLC

Somerville Office:
33 North Bridge Street
Somerville, New Jersey 08876
908-707-4560
Fax: 908-707-0899

*Michael L. Detzky, Esq.
Stephen B. Hunter, Esq.

*Also Member of NY Bar

Freehold Office:
45 Court Street
Freehold, New Jersey 07728
732-780-3090
Fax: 732-308-3866

Reply to: Somerville

November 3, 2010

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2010 NOV -5 A 11: 39
RECEIVED

Honorable Patricia Kerins
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, N.J. 08625-0049

RE: BARRY BAITY and ASBURY PARK BOARD OF EDUCATION
OAL DOCKET NO. EDUOR-02459-2010S
AGENCY REFERENCE NO. 29-2/10

Dear Judge Kerins:

Enclosed please find a fully executed copy of the Stipulation of Settlement and Dismissal in the above referenced matter, along with the required Certificate.

Please advise the undersigned if you require any additional information from the parties concerning the resolution of the above referenced matter.

Respectfully submitted,

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Michael Gross, Esq.
Barry Baity
Tom Bohnyak, NJEA

DETZKY & HUNTER, LLC
33 North Bridge Street
Somerville, N.J. 08876
(908) 707-4560
Attorneys for Petitioner

BARRY BAITY, Petitioner, vs. ASBURY PARK BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY : : DOCKET NO. EDU-02459-2010S AGENCY REFERENCE NO. 29-2/10 : : STIPULATION OF SETTLEMENT AND DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, with Petitioner Barry Baity receiving the sum of **$6,500.00** in full resolution of the above referenced matter, it is hereby stipulated and agreed that this case be dismissed with prejudice.

Michael Gross, Esq., Attorneys for Respondent

Dated:

Stephen B. Hunter, Esq., Attorneys for Petitioner

Dated: 9/29/10

Asbury Park Board of Education

603 Mattison Avenue, 3rd Floor
Asbury Park, NJ 07712
(732) 776-2606, Ext. 2437
Fax: (732) 988-7315

CERTIFICATE

I Geoffrey Hastings, Assistant Business Administrator of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on October 27, 2010 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

11. Petitions of Appeal

The Superintendent recommends that the Petitions of Appeal, Office of Administrative Law Docket Nos. EDU 02459-2010S; EDU 02458-2010S; EDU 06270-2009; and EDU -4691-2010S be resolved consistent with the terms set forth in their corresponding Stipulations of Settlement and Dismissal, which are on file in the Office of the Board Secretary.

Motion to approve: Mr. Brewington **Second**: Ms. Breech
Aye: 6 **Nay**: 0 **Abs**: 1 Upon roll call the motion was adopted. With Mr. Palmer abstaining.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 28th day of October 2010.

Geoffrey Hastings, Assistant Business Administrator

546-10

JOSEPH GALEGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a head security guard employed by respondent Board – sought indemnification in the amount of $13,402.50 for counsel fees incurred in defending a civil action brought against him. Petitioner requests indemnification for the work of attorney Sanford R. Oxfeld (Oxfeld) at a rate of $300/hour, and work performed by Oxfeld's associate at a rate of $250/hour. The Board contends that the counsel fees are unreasonable because they exceed the allowable reimbursement rate of $125/hour set forth in its policy on employee indemnification. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia,* that: there is no genuine issue of material fact and the matter can be decided on summary decision; the record includes a letter dated March 26, 2007, wherein counsel for petitioner clearly stated that he was representing petitioner at the hourly rate of $150; petitioner never paid nor was he expected to pay more than $150/hour for Oxfeld's legal services; and the respondent Board's policy restricting attorney fees to hourly rates not exceeding $125 violates the Board's responsibility under *N.J.S.A.* 18A:16-6 to defray all costs incurred by school employees in defending civil actions arising out of their employment. Accordingly, the ALJ concluded that petitioner is entitled to indemnification in this matter at the hourly rate of $150, and ordered that the petitioner be indemnified for attorney's fees in the sum of $6,795, which represents 45.30 hours of legal services at the hourly rate of $150.

Upon a thorough and independent review, the Commissioner concurred with the ALJ's conclusion that *N.J.S.A.* 18A:16-6 governs the indemnification of legal costs incurred by employees for the defense of civil actions arising out of the performance of the employees' duties, and found that the March 26, 2007 letter from petitioner's attorney clearly stating a fee of $150/hour – and the lack of objection to that rate by the respondent – constitute facts supporting a contract implied-in-fact concerning the fee of $150/hour. Accordingly, the Commissioner ordered that both parties should be bound by that rate, but noted that the associate in petitioner's counsel's firm who worked on the case should be compensated at a rate of $125/hour based on facts in the record which show that the billing rate for the associate is $25 less per hour than lead counsel's rate.

This synopsis is not part of 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 20. 2010

546-10

OAL DKT. NO. EDU 3818-10
AGENCY DKT. NO. 63-4/10

JOSEPH GALEGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

At issue in this controversy is the hourly rate which may be used by petitioner's counsel to calculate the amount of attorney fees payable to him for services he rendered defending petitioner in a civil lawsuit brought against both parties. Respondent neither contests the petitioner's entitlement to indemnification for the legal fees nor disputes the number of hours itemized in the invoice provided by petitioner's counsel. Rather, respondent contends that the rate for the indemnified legal services should be $125/hour, the maximum rate allowed in a policy which respondent approved on June 25, 2009 – over two years after petitioner's counsel had begun representing petitioner. Petitioner, on the other hand, maintains that his counsel should be paid $300/per hour because that is a reasonable rate for an experienced attorney.

In her Initial Decision, the Administrative Law Judge (ALJ) correctly found that *N.J.S.A.* 18A:16-6 governs the indemnification of legal costs incurred by employees of boards of education for the defense of civil actions arising out of the performance of the employees' duties. *N.J.S.A.* 18A:16-6 provides, in pertinent part, that

> 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 . . . .
> (Emphasis added.)

Acknowledging the statute's mandate that boards shall defray all reasonable legal defense costs incurred by employees, the ALJ reasoned that the respondent board could not defeat same by imposing a low ceiling on legal fees.[1]

Further, the record contains a letter dated March 26, 2007, from petitioner's counsel providing notice to respondent's counsel that he would be representing petitioner at the rate of $150/hour. There is no evidence that respondent objected to the rate, and petitioner's counsel proceeded to render his services. Under these circumstances petitioner and his counsel could justifiably expect indemnification at the designated rate. *See, e.g. Starkey, Kelly, Blaney & White, v. Estate of Nancy Nicolaysen, Lisa Gelburd and Sigurd Nicolaysen, Jr.,* 172 *N.J.* 60, 68 and 69, (2002) *citing Restatement (Third) of the Law Governing Lawyers* § 39 *comment b(i)* (1998):

> Quantum meruit is a form of quasi-contractual recovery and rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Courts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust. Quantum meruit recovery then provides compensation in circumstances in which it would be contrary to the parties' expectation to deprive the lawyer of all compensation.

Petitioner's arguments in favor of the hourly counsel fee of $300 focused on the language in *N.J.S.A.* 18A:16-6 that directs boards of education to indemnify their employees for reasonable counsel fees and expenses. Relying on *Rendine v. Pantzer,* 142 *N.J.* 292 (1995),

[1] The ALJ's conclusion would appear to be especially appropriate in the present case, where the policy to cap legal fees was instituted by respondent over two years after petitioner's counsel had begun representing him.

certain Merit System Board regulations concerning representation fees in disciplinary hearings, and a certification by a fellow attorney, petitioner argued that $300/hour is a reasonable fee for his attorney, who is experienced and a name partner in a firm.

The ALJ correctly determined, however, that the reasonability of the fee must be evaluated within the four corners of the case at hand. While petitioner's counsel may enjoy the stature to charge $300/hour in today's market, there is no evidence that petitioner entered into a fee agreement binding him to pay that rate, or that petitioner made any payments to his counsel at that rate. To the contrary, the record contains the above-referenced March 26, 2007 letter from petitioner's counsel informing respondent's counsel that he would be representing petitioner at the rate of $150/hour.[2] While the letter itself did not constitute an express contract, the law provides alternative theories of contract.

Contracts are traditionally classified as express, implied-in-fact or implied-in-law. As explained in *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford,* 144 *N.J.* 564, 574 (1996):

> The contract is express if the agreement is manifested by written or spoken words, and **implied-in-fact** if the agreement is manifested by other conduct. Thus, contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings. Courts often find and enforce implied promises by interpretation of a promisor's word and conduct in light of the surrounding circumstances. See Restatement (Second) of Contracts § 4 comment a (1979); *id.* at § 5 comment a ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct.").

---

[2] Apparently, the first appearance of a $200/hour rate was in a bill from petitioner's counsel issued on January 14, 2010 – three years after the letter establishing $150/hour as the representation rate. In consequence of respondent's resist**ance to paying $200/hour, the instant petition was filed – on March 31, 2010 – demanding indemnification of** counsel fees at the rate of $300/hour.

The Commissioner finds that the March 26, 2007 letter from petitioner's counsel's to respondent's counsel – reliance upon which should have been reasonably forseen by petitioner's counsel – and the lack of objection thereto by respondent during the following two years of counsel's representation of petitioner, constitute facts supporting a contract implied-in-fact concerning the fee of $150/hour. Consequently, the Commissioner concludes that both parties should be bound by that rate.

In sum, upon review of the record and Initial Decision, and after consideration of the arguments in the parties' exceptions, the Commissioner grants summary disposition with the following modification to the relief requested in petitioner's summary disposition motion: the Commissioner adopts the conclusion of the ALJ that the proper fee for petitioner's counsel's work time is $150/hour. In light of the facts in the record which show that the billing rate for the associate in petitioner's counsel's firm is $25 less per hour than lead counsel's rate, the Commissioner finds that the appropriate proportional fee for the associate's work time is $125/hour.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|20|10

Date of Mailing: 12|20|10

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

OAL DKT. NO. EDU 3818-10
AGENCY DKT. NO. 63-4/10

JOSEPH GALEGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

At issue in this controversy is the hourly rate which may be used by petitioner's counsel to calculate the amount of attorney fees payable to him for services he rendered defending petitioner in a civil lawsuit brought against both parties. Respondent neither contests the petitioner's entitlement to indemnification for the legal fees nor disputes the number of hours itemized in the invoice provided by petitioner's counsel. Rather, respondent contends that the rate for the indemnified legal services should be $125/hour, the maximum rate allowed in a policy which respondent approved on June 25, 2009 – over two years after petitioner's counsel had begun representing petitioner. Petitioner, on the other hand, maintains that his counsel should be paid $300/per hour because that is a reasonable rate for an experienced attorney.

In her Initial Decision, the Administrative Law Judge (ALJ) correctly found that *N.J.S.A.* 18A:16-6 governs the indemnification of legal costs incurred by employees of boards of education for the defense of civil actions arising out of the performance of the employees' duties. *N.J.S.A.* 18A:16-6 provides, in pertinent part, that

> 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 . . . .
> (Emphasis added.)

Acknowledging the statute's mandate that boards shall defray all reasonable legal defense costs incurred by employees, the ALJ reasoned that the respondent board could not defeat same by imposing a low ceiling on legal fees.[1]

Further, the record contains a letter dated March 26, 2007, from petitioner's counsel providing notice to respondent's counsel that he would be representing petitioner at the rate of $150/hour. There is no evidence that respondent objected to the rate, and petitioner's counsel proceeded to render his services. Under these circumstances petitioner and his counsel could justifiably expect indemnification at the designated rate. *See, e.g. Starkey, Kelly, Blaney & White, v. Estate of Nancy Nicolaysen, Lisa Gelburd and Sigurd Nicolaysen, Jr.*, 172 *N.J.* 60, 68 and 69, (2002) *citing Restatement (Third) of the Law Governing Lawyers* § 39 *comment b(i)* (1998):

> Quantum meruit is a form of quasi-contractual recovery and rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Courts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust. Quantum meruit recovery then provides compensation in circumstances in which it would be contrary to the parties' expectation to deprive the lawyer of all compensation.

Petitioner's arguments in favor of the hourly counsel fee of $300 focused on the language in *N.J.S.A.* 18A:16-6 that directs boards of education to indemnify their employees for reasonable counsel fees and expenses. Relying on *Rendine v. Pantzer,* 142 *N.J.* 292 (1995),

[1] The ALJ's conclusion would appear to be especially appropriate in the present case, where the policy to cap legal fees was instituted by respondent over two years after petitioner's counsel had begun representing him.

certain Merit System Board regulations concerning representation fees in disciplinary hearings, and a certification by a fellow attorney, petitioner argued that $300/hour is a reasonable fee for his attorney, who is experienced and a name partner in a firm.

The ALJ correctly determined, however, that the reasonability of the fee must be evaluated within the four corners of the case at hand. While petitioner's counsel may enjoy the stature to charge $300/hour in today's market, there is no evidence that petitioner entered into a fee agreement binding him to pay that rate, or that petitioner made any payments to his counsel at that rate. To the contrary, the record contains the above-referenced March 26, 2007 letter from petitioner's counsel informing respondent's counsel that he would be representing petitioner at the rate of $150/hour.[2] While the letter itself did not constitute an express contract, the law provides alternative theories of contract.

Contracts are traditionally classified as express, implied-in-fact or implied-in-law. As explained in *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford,* 144 *N.J.* 564, 574 (1996):

> The contract is express if the agreement is manifested by written or spoken words, and **implied-in-fact** if the agreement is manifested by other conduct. Thus, contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings. Courts often find and enforce implied promises by interpretation of a promisor's word and conduct in light of the surrounding circumstances. See Restatement (Second) of Contracts § 4 comment a (1979); *id.* at § 5 comment a ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct.").

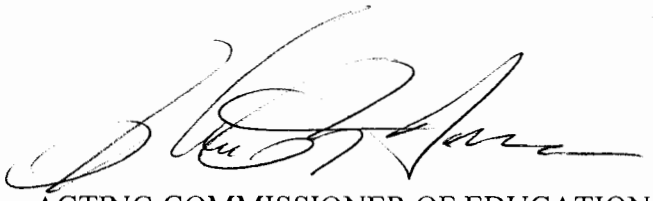
---

[2] Apparently, the first appearance of a $200/hour rate was in a bill from petitioner's counsel issued on January 14, 2010 – three years after the letter establishing $150/hour as the representation rate. In consequence of respondent's resistance **to paying $200/hour, the instant petition was filed – on March 31, 2010 – demanding indemnification of** counsel fees at the rate of $300/hour.

The Commissioner finds that the March 26, 2007 letter from petitioner's counsel's to respondent's counsel – reliance upon which should have been reasonably forseen by petitioner's counsel – and the lack of objection thereto by respondent during the following two years of counsel's representation of petitioner, constitute facts supporting a contract implied-in-fact concerning the fee of $150/hour. Consequently, the Commissioner concludes that both parties should be bound by that rate.

In sum, upon review of the record and Initial Decision, and after consideration of the arguments in the parties' exceptions, the Commissioner grants summary disposition with the following modification to the relief requested in petitioner's summary disposition motion: the Commissioner adopts the conclusion of the ALJ that the proper fee for petitioner's counsel's work time is $150/hour. In light of the facts in the record which show that the billing rate for the associate in petitioner's counsel's firm is $25 less per hour than lead counsel's rate, the Commissioner finds that the appropriate proportional fee for the associate's work time is $125/hour.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|20|10

Date of Mailing: 12|20|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03818-10
AGENCY DKT. NO. 63-4/10

JOSEPH GALEGO,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,
UNION COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld and Cohen, attorneys)

Nicole Morgan, Esq., for respondent (Elizabeth Public Schools)

Record Closed: October 28, 2010 Decided: November 8, 2010

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE

Joseph Galego, petitioner, an employee of the Board of Education of the City of Elizabeth (the Board/respondent), seeks indemnification in the amount of $13,402.50 for counsel fees incurred in defending a civil action brought against him. Petitioner requests indemnification for the work of attorney Sanford R. Oxfeld (Oxfeld) at a rate of

$300.00 per hour and work performed by Oxfeld's associate at a rate of $250.00 per hour. The Board contends the counsel fees are unreasonable because they exceed its policy on employee indemnification, which precludes reimbursement of attorney's fees in excess of $125.00 per hour. Petitioner contends there are no facts in dispute and has filed a motion for summary decision.

The issue presented is whether Oxfeld is entitled to attorney's fees at the requested hourly rates pursuant to N.J.S.A. 18A:16-6.

PROCEDURAL HISTORY

Petitioner filed his appeal before the Commissioner of Education (the Commissioner) on March 31, 2010. The Board filed an answer on April 20, 2010, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. The hearing was scheduled for October 28 and October 29, 2010. Petitioner filed his motion for summary decision on July 30, 2010. The Board filed a response on August 23, 2010, and petitioner filed a reply on August 31, 2010. Oral argument was held on the motion on September 24, 2010. The record closed on October 28, 2010, following the submission of the transcript of the oral argument proceedings; the receipt of a letter produced at oral argument that was inadvertently left out of the case file and the party's submissions concerning that letter.

FINDINGS OF FACT

After reviewing the papers submitted by both parties, I **FIND** the following **FACTS** are undisputed:

1. Petitioner, Joseph Galego, is a head security guard in the employ of the respondent.

2. Petitioner was named as a defendant individually in a lawsuit filed in the United States District Court for the District of New Jersey by Edward Brennan (Brennan), a former Board employee. In addition to petitioner the lawsuit named the Board; the individual Board members; and approximately 50 other named and up to 100 unidentified defendants (Docket No. 07-CV-329 (DMC)).

3. Brennan alleged that the Board wrongfully terminated him as a result of improper actions taken by petitioner.

4. Petitioner was named in the lawsuit in his capacity of Brennan's supervisor.

5. By letter dated March 26, 2007, Oxfeld notified Karen Murray, Esq. (Murray), Respondent's Labor Counsel that he was representing petitioner in connection with the lawsuit brought by Mr. Brennan. He stated that because the cause of action was civil in nature, petitioner had the right, pursuant to N.J.S.A. 18A:16-6, to expect the Board to "defray all costs of defending such action, including reasonable counsel fees and expenses." Further, Oxfeld advised Ms. Murray that his hourly rate for the matter was $150.00 and he asked her to advise him whether he should send billing on a monthly basis or upon completion of the case.

6. Petitioner was represented individually by Oxfeld throughout the pendency of the Brennan lawsuit.

7. In 2009, the parties entered into a settlement agreement, whereby Brennan agreed to dismiss the complaint, with prejudice, as to all defendants.

8. On January 13, 2010, the Hon. Dennis M. Cavanaugh, U.S.D.J., entered an Order of Dismissal, followed by a Settlement Order entered by Judge Cavanaugh on April 13, 2010.

9. Oxfeld worked a total of 40.3 hours on the case and his associate worked a total of 5 hours.

10. On January 14, 2010, Oxfeld submitted an invoice to the Board, which indicated that the total amount of his legal services pertaining to his representation of petitioner in the Brennan matter was $8,935.00. This amount was based on Oxfeld's rate of $200.00 per hour and work performed by his associate at a rate of $175.00.

11. In response to Oxfeld's letter, on February 12, 2010, the Board sent Oxfeld a copy of its policy regarding Employee Indemnification, which outlined the Board's policy with respect to reimbursement of attorney's fees, stating that such fees shall not exceed $125.00 per hour.

12. By letter dated February 16, 2010, Oxfeld replied that the $125.00 hourly rate was unacceptable and advised that if he was not reimbursed for the total amount of attorney's fees sought, he would file a petition on behalf of his client.

13. Subsequently, on March 31, 2010, Oxfeld filed the instant petition on petitioner's behalf seeking indemnification of petitioner's attorney's fees in the Brennan matter in the amount of $13,402.50. This amount was based on Oxfeld's rate of $300.00 per hour and work performed by his associate at a rate of $250.00.

LEGAL ANALYSIS AND CONCLUSION

The rules governing motions for Summary Decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), the motion for 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." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary

judgment if the evidence is "so one sided that [the moving party] must prevail as a matter of law." Id. at 536. 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). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539.

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

This dispute concerns petitioner's indemnification pursuant to N.J.S.A. 18A:16-6 for legal expenses incurred in defending the civil action brought against him. N.J.S.A. 18A:16-6 provides in relevant part:

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher or person assigned to other professional pre-teaching field experience, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, 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; ...
>
> [N.J.S.A. 18A:16-6.]

Oxfeld avers that petitioner is entitled to indemnification for reasonable attorney's fees in the amount of $13,340.00 at an hourly rate of $300.00 for his services and at a rate of $250.00 for the work performed by his associate. He argues the hourly rate of $300.00 is reasonable considering his experience and expertise. In support of his claim, he references the Court's discussion in Rendine v. Pantzer, 142 N.J. 292, (1995)

regarding the establishment of the Lodestar amount in awarding reasonable attorney's fees; as well as, the rules of the Merit System Board (MSB) that provide for the payment of reasonable counsel fees incurred where an employee has prevailed in major disciplinary proceedings. See N.J.A.C. 4A:2-2.12. In particular, he references the MSB rule that establishes ranges of reasonable counsel fees based upon whether the attorney is a partner or associate and the attorney's years of experience and expertise. See N.J.A.C. 4A:2-2.12(c). In addition, he relies upon the certification of attorney Sheldon Pincus, which opines the requested $300.00 hourly rate is not only reasonable but less than what he believes is the appropriate rate of pay ($350.00 per hour) for an employment law attorney with Oxfeld's experience and skill.

Respondent does not contest petitioner's entitlement to indemnification; nor does respondent contest the number of hours itemized in Oxfeld's invoice. Respondent contends the hourly rate that petitioner seeks is unreasonable because it violates the Board's policy enacted in March 2008 that restricts reimbursement of attorney's fees in excess of $125.00 per hour. To support its claim that the Board's policy to reimburse attorneys at the hourly rate of $125.00 is reasonable, respondent relies upon an agreement between the Jersey City School District and the Jersey City Education Association that set an hourly rate for the reimbursement of attorney's fees at $150.00. Respondent further argues that Mr. Oxfeld's claim that the Board's policy is unreasonable and unacceptable is disingenuous when he initially stated in his March 2007 letter that his hourly rate was $150.00, only $25.00 above the hourly rate in the Board's policy.

Having reviewed the parties' briefs, certifications and exhibits, and having considered the parties' oral argument; I reject both party's suppositions.

Although, I agree that an attorney with the experience and expertise of petitioner's attorney could reasonably command an hourly rate of $300.00 or more; to determine whether petitioner is entitled to indemnification at that hourly rate, it is critical that the gravamen of N.J.S.A. 18A:16-6 be recognized. From the language of N.J.S.A.18A:16-6, it is clear that the statute is designed to protect school employees from any financial loss that could be incurred in defending civil actions arising out of

their employment. Thus, in determining the indemnification of attorney's fees, the threshold determination must be what did the employee actually pay or agree to pay for the attorney's legal services. Petitioner never paid Oxfeld for his legal services. Rather, Oxfeld presented an invoice for his services directly to the Board. Moreover, Mr. Oxfeld presented not one but two different invoices to the Board seeking indemnification at two different hourly rates.[1] The hourly rates reflected in the invoices conflicts with Oxfeld's letter dated March 26, 2007,[2] wherein he notified respondent's Labor Counsel that he was representing petitioner in connection with the lawsuit brought by Mr. Brennan and advised her that his hourly rate for the matter was $150.00. Oxfeld argued his letter is of no consequence to this matter because Ms. Murray never accepted his offer; however, I am unable to ascertain any language in the letter that would lead one to conclude it manifested an offer. Instead, I **FIND** Oxfeld clearly and undeniably stated in his letter that he was representing petitioner in the Brennan matter at the hourly rate of $150.00 and I further **FIND** that petitioner never paid nor was he expected to pay more than $150.00 per hour for Oxfeld's legal services.

Contra to petitioner, the respondent argues any hourly rate that exceeds its policy on Employee Indemnification at the hourly rate of $125.00 is unreasonable. I reject this contention for the same reason I rejected petitioner's claim that he was entitled to indemnification at the hourly rate of $300.00, that is, because both suppositions ignore the clear mandate of the statute – to defray **all** costs incurred by school employees in defending civil actions arising out of their employment. I therefore **FIND** the Board's policy restricting attorney's fees to hourly rates not exceeding $125.00 clearly violates the Board's responsibility under N.J.S.A. 18A:16-6 and I **FIND** it has no application to the matter at hand.

---

[1] I am mindful that the Commissioner's decision in Meisenbacher v. Board of Education of the City of Newark, 1 N.J.A.R. 162 (1980) denies standing to an attorney seeking payment for his services under N.J.S.A. 18A:16-6. However, in this matter the petition for indemnification was filed on behalf of the petitioner.

[2] Mr. Oxfeld objected to my consideration of this letter because he was not made aware that this document would be introduced into the record ten days prior to the scheduled motion date, pursuant to N.J.A.C. 1:1-10.4(e). However, Mr. Oxfeld's reliance on this rule is misplaced, as N.J.A.C. 1-10.4(e) only requires the parties to "complete all discovery no later than 10 days before the first scheduled evidentiary hearing or by such date ordered by the judge." N.J.A.C. 1:1-10.4(e).

Accordingly, I deny petitioner's contention that he be indemnified for attorney's fees at the hourly rate of $300.00. I also deny respondent's contention that petitioner be indemnified for attorney's fees at the hourly rate of $125.00. Instead, I **CONCLUDE** petitioner is entitled to indemnification in this matter at the hourly rate of $150.00 – the hourly rate stated in Oxfeld's letter of March 26, 2007.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petitioner be indemnified for attorney's fees in the sum of $6,795.00, which represents 45.30 hours of legal services at the hourly rate of $150.00 and the appeal is hereby DISMISSED with prejudice.

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

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

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

November 8, 2010
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: November 8, 2010

Date Mailed to Parties: NOV 9 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

EXHIBITS

For Petitioner:

Certification of Sanford R. Oxfeld, Esq. with attached exhibit
Certification of Sheldon H. Pincus, Esq.

For Respondent

Certification of Karen A. Murray, Esq. with attached exhibits A-F
Letter dated March 26, 2007 from Sanford R. Oxfeld, Esq. to Karen Murray, Esq.

547-10

OAL DKT. NO. EDU 6380-09
AGENCY DKT. NO. 197-7/08

DEBORAH BURKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Section 1 contemplates payment to petitioner of $9,200 within thirty days of the Trenton Board of Education's resolution approving the Agreement – which resolution occurred on October 12, 2010. Additionally, Section 2 of the Agreement calls for dismissal of the petition upon full execution of the Agreement – which execution also occurred on October 2, 2010. The parties are reminded that a settlement of litigation is not binding until the Commissioner approves it.

The foregoing notwithstanding, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12 | 20 | 10
Date of Mailing: 12 | 20 | 10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6380-09

AGENCY DKT. NC. 197-7/08

DEBORAH BURKE,

Petitioner,

v.

CITY OF TRENTON

BOARD OF EDUCATION,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Dana M. Lane, Esq., for respondent (Hill Wallack LLP, attorneys)

Record Closed: October 27, 2010 Decided: November 4, 2010

BEFORE **ELIA A. PELIOS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 20, 2009, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

11/4/2010
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: NOV 23 2010

Date Mailed to Parties: NOV 23 2010

/mev

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
MONTGOMERY KNOLL
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Deborah Burke

RECEIVED

2010 OCT 27 A 11: 22

Deborah Burke,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	:	
v.	:	OAL DOCKET NO.: **EDUOA 06380-2009S**
City of Trenton Board of Education,	:	AGENCY DOCKET NO.: **197-7/08**
Respondent.	:	**SETTLEMENT AGREEMENT**

This Settlement Agreement (hereinafter, Agreement) is made and entered into between the BOARD OF EDUCATION OF THE CITY OF TRENTON (hereinafter, "Board") with administrative offices at 108 N. Clinton Avenue, Trenton, New Jersey and DEBORAH BURKE (hereinafter, Petitioner) residing at 5 Monmouth Place, Trenton, New Jersey.

WHEREAS, Petitioner was a tenured secretarial employee of the Board of Education for many years who retired from employment with the Board effective November 1, 2006; and

WHEREAS, Petitioner was unable to perform the duties of her position between March 1, 2006 and November 1, 2006, the effective date of her retirement, because of a work related injury; and

WHEREAS, in a separate and distinct legal matter between the parties resolved by

the Division of Workers' Compensation, it was determined that the absences between March 1, 2006 and November 1, 2006 (totaling 139 days) were absences that fell under the coverage of N.J.S.A. 18A: 30-2.1 in light of said determination of the Division of Workers' Compensation; and

WHEREAS, the Board agrees to restore 139 days to Petitioner's sick bank as a part of this settlement; and

WHEREAS, Petitioner acknowledges that, pursuant to the Collective Bargaining Agreement (CBA) between the parties, in view of her retirement the Petitioner is entitled to receive credit for one-third of this time or 46 days at her per diem rate of $200.00 per day for a gross payment of $9,200.00; and

WHEREAS, the Board and Petitioner have been afforded the opportunity to consider the terms of this Agreement with advice of counsel of their choice;

NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows.

1. The Board shall pay to the Petitioner by way of salary reimbursement the gross amount of $9,200.00. These monies shall be subject to all normal payroll deductions. This payment shall be made within thirty (30) days of the Board's approval of the Settlement Agreement.

2. In return for compliance with the Settlement Agreement, the Petitioner hereby agrees to the dismissal, with prejudice, of the Petition of this matter, said Petition to be withdrawn upon the full execution of this Agreement.

3. The Board and the Petitioner further agree and understand that this Agreement is a

compromise settlement of all claims asserted in connection with the Petition in this matter. Entering into this agreement does not constitute an admission of wrong-doing, error or omission by the Board. The Board does not admit that it has violated Title 18A, state or federal law or any contractual provisions that might exist by virtue of its entry into this Agreement.

4. This Agreement does not constitute a past practice or policy in the Trenton School District. The terms of this Agreement do not apply to any employee other than the Petitioner and may not form the basis for a claim by other employees, nor act as a bar to claims by other employees against the Board.

5. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms. The Board shall adopt a resolution approving this settlement which shall be annexed hereto prior to the submission of this Agreement to the Administrative Law Judge.

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

7. The Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey,

8. This Agreement may be executed in counterparts but shall be enforceable only if executed by all of the Petitioners named herein and by the Board's authorized representatives.

9. In entering into this Agreement, the parties have each relied upon the legal advice

of their respective attorney and have read its terms. Neither party shall be responsible for the counsel fees of the other party's attorney.

Attest:

BOARD OF EDUCATION OF THE CITY OF TRENTON

Faye S Thad
BOARD SECRETARY

Nicole Jatrum
BOARD PRESIDENT

Dated: 10/12/10

Dated: 10/11/2010

PETITIONER'S ATTORNEY

PETITIONER

MICHAEL T. BARRETT, ESQ.

Deborah R Burke
DEBORAH BURKE

Dated: 9/8/10

Dated: 9/8/10

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH DEBORAH BURKE

WHEREAS, the Trenton Board of Education has reviewed the Stipulation of Settlement Agreement between Deborah Burke and the Board of Education in regard to OAL Docket No. EDUOA 06380-2009S and DOE Agency Docket No. 197-7/08; and

WHEREAS, the Board has voted on this date to approve the Stipulation of Settlement Agreement; and

WHEREAS, the Board designates and authorizes the Board President to execute the Stipulation of Settlement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Stipulation of Settlement Agreement between Deborah Burke and the Board of Education

Nicola Tatum
Nicola Tatum
Board President

Jayne S Howard
Jayne S. Howard
School Business Administrator/Board Secretary

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2010 NOV 19 A 10:47

October 12, 2010
ADOPTED

Jayne Howard, Board Secretary, certifies that this is a true copy of the original Board Resolution on file with the Trenton Board of Education.

Jayne S Howard
Jayne S. Howard, Board Secretary

551-10J0

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

ROCHELLE R. HENDRICKS
Acting Commissioner

December 22, 2010

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,[1] I am requesting that the assessment against Glen and Bathsheba Davis ordered by the Acting Commissioner of Education on February 25, 2010, at the conclusion of the contested case proceeding entitled *G.D. and B.D., on behalf of minor children, E.D. and E.D. v. Board of Education of the City of Rahway, Union County*, be entered on the judgment docket of the court. This assessment represents a tuition payment to compensate the Rahway Board of Education for E.D. and E.D.'s period of ineligible attendance in the public schools of the district pursuant to *N.J.S.A.* 18A:38-1; the amount to be entered is $20,680, with interest to accrue as provided by law.

I make this request at the behest of the Rahway Board of Education, which reports that – subsequent to the issuance of the Acting Commissioner's February 25, 2010 decision – Glen and Bathsheba Davis have failed to make the required payment for the period of their children's ineligible attendance. Glen and Bathsheba Davis have offered no reasons why the judgment against them should not be docketed as sought by the Board, although given an opportunity by this agency to do so.

[1] Provides, in pertinent part, that if a State administrative agency has ordered payment of a fixed amount of money after having afforded the person so ordered an opportunity for administrative hearing, the agency may request the Clerk to record the final order of assessment on the judgment docket of the court and it will thereafter have the same effect as a judgment of the court.

A copy of the pertinent order is enclosed for your reference. If you require anything more to effectuate the provisions of *N.J.S.A.* 2A:58-10 in this matter, please contact the Bureau of Controversies and Disputes at (609) 292-5706.

Sincerely,

Rochelle R. Hendricks
Acting Commissioner

Enclosure
c: Sarah A. Makuch, Esq.(with copy of Order)
Glen & Bathsheba Davis (with copy of Order)
1380 Bryant Street
P.O. Box 672
Rahway, NJ 07065
Jones Addo (with copy of Order)

551-10J0

AGENCY DKT. NO. 349-12/09

G.D. and B.D., on behalf of minor children, E.D. and E.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	ORDER
RESPONDENT.	:	

On February 25, 2010, a final agency decision was rendered in this matter, wherein the Commissioner dismissed petitioners' residency appeal as a consequence of their failure to appear at the hearing scheduled for this matter without providing any explanation for their non-appearance – notwithstanding that notice of the February 2, 2010 hearing date was mailed to them at the address designated in their petition of appeal, and was not returned as undelivered. Because petitioners, therefore, failed to sustain their burden of establishing that their children, E.D. and E.D., were entitled to a free public education in the Rahway schools during the 2009-2010 school year, the Commissioner granted the Board's counterclaim for tuition. The Commissioner ordered petitioners to remit to the Board tuition in the amount of $10,340 for the period of the children's ineligible attendance in the Board's schools – that period encompassing the commencement of the 2009-2010 school year through February 2, 2010 – and $57.44 per day per child for each subsequent school day after February 2, 2010 that they remained in the Board's schools.

By letter dated August 23, 2010, the Board notified the Commissioner that the respondents had failed to comply with the decision, and that – in accordance with the decision – petitioners now owe the Board a total tuition amount of $20,680 for their children's ineligible attendance in its schools during the 2009-2010 school year. 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, Glen and Bathsheba Davis are now subject to entry of a judgment by the court in the amount of $20,680, 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/10

Date of Mailing: 12/22/10

552-10R

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN PRICKETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
BRIDGETON, CUMBERLAND COUNTY.	:	

SYNOPSIS

The petitioning Board certified tenure charges against respondent – a teacher at Bridgeton High School – for conduct unbecoming a teaching staff member, incompetence, insubordination and other just cause for dismissal. The charges stem, *inter alia*, from allegations of severe attendance problems, refusal to sign evaluations, poor classroom management, and storing pictures of a sexual nature on his district assigned computer. Respondent twice failed to appear at scheduled hearings at the OAL in this matter, resulting in a default judgment against him. The Commissioner remanded the matter to the OAL for an explanation of the circumstances surrounding respondent's failure to appear.

On remand, the ALJ found that: the Board filed written tenure charges against respondent in accordance with *N.J.S.A.* 18A:6-11, and submitted into evidence 43 documents in support of those charges; respondent was afforded every opportunity for a hearing to contest the tenure charges; and respondent failed to appear for hearings on June 22, 2010 and July 12, 2010, without explanation or excuse. The ALJ determined that given respondent's failure to contest the charges – and given the overwhelming documentation submitted by the Board in support of those charges – the tenure charges must be sustained. Accordingly, the ALJ ordered that respondent be dismissed from his tenured position.

Upon independent review of the record and the Initial Decision, the Commissioner adopted the ALJ's decision as the final decision in this matter. Respondent was dismissed from his tenured employment, and a copy of this decision was forwarded to the State Board of Examiners 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.

December 23, 2010

OAL DKT. NO. EDU 9349-10
(EDU 811-10 ON REMAND)
AGENCY DKT. NO. 40-3/10

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN PRICKETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
BRIDGETON, CUMBERLAND COUNTY.	:	

After consideration of the record and the Initial Decision of the Office of Administrative Law,[1] the Commissioner adopts the Initial Decision as the final decision in this case – for the reasons set forth therein. The tenure charges are sustained, and respondent is hereby terminated from his teaching position in petitioner's district. In addition, 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.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|23|10
Date of Mailing: 12|23|10

[1] No exceptions to the Initial Decision were filed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9349-10
(On Remand from DKT. NO. EDU 811-10
AGENCY DKT. NO. 40-3/10

IN THE MATTER OF THE TENURE HEARING OF BRIAN PRICKETT, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.

Paul Kienzle, Esq., for petitioner (Casarow, Kienzle & Raczenbek, attorneys)

Ned P. Rogovoy, Esq., for respondent, Brian Prickett

Record Closed: October 20, 2010 Decided: November 15, 2010

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

STATEMENT OF THE CASE

Petitioner, Bridgeton Board of Education, filed tenure charges against respondent, Brian Prickett, for conduct unbecoming a staff member, incompetence, insubordination, and other just cause.

PROCEDURAL HISTORY

On January 20, 2010, tenure charges were certified against respondent. Those charges were filed with the Department of Education on March 5, 2010. Respondent

contested the charges, and the matter was received by the Office of Administrative Law (OAL) on March 24, 2010 and docketed at OAL Docket No. EDU 811-10. A hearing was scheduled for June 22, 2010, at which time respondent failed to appear. The matter was relisted for July 12, 2010, and again respondent failed to appear. At that time, his answer was stricken and judgment was entered in favor of the Board of Education. Thereafter, on August 24, 2010, the Commissioner of Education issued a Decision remanding the matter to the OAL for an explanation of the circumstances surrounding respondent's failure to appear, where it was received and docketed at OAL Docket No. EDU 9349-10.

On October 20, 2010, the record was opened for a detailed explanation of the circumstances surrounding the default. The record closed on October 20, 2010.

FACTS

On January 20, 2010, tenure charges were certified against respondent, Brian Prickett, by the Bridgeton Board of Education. Those charges were introduced into evidence as P-1. Supporting documentation was likewise introduced into evidence (P-1 - 43).

Respondent was represented by Ned P. Rogovoy, Esquire, throughout the proceedings. Mr. Rogovoy provided a narrative delineating the circumstances leading to the default, together with supporting documentation.

On April 27, 2010, Rogovoy forwarded to respondent a letter advising him that three trial dates had been set for his case: June 15, June 22, and July 12, 2010 (R-1). Subsequently, the Board of Education's attorney became ill, and the June 15, 2010, hearing date was adjourned. Rogovoy so advised respondent by e-mail dated June 11, 2010 (R-2).

On June 21, 2010, Rogovoy's office forwarded to respondent an e-mail reminding him that the hearing would commence on June 22, 2010 (R-3). On the same date, Rogovoy's office sent a second e-mail advising of the June 22, hearing date, and setting forth its efforts to contact respondent by cell phone (R-4).

On June 22, 2010, attorneys for both sides appeared at the Office of Administrative Law, 1601 Atlantic Avenue, Suite 601, Atlantic City, New Jersey, for the commencement of the hearing. Also present was Thomas Myers, New Jersey Education Association UniServ Representative, and six witnesses for the Board of Education. Respondent did not appear. Mr. Rogovoy was unable to account for his client's failure to appear, but requested that the matter be adjourned so that he could contact the respondent. Because of the serious nature of the charges, the postponement request was granted and it was ordered that the hearing would commence on the already scheduled July 12, 2010, date.

Upon returning to his office on June 22, Mr. Rogovoy forwarded a letter of that date to respondent (R-5). That letter sets forth the events of June 22, and advised respondent that the hearing would commence on July 12, 2010. Mr. Rogovoy delineated the failure of respondent to assist in the preparation of his defense. Finally, the letter advised respondent that if he failed to appear on July 12, he would forfeit his tenure.

On July 2, 2010, Rogovoy's office engaged in an exchange of e-mails with respondent in which Rogovoy requested respondent to make an appointment to meet with him or, alternatively, to have any new attorney file a substitution with the court. Appellant responded, requesting a copy of all documentation, witness list, and dates of court appearances (R-6). On July 2, Rogovoy follow up those e-mails with a letter to respondent in which he confirmed his intention to Federal Express all documents to respondent (R-7).

Again on July 2, 2010, respondent e-mailed Rogovoy's office, forwarding a draft of his defense statement, together with the names of his witnesses (R-8). On the same

date, Rogovoy responded with another letter (R-9). This second letter of July 2 included a copy of a receipt executed by respondent's mother, evidencing her receipt of Rogovoy's letter June 22. R-9 also confirmed that Rogovoy had scheduled an appointment to meet with respondent on July 8, 2010, at 1:00 p.m. to discuss the tenure hearing. Finally, that letter states that respondent was considering new legal representation.

Again on July 2, Rogovoy sent another e-mail to respondent, asking him to have his new attorney call Rogovoy so that a substitution of attorney could be arranged (R-10). Rogovoy's office sent yet another e-mail to respondent on July 2, confirming the July 8 appointment.

On July 8, 2010, respondent e-mailed Rogovoy's office advising he was unable to keep the appointment because he was sick (R-12). Respondent attempted to reschedule for July 9. Rogovoy's office responded by e-mail on July 8, rescheduling respondent's appointment for July 9, at 9:30 a.m. (R-13).

On July 9, 2010, at 10:06 a.m., Rogovoy's office e-mailed respondent, noting that respondent had again failed to keep an appointment with Rogovoy (R-14). The e-mail confirmed that both Rogovoy and Tom Myers, the NJEA UniServ representative, were present on July 9, at 9:30 a.m., in Rogovoy's office awaiting respondent's arrival.

Respondent responded to the e-mail at 3:21 p.m. by forwarding extensive documentation to Rogovoy. He offered no explanation for his failure to keep the appointment (R-15).

At 4:18 p.m. on July 9, Rogovoy responded, advising respondent to bring his documents to the hearing (R-16).

The attorneys for both parties appeared for the hearing at the Office of Administrative Law on July 12, 2010, at 9:30 a.m. Also present were Tom Myers, the NJEA UniServ representative, and the Board's witnesses. Once again, respondent

failed to appear. At 9:41 a.m., Rogovoy's office e-mailed respondent asking for his location and advising that Rogovoy and Myers were in court awaiting him (R-17). When respondent failed to either appear at court or answer the e-mail by 10:00 a.m., default was entered against him.

At 10:40 a.m. on July 12, 2010, Rogovoy's office e-mailed respondent, advising what had transpired in court (R-18). The e-mail went on to instruct respondent that the default would become final on July 13, 2010, at 10:00 a.m. unless respondent called the court and advised why he had failed to appear.

On July 26, 2010, respondent e-mailed Rogovoy, Myers, and two other NJEA representatives, advising that he had been ill and seeking direction regarding reopening his case (R-19). The e-mail goes on to complain that respondent's health has declined, his house has been condemned, and he requires medical coverage.

Rogovoy responded on July 26 by e-mail, advising that Director Duncan from the Commissioner of Education's office had called to set up a telephone conference for 11:00 a.m. on July 21, 2010, regarding his matter (R-20). On July 27, 2010, Rogovoy's office e-mailed respondent and advised that Director Duncan "wanted to be assured that you defaulted by not attending or otherwise getting an excuse not to attend" (R-21).

LEGAL DISCUSSION

In accordance with N.J.S.A. 18A:6-11, the Board of Education filed written tenure charges against the respondent. The Board submitted into evidence forty-three documents in support of those charges (P-1 – 43). Respondent was afforded every opportunity for a hearing to contest those charges. He failed to appear for hearing on June 22, 2010, without explanation or excuse. Notwithstanding respondent's failure to offer any reason for his failure to appear, he was afforded a second opportunity to have a hearing on July 12, 2010. Again, he failed to appear without explanation or excuse.

Given respondent's failure to contest the charges, despite multiple opportunities to do so, and given the overwhelming documentation submitted by the Board, the tenure charges must be **SUSTAINED**.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Brian Prickett be **DISMISSED** from his tenured position of employment with the School District of the City of Bridgeton.

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

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

11-15-10
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 11-15-10

Mailed to Parties: 11-15-10

/sd

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

P-1 Certified Tenure Charges
P-2 Chronology of events regarding student R.H.
P-3 Memo to James Dunkins from Lynn Williams, December 10, 2009
P-4 Letter to Prickett, December 9, 2009
P-5 Memo to Prickett from Lynn Williams, December 8, 2009
P-6 Letter to Prickett from H. Victor Gilson, December 3, 2009
P-7 Letter to Prickett from James A. Dunkins, December 3, 2009
P-8 Track III – Awarness Phase, December 3, 2009
P-9 Letter to Prickett from Sandy Allen, December 1, 2009
P-10 Note from student, date stamped December 8, 2009
P-11 Notes of unspecified person
P-12 Letter to Prickett from Sandy Allen (undated)
P-13 E-mail - Sandy Allen to Lynn Williams, November 24, 2009 (8:32 A.M.)
P-14 Memo to Prickett from James Dunkins, November 19, 2009
P-15 Certificate of Return to work or Schook, November 25, 2009
P-16 Return to Work Note, November 18, 2009
P-17 Memo to James Dunkins from Lynn Williams, November 20, 2009
P-18 E-mail re: Grades, November 20, 2009 (11:17 A.M.)

P-19 Learning Center Activity Notation

P-20 E-mail - Rose Marie Cwik to Lynette Taylor, November 19, 2009 (8:14 A.M.

P-21 Memo from Dorian Giorgio,November 19, 2009

P-22 Student Statement of B.D., November 19, 2009

P-23 Student Statement of R.H., date stamped November 18, 2009

P-24 Handwritten Memo, November 19, 2009

P-25 E-mail – Prickett to Dorian Giorgio, November 18, 2009 (6:13 P.M.)

P-26 E-mail – Prickett to Diedra Bowen, November 16, 2009 (9:10 A.M.)

P-27 Handwritten Letter to Mr.Amad (undated)

P-28 Handwritten Letter to Mr. Ahmad from T.K. (undated)

P-29 Classroom Observation Report, December 2, 2009

P-30 E-mail from Dorothy Realdine to Lynn Williams, November 9, 2009 (2:32 P.M.)

P-31 E-mail from Sandy Allen to Prickett, October 23, 2009 (7:36 A.M.

P-32 Letter to Prickett from Sandra L. Allen, October 21, 2009

P-33 E-mail from Sandy Allen to Lynn Williams, November 30, 2009 (8:17 A.M.)

P-34 E-mail – Sandy Allen to Lynn Williams, November 20, 2009 (8:18 A.M.)

P-35 Biology Test – Ecosystems 1 (student W.R.)

P-36 Biology Test – Ecosystems 1 (student C.)

P-37 Biology Test – Ecosystems 1 (student S.)

P-38 Biology Test – Ecosystems 1 (student A.V.)

P-39 E-mail – Sandy Allen to Lynn Williams, November 20, 2009 (8:18 A.M.)

P-40 E-mail – Sandy Allen to Lynn Williams, November 20, 2009 (8:19 A.M.)

P-41 E-mail – Sandy Allen to Lynn Williams, November 20, 2009 (8:19 A.M.

P-42 Power Teacher Gradebook

P-43 Welcome Back, September 1, 2009

For respondent:

R-1 Letter, Rogovoy to Prickett, April 27, 2010

R-2 E-mail – Rogovoy's office to Prickett, June 11, 2010 (2:13 P.M.)

R-3 E-mail – Rogovoy's office to Prickett, June 21, 2010 (2:07 P.M.)

R-4 E-mail – Rogovoy's office to Prickett, June 21, 2010 (10:44 A.M.)

R-5 Letter, Rogovoy to Prickett, June 22, 2010

R-6 E-mail – Prickett to Sherrie at Rogovoy's office, July 2, 2010 (11:11 A.M.)

R-7 Letter, Rogovoy to Prickett, July 2, 2010

R-8 E-mail - Prickett to Sherrie at Rogovoy's office, July 2, 2010 (12:15 P.M.)

R-9 Letter, Rogovoy to Prickett, July 2, 2010

R-10 E-mail – Rogovoy's office to Prickett, July 2, 2010 (10:17 A.M.)

R-11 E-mail – Rogovoy's office to Prickett, July 2, 2010 (10:08 A.M.)

R-12 E-Mail – Prickett to Sherrie at Rogovoy's office, July 8, 2010 (12:05 P.M.)

R-13 E-mail – Rogovoy's office to Prickett, July 8, 2010 (1:28 P.M.)

R-14 E-mail – Rogovoy's office to Prickett, July 9, 2010 (10:06 A.M.)

R-15 E-Mail – Prickett to Sherrie at Rogovoy's office, July 9, 2010 (3:21 P.M.)

R-16 E-mail – Rogovoy's office to Prickett, July 9, 2010 (4:18 P.M.)

R-17 E-mail – Rogovoy's office to Prickett, July 12, 2010 (9:41 A.M.)

R-18 E-mail – Rogovoy's office to Prickett, July 12, 2010 (10:40 A.M.)

R-19 E-Mail – Prickett to Sherrie at Rogovoy's office, July 26, 2010 (1:09 A.M.)

R-20 E-mail – Rogovoy's office to Prickett, July 26, 2010 (2:29 P.M.)

R-21 E-mail – Rogovoy's office to Prickett, July 27, 2010 (3:59 P.M.)

J.G. and D.G. on behalf of minor child, J.T.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners filed a *Pro Se* residency appeal, challenging the respondent Board's determination that their son, J.T.G. is not entitled to a free public education in the Point Pleasant schools because the family no longer resides in the district. Petitioners contend that their move out of Point Pleasant following the sale of their house on March 19, 2010 is temporary and was based on personal and financial setbacks beyond their control; that they plan to re-establish residency in Point Pleasant at some undetermined point in the future; and that they are homeless and living temporarily with D.G.'s parents in Brick Township. Respondent Board filed a counterclaim seeking payment of tuition for the number of days J.T.G. attended school subsequent to March 19, 2010.

The ALJ found that: it is undisputed that petitioners are no longer domiciled in Point Pleasant, and have endured significant personal and financial hardship; the issue in this case is whether J.T.G. is homeless for purposes of educational jurisdiction; petitioners bear the burden of proof to show that they are residing with relatives out of necessity; no evidence exists to show that petitioners' temporary living situation was an option undertaken in a crisis of immediacy, or that other options were thoroughly explored; and petitioners have failed to prove that J.T.G. is homeless. Accordingly, the ALJ concluded that J.T.G. was not entitled to a free public education in Point Pleasant once his family moved out of the district, and that the Board is entitled to reimbursement of tuition for the 62 days that J.T.G. attended school after March 19, 2010, at the daily tuition rate of $59.56.

Upon a full and independent review of the record, the Commissioner adopted the ALJ's findings that petitioners are not homeless and that – once the family moved from the district – J.T.G. was not entitled to a free public education in Point Pleasant schools, and ordered the petitioners to remit tuition in the amount of $3692.72 to the respondent Board. The petition was dismissed.

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

December 27, 2010

554-10

OAL DKT. NO. EDU 4688-10
AGENCY DKT. NO. 95-5/10

J.G. and D.G. on behalf of minor child, J.T.G.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	
RESPONDENT.	:	

This case was initially filed as a residency dispute, wherein petitioners alleged:

> We sold our house [in Point Pleasant] on March 19, 2010 and moved in with [D.G.'s] parents [in Brick] temporarily due to illness and financial hardship. We are actively looking to relocate back into Point Pleasant Boro and the Nellie Bennett school district. (Petition dated May 14, 2010, at 1)

However, after the matter was transmitted to the OAL, an examination of the facts revealed that it was unlikely that petitioner's circumstances would allow an expeditious return to residency in Point Pleasant, and that the family could not be regarded as domiciled there.

More specifically, after selling their house in Point Pleasant and moving in with D.G.'s parents in Brick, J.G. found a job in northern New Jersey. Petitioners wrote a letter dated April 8, 2010 to Vincent Smith, Superintendent of the Point Pleasant Schools (R-2), stating:

> In all honesty as much as we want to stay in Point Pleasant as we have been for 6 years. [*sic*] We will not be able to . . . . Realistically my kids need to see their dad so moving closer to his

> work [at Picatinny Arsenal in Sparta, NJ] is what is best for all of us.

In addition, when asked – at an April 26, 2010 hearing before the respondent Board of Education – whether the family would consider moving back to Point Pleasant for the remainder of the 2009-2010 school year, petitioner D.G. explained that they would continue to stay at her parents' home because she was still monitoring her own health issues. (T at 17[1]) Further, at the August 10, 2010 OAL hearing, petitioners were still living in Brick and J.G. testified that he had not considered looking for a rental in Point Pleasant. (Initial Decision at 6)

Thus, while petitioners might hope to return to Point Pleasant some day, various circumstances beyond their control, together with decisions that they have made about their living arrangements have combined to undermine the realization of that hope in the near term. Nor can petitioners' domicile be assigned to Point Pleasant based upon such a hope.

Perhaps in light of the foregoing, petitioners argued in the OAL that the sale of their house and their move into the home of D.G.'s parents rendered the family homeless. Thus, they reasoned that the respondent school district – as J.T.G.'s last school district before the sale of their house – should be responsible for J.T.G.'s education and should allow J.T.G. to continue to attend the Nellie Bennett School.

Normally, the initial determination in a dispute about homelessness is made by the County Superintendent of Schools. *N.J.A.C.* 6A:17-2.8. Here, however, the claim of homelessness was apparently raised subsequent to the transmission of this case to the OAL. For purposes of expediency, the Administrative Law Judge (ALJ) adjudicated the issue. Upon review of the record and Initial Decision,[2] and for the reasons set forth in the Initial Decision,

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[1] T designates the transcript of the April 26, 2010 Board of Education hearing concerning this matter.

[2] No transcript of the hearing in the Office of Administrative Law (OAL) has been provided and no exceptions have been filed.

the Commissioner adopts the ALJ's findings that 1) petitioners are not homeless and 2) once the family moved from the district, J.T.G. was not entitled to a free public education in Point Pleasant schools.

The record reveals that petitioners moved from the Point Pleasant school district on March 19, 2010 (Respondent's Exhibit R-2) and that respondent's *per diem* tuition rate for J.T.G.'s grade was $59.56 in the 2009-2010 school year. (Respondent's Exhibit R-3) The Commissioner consequently finds that petitioners owe respondent $3692.72. Accordingly, the petition is hereby dismissed and petitioners are ordered to remit that amount to respondent.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|27|10

Date of Mailing: 12|30|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 04688-10

AGENCY DKT. NO. 95-5/10

J.G. and D.G., ON BEHALF OF MINOR CHILD,

J.T.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF POINT PLEASANT,

OCEAN COUNTY,

Respondent.

J.G., father of J.T.G., petitioner, pro se

Daniel S. Popovitch, Esq., for respondent (Popovitch & Popovitch, attorneys)

Record Closed: August 10, 2010 Decided: September 23, 2010

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

J.G., and D.G., the parents of J.T.G. (petitioner), challenge the determination made by the Point Pleasant Boro Board of Education (District) that he did not reside in

the Point Pleasant School District. The District has filed a counterclaim seeking payment of tuition for the number of days J.T.G. attended school in the district.

PROCEDURAL HISTORY

In April 2010, the District notified the petitioners that their son was being disenrolled based on non-residency. Petitioners appealed the decision. On June 3, 2010, the case was transmitted to the Office of Administrative Law (OAL). A hearing date was set for August 10, 2010. The matter was heard and the record closed on that date.

STATEMENT OF FACTS

The facts in this matter are undisputed. Since the beginning of the 2009-2010 school year, J.T.G. attended the Nellie F. Bennett School in the Point Pleasant District. During the course of the year, petitioners went through a series of personal and financial setbacks. D.G. became seriously ill and is still recovering from her illness. J.G. received a 25% pay cut in September, 2009 and then ultimately lost his job in December. Although he has since found employment at Picatinny Arsenal (which involves a two hour commute), petitioners found that they were unable to remain in their home for financial reasons and in January, 2010, decided to list their home for sale. Their financial situation had become dire as they had medical bills in collection and had missed their December, 2009, mortgage payment.

Petitioners found a willing buyer and entered into a contract for sale of their home on or about February 1, 2010. A closing date of March 19, 2010 was set. Petitioners had sought to delay the closing through the end of the school year but found that the purchaser was unwilling or unable to do so. When closing came, petitioners had not made arrangements to remain domiciled in Point Pleasant. They moved in with D.G.'s parents in Brick Township, while continuing to send J.T.G. to the Nellie Bennett School, as they found he was doing very well there and did not want to disrupt his educational setting. After discussing with banks the possibilities of getting

a mortgage, petitioners were advised that due to their credit situation they may be better off waiting 6-8 months before trying to purchase a home.

On March 22, 2010, James E. Karaba, Principal of the Nellie Bennett School notified petitioners that it had come to his attention that they no longer resided at the address of record, and asked that they provide proof of residency (R-1). Petitioner D.G. replied to the Superintendant of schools. Upon considering petitioners' responses and conducting a hearing at the local board level, (Transcript, J-1) the board determined that petitioners and J.T.G. were not domiciled in Point Pleasant and removed J.T.G. from the rolls of the school (R-5).

At the Board hearing, J.G. advised the Board that a friend of his from North Jersey had mentioned in passing that petitioners and J.T.G. could stay in their summer home in Point Pleasant. J.G. attempted to contact his friend after the hearing but the friend was non-responsive. J.G. admits that petitioners did not explore the possibility of renting a property in Point Pleasant and does not know what it would have cost or if they would have been able to do so.

J.T.G. was enrolled in the District for 62 days after the family moved to Brick Township. The daily rate is $59.56 per day. Therefore, the District is seeking reimbursement in the amount of $3,691.72 (R-1).

Petitioner does not dispute that the family has not been domiciled in Point Pleasant since March 19, 2010. He claims however that the family is homeless and as such entitled to be educated by the district of last residence, Point Pleasant Borough. The district disputes that J.T.G. is homeless and argues that even if he were that the district could pay to have J.T.G. educated in Brick Township. Petitioners argue that the location would be petitioner's choice.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

CONCLUSIONS OF LAW

The issue in this matter is whether J.T.G. 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).

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.

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.

Petitioners contend that they resided within respondent's school district until they became homeless with the result that J.T.G.'s education is still respondent's responsibility. Respondent maintains that petitioners have not proven that J.T.G. meets the definition of a homeless child.

It is not disputed that petitioners have endured significant personal and financial hardship. In fact, there is much evidence to that fact. It is also not disputed that J.T.G. is not domiciled in Point Pleasant. The issue is whether J.T.G. is homeless for purposes of educational jurisdiction.

While petitioners clearly are residing with relatives, they have the burden of proof of showing that they are doing so out of necessity. Homeless connotes a situation of immediacy and is usually a matter of emergent circumstances. In the current matter, petitioners were not evicted from their home, it was not foreclosed upon or destroyed in a disaster. Petitioners listed their house for sale in early January and closed on its sale 2.5 months later. Other than testimony as to advice given by banks to wait before attempting to purchase another property, and an email to see if they could stay at a friend's house, this is little evidence as to petitioners efforts to remain in Point Pleasant Borough, or even in their house (attempts to refinance, to renegotiate the mortgage,

etc...). J.G. admits that rental was not considered and that he does not now if he could afford to rent or not.

The decision to move in with D.G.'s parents (where petitioners and J.T.G. remained as of the hearing date) may not have been an appealing or desired option, and may not have been intended to be a permanent or even long term option, but there is no evidence that it was an option undertook in a crisis of immediacy, or that other options were thoroughly explored.

Accordingly, I **CONCLUDE** that petitioners have not met their burden of proof in showing that J.T.G. is "homeless." I further **CONCLUDE** that J.T.G. was not entitled to a free public education in the District once his family moved from the district and that the Board is entitled to reimbursement of residence tuition in the amount of $3,691.72.

DECISION AND ORDER

It is, therefore, **ORDERED** that petitioner pay respondent tuition in the total amount of $3,691.72 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that, without proof of current domicile/residency, J.T.G. may be excluded from further attending the Point Pleasant public schools, at the discretion of the District, unless tuition is paid for this continued attendance. 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.

September 24, 2010
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: September 27, 2010

Date Mailed to Parties: SEP 28 2010

/mamf

APPENDIX

WITNESSES

For petitioner:

J.G.

For respondent:

None

EXHIBITS

Joint Exhibits:

J-1 Transcript of Proceedings before the Point Pleasant BOE

For Petitioner:

P-1 Education Rights of Homeless Students

P-2 Education for Homeless Children and Youth Program

For Respondent:

R-1 Letter to Petitioners Requesting Proof of Residency

R-2 Response from Petitioners

R-3 Notice of Application for Removal from School

R-4 Request for Hearing Before Board of Education

R-5 Resolution Removing J.G. from the Rolls of the District

R-6 Notice of Board's Action and Right to Appeal

555-10

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY, AND NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner Egg Harbor Township Board of Education appealed the determination of the New Jersey Department of Education, Division of Finance, that Egg Harbor is responsible for the cost of educating the children of the L. family for the 2008-2009 school year, following a determination of homelessness by the Atlantic County Executive Superintendent. The L. family lived in a number of locations between 2003 and 2010, including a period of 24 continuous months when they resided at a motel in Egg Harbor Township. Petitioner contends that a homeless family's housing must be fixed and permanent before a district becomes liable for education costs. Respondent Mainland Regional High School District (Mainland) contends that once a homeless family resides in a district for one year, financial responsibility attaches, regardless of the form of housing. Mainland filed a motion for summary decision.

The ALJ found that: the facts are not in dispute and the matter is ripe for summary decision; the motels in which the L. family lived are not intended as permanent housing and therefore – in order for Egg Harbor to become the district of residence of the L. family, the family had to satisfy the one year criteria set forth in *N.J.S.A.* 18A:38-1(d), which deems a homeless family domiciled in a particular jurisdiction so long as they have an "all-year-round dwelling place within the district for one year or longer"; the L. family was permanently domiciled within the Mainland district in 2005-2006, and became homeless again in the 2006-2007 school year; tuition responsibility remained with Mainland during this period, and would remain responsible until the L. household established a new residence or met the 12 month criteria set forth in *N.J.S.A.* 18A:38-1(d); and starting in September 2008, Egg Harbor became the responsible district for tuition because the family had lived in a motel in the township for 12 months or more. Accordingly, the ALJ granted Mainland's motion for summary decision and denied Egg Harbor's request for relief.

Upon full and careful consideration, the Commissioner adopted the conclusions of the ALJ that Mainland bears tuition responsibility from 2005 to August 2008, that petitioner bears tuition responsibility from September 2008 through October 2010, and that – if the L. family still resides in Mays Landing as of November 2010 – tuition responsibility for B.L., if any, reverts to that 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.

December 30, 2010

555-10

OAL DKT. NO. EDU 6680-09
AGENCY DKT. NO. 170-7/09

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY, AND NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

This controversy arises from a disagreement between school districts as to the financial responsibility for the education of M.L. and B.L., the minor children of the L. family, which was homeless for a period of time.[1] Although the facts are undisputed, the parties offer conflicting interpretations of the statutes and regulations pertaining to homelessness, domicile and the right to a free public education.[2]

The facts are thoroughly set forth in the Initial Decision, but for ease of reference the Commissioner offers the following time line:

1998-2003 The L. family resided in the Karl-Le trailer park in Egg Harbor.

[1] B.L. attended Atlantic County Special School Services (ACSSS) during the time period at issue in this case. No claims for reimbursement of tuition have been made concerning B.L.'s education.

[2] In addition to the record and the Initial Decision, petitioner's exceptions, the replies thereto by respondents Mainland Regional High School District (Mainland) and the New Jersey Department of Education (NJDOE), respondent Mainland's exceptions, and petitioner's reply thereto have been reviewed.

2003-2005 The L. family was evicted from Karl-Le, stayed with various in-laws and lived in various motels within petitioner's school district. (Petitioner does not ask for tuition reimbursement for this time period.)

2005-October 2006 The L. family resided in the Atlantis Apartments in Somers Point. (M.L. finished eighth grade in Somers Point in June 2006.)

October 2006-December 2006 The L. family stayed with a sister-in-law and then in the Rex Motel in Egg Harbor for about six weeks.

January 2007-August 2007 The L. family lived in the Plaza Motel in Mays Landing and M.L. attended Oakcrest High School in the Greater Egg Harbor Regional High School district.

August 2007–October 2009 The L. family resided in the Rex Motel, Egg Harbor and M.L. attended Egg Harbor Township High School.

October 2009 The L. family moved to the Plaza Motel in Mays Landing, but M.L. completed 12th grade in Egg Harbor Township High School in June 2010.

August 2010 As of the August 20, 2010 hearing in the Office of Administrative Law (OAL), the L. family still resided in the Plaza Motel in Mays Landing.

After assessing the facts and relevant law, the Administrative Law Judge (ALJ) concluded that: 1) petitioner was responsible for the children's education through a period ending in 2005, when the family moved to a permanent residence in the Atlantis Apartments in Somers Point; 2) Somers Point was responsible for the children's education both during the family's residence in Somers Point and during the subsequent school year (2006-2007), in which the family was homeless and lived first in an Egg Harbor motel and then in a Mays Landing motel; 3) because the family moved again in August 2007 – this time to the Rex Motel in Egg Harbor – the ALJ determined that the family was still homeless and Somers Point was still responsible for the children's education for the 2007-2008 school year; 4) at the beginning of the 2008-2009 school year the L. family was domiciled in Egg Harbor by virtue of

N.J.S.A. 18A:38-1(d), which deems persons temporarily residing in a district to be domiciled there after they have lived there for a year; 5) petitioner was consequently responsible for the children's education during the 2008-2009 school year; 6) because the family moved to a motel in Mays Landing in October 2009, it was once again homeless, and petitioner was consequently still responsible for the children's education in the 2009-2010 school year; and 7) if the family has remained in Mays Landing past October 2010, B.L.'s education will be that district's responsibility. The Commissioner concurs with the ALJ's analysis.

In its exceptions petitioner contends that the ALJ was wrong to conclude that living in a motel, *i.e.* the Rex Motel in Egg Harbor, for over a year made the Egg Harbor district responsible for the L. children's tuition. Petitioner reasons that since – under *N.J.A.C.* 6A: 17-2.3(a) – families dwelling in motels will be considered homeless for purposes of the education of their children, the district in which the motel is situated should not be responsible for the education of the children – even after a year of residence in the same motel. The Commissioner disagrees.

First, *N.J.S.A.* 18A:38-1(d) instructs that any student whose parent or guardian is not domiciled in a district (*e.g.* because he or she is homeless), but has had his or her all-year-round dwelling place in the district for at least one year, shall be deemed domiciled in the district for the purpose of *N.J.S.A.* 18A:38-1, which entitles a student to a free public education in the district of domicile. *N.J.S.A.* 18A:38-1(a). Thus, although a family may fall under the rubric of 'homeless,' it nonetheless achieves domicile for school law purposes after a year of residence in one district. With that designation of domicile in the district, comes the provision by the district of a public education to the minor children.[3]

[3] As respondent NJDOE argues in its reply to Egg Harbor's exceptions, a finding of 'homeless' pursuant to the definitions in *N.J.A.C.* 6A:17-2.3(a) and *N.J.S.A.* 18A:7B-12 does not preclude the operation of

Second, consideration of the time that a 'homeless' family has spent in the same location has resulted in administrative decisions bestowing domicile on such families. *See, e.g. Board of Education of the Borough of Magnolia, Camden County v. Board of Education of the Township of Deptford, Gloucester County and A.D. and T.D. on behalf of minor children, C.V., H.L., J.D., J.D. and C.D., and Board of Education of the Township of Deptford, Gloucester County v. New Jersey Department of Education, Finance Division, Board of Education of the Borough of Magnolia, Camden County and Board of Education of the Township of Moorestown, Burlington County,* OAL Dkt. Nos. EDU 994-07 and EDU 8783-07, Initial Decision (March 27, 2009) at 15, http://lawlibrary.rutgers.edu/oal/html/initial/edu00994-07_1.html. In that Initial Decision, ALJ Israel Dubin instructed that *N.J.S.A.* 18A:38-1(d) "sets forth conditions under which a free public education shall be provided to a child, even though that child may not be domiciled in a particular school district." More specifically, he found that "one must look at the length of time a family that is alleged to be homeless has resided in one location." (*Ibid.)* ALJ Dubin rejected the Deptford Board of Education's position that after four years in the same dwelling the family should still be considered homeless, finding that such a practice would create a category of 'eternally homeless' children.

Finally, the Commissioner notes that petitioner's position would assign ultimate responsibility for tuition based on the physical configuration of the dwelling in which a family resides, irrespective of the duration of residence in the district. Such a position would render *N.J.S.A.* 18A:38-1(d) meaningless, since domicile attaches immediately if a student's dwelling is found to be fixed, regular and adequate. *See, e.g. N.J.S.A.* 18A:17B-12(c).

N.J.S.A. 18A:38-1(d), which bestows domicile on families after a year in the same dwelling despite the fact that they otherwise qualify as 'homeless.'

Respondent Mainland excepts to the ALJ's finding that the Rex Motel "did not fulfill the criteria for permanent housing." (Initial Decision at 9) This finding was based on the undisputed facts that the motel unit for the family of four consisted of a living room, a bedroom, a bathroom and a space with a sink, refrigerator and microwave. (T28[4]) Rent was not paid pursuant to a lease, but rather on a weekly basis. (T29-30) Basic amenities, such as a stove, storage spaces or dining table were absent. (T28, T48) The family members ate while sitting on the beds and stored their clothes in bags on the floor. (T48-49) The family could receive but not make calls. (T58) Their mail went to the motel's mailbox. (*Ibid.*) Not surprisingly, Mrs. L. testified that she did not consider the Rex Hotel as a permanent home. (*See, e.g.* T26-27 and T52)

In support of its position that the Rex Hotel was a true, fixed and adequate residence that established the family's domicile in Egg Harbor – independently from the operation of *N.J.S.A.* 18A:38-1(d) – Mainland recites four facts supported by the record. First, Mainland points to the length of time that the L. family stayed at the Rex Hotel (August 2007-October 2009), and the family's failure to find another residence in keeping with its $1700 monthly income. Second, Mainland makes much of the fact that the family used the motel address for such things as social security benefits, medical provider records, and Mrs. L's driver's license. Third, Mainland characterizes as significant the fact that the family brought food and toiletries to the motel. Fourth, Mainland appears to contend that Mrs. L's development of friendships with other motel residents was an indicia of permanent residency.

The Commissioner finds the foregoing arguments unpersuasive. The record shows that Mr. and Mrs. L made attempts to obtain more permanent housing, but Mr. L's disability and the family's limited resources limited their options. Mrs. L. testified that they are

[4] T designates the transcript of an August 20, 2010 hearing in the Office of Administrative Law.

on waiting lists for low-income housing. (T53) The fact that the family used the motel address for such necessary purposes as the receipt of disability checks and as contact information for medical providers offers no insight regarding domicile. Mrs. L. testified, and the record supports, that the family had no alternate address. (*See, e.g.* T41; T47; T58-59) The Commissioner also rejects as meritless the notion that the purchase of food and toiletries, *per se*, or the nurturing of friendships with fellow motel residents transforms a temporary dwelling into a permanent residence. Finally, the cases cited by Mainland to support its position are inapposite. *See, L.C. on behalf of minor child B.C. v. Board of Education of the Township of Branchburg,* 96 *N.J.A.R.* 2d 1003 (decided September 12, 1996), and *Englewood Cliffs Board of Education v. E.S. and W.S. on behalf of minor children A.S. and E.S., and the Teaneck Board of Education,* EDU 11601-09, Initial Decision (May 20, 2010), http://lawlibrary.rutgers.edu/oal/html/initial/edu11601-091.html, Commissioner Decision No. 196-10, June 30, 2010.

In light of the foregoing, the Commissioner adopts the conclusions of the ALJ that 1) respondent Mainland bears tuition responsibility for the L. children from 2005 to August 2008, 2) petitioner bears tuition responsibility from September 2008 through October 2010, and 3) if the L. family still resides in Mays Landing as of November 2010, tuition responsibility for B.L., if any, reverts to that district. Respondent Mainland's motion to dismiss the petition is granted.

IT IS SO ORDERED.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12|30|10
Date of Mailing: 12|30|10

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6680-09
AGENCY DKT. NO. 170-7/09

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY AND NEW JERSEY DEPARTMENT OF EDUCATION, DEPARTMENT OF FINANCE,
Respondents.

Michael Stanton, Esq., for petitioner, Board of Education of the Township of Egg Harbor (Taht, Stanton & McCrosson, attorneys)

Kimberly A. Varillo, Esq., for respondent, Board of Education of Mainland Regional High School (Comegno Law Group, attorneys)

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondent, New Jersey Dept. of Education, Dept. of Finance (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: October 7, 2010 Decided: October 15, 2010

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

This matter involves the allocation of education costs between districts for a homeless family living in various motels. The Egg Harbor Township Board of Education[1] (Egg Harbor Township or EHT) contends that a homeless family's housing must be fixed and permanent before a district becomes liable for education costs. The Mainland Board of Education (Mainland) contends that once a homeless family resides in a district for one year, financial responsibility attaches, regardless of the form of housing. For the reasons discussed below, I **CONCLUDE** the responsibility for providing and funding education costs attaches to a district once a family that is determined to be "homeless" resides in the district for one year, regardless of the form of housing.

PROCEDURAL HISTORY

On March 17, 2009, the Atlantic County Executive Superintendent (ACES) determined that the L. Family was homeless and that Mainland Board was responsible for the cost of educating the children. On May 11, 2009, the Department of Education (DOE) finance division modified the ACES decision and concluded that Mainland is only responsible for the 2007-2008 school year, while the Egg Harbor Township is responsible for the 2008-2009 school year. An appeal was filed with the Commissioner of Education.

The petitioner requested a fair hearing and the matter was transmitted to the OAL on September 30, 2009, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. Mainland filed a motion for summary decision on

[1] The November 12, 2009, prehearing order placed the burden of proof upon Egg Harbor Township by the preponderance of evidence. This appeal was filed in response to a determination of the Department of Education's finance division, a sub-agency of the Commissioner of Education. This is not an appeal of a Commissioner's decision. Hence, the preponderance of evidence standard applies in lieu of the arbitrary and capricious standard because the OAL is hearing the case de novo rather than as an

November 13, 2009. This matter was placed on the inactive list pending a ruling in Magnolia Board of Education v. Deptford Township Board of Education, Docket No. A-004942-08T3 (decided June 28, 2010). It was anticipated that Magnolia might be dispositive of some or all of the issues presented in this case. Ultimately Magnolia was not dispositive of the issues in this case.

On August 20, 2010, limited testimony was presented and oral argument was held. The record remained open to enable the parties to request transcripts and make final submissions. The record closed on October 7, 2010.

FINDINGS OF FACT

The material facts were undisputed. Mainland High School is a regional high school district comprised of Somers Point, Linwood, and Northfield. Egg Harbor Township is an independent district with its own high school.

The L. family testified on August 20, 2010. The L. family consists of two adults and two children, to wit: Mrs. L. (F.L.); Mr. L (J.L.); and two children M.L. and B.L. Mrs. L. has another child who is emancipated. B.L. is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), together with multiple learning disabilities. B.L. attends the Atlantic County Special School Services (ACSSS). M.L. has also been diagnosed with several learning deficits but attends regular public schools.

Mr. L. had one of his legs amputated and survived a coma in 2003. The household has no earned income. The household income consists entirely of Social Security benefits. The approximate monthly household income is $1,700. Prior to becoming eligible for Social Security benefits, the family received assistance from the county welfare agency.

Mrs. L. primarily grew up in Egg Harbor Township. She married and resided in the Karl-Le trailer park off of the Black Horse Pike in Egg Harbor Township. She and

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appellate tribunal. See Muir v. New Jersey Dept. of Environmental Protection, Land Use Regulations, OAL Dkt. No. ESA 2956-98 (Decided August 26, 1999); aff'd January 10, 2010.

her husband raised their children, M.L. and B.L. at the Karl-Lee Park from 1998 through 2003. During this period, M.L. attended grades K-6 at the Egg Harbor Township schools and B.L. attended the ACSSS. The family was evicted from Karl-Le due to financial difficulties. Mr. L.'s medical problems contributed to the family's financial difficulties.

Between 2003 and 2005, the family resided at various locations, including motels, the homes of their in-laws, and other temporary locations. The children continued to attend, or remain part of the Egg Harbor Township school system, while the family faced these difficulties.

In 2005, the family moved to the Atlantis apartments in Somers Point. They resided there for approximately one year. Their monthly rent was approximately $700 - $800 per month, which was affordable based upon the household's income. Mrs. L. considered the Atlantis Apartments to be a permanent residence. The apartment had two bedrooms, a kitchen, living area and all other conveniences associated with a permanent residence. The family would have remained at the Atlantis Apartments If not for the financial difficulties. The family was forced to move in or around October 2006.

M.L. was permitted to complete his eighth grade year in the Somers Point even though the family was evicted from the Atlantis apartments during the school year. B.L. remained at the ACSSS.

In October 2006, the family moved in with a sister-in-law. This lasted only a few days. In or around November 2006, the family moved to the Rex Motel in Egg Harbor Township for approximately a month and half.

In January 2007, the family moved into the Plaza Motel in Mays Landing. The family remained at the Plaza Motel until August 2007. M.L. attended Oakcrest High School from his freshman high school year. B.L. continued to attend the ACSSS.

In August 2007, the family moved back to the Rex Motel. The family remained at the Rex Motel from August 2007 through October 2009[2], resulting in twenty-four months of continuous living within Egg Harbor Township. Since the family resided in Mays Landing for a portion of the year 2007, M.L. attended Oakcrest High School for his entire freshman year (2006-2007). However, he attended the Egg Harbor Township High School for his sophomore (2007-2008), junior (2008-2009) and senior years (2009-2010).

A summary of the schools attended by M.L. is as follows:

Year	School Year	Motel	Town/Residence	School Attended
Freshman	2006-2007	Rex/Plaza	Mays Landing	Oakcrest
Sophomore	2007-2008	Rex	Egg Harbor Twp.	Egg Harbor Twp.
Junior	2008-2009	Rex	Egg Harbor Twp.	Egg Harbor Twp.
Senior	2009-2010	Plaza	Mays Landing	Egg Harbor Twp.

Mrs. L. described the living arrangements while at the Rex Motel. Rent was $300 per week which was paid monthly at $1,200. The accommodations consisted of one large living room, a small partial kitchen and a bathroom. There was no dining table. The kitchen consisted of a sink and microwave. The family cooked microwave food or bought food outside the motel. They ate meal on trays while sitting on the beds. There were no closets or other storage areas. Clothes were stored in bags on the floor. Mrs. L. described it as a temporary living arrangement. Transportation was difficult. There was public transportation and there were convenience stores within walking distance.

Mrs. L.'s ultimate desire was to find a permanent residence in Egg Harbor Township. She was raised in Egg Harbor Township and wanted to continue to live there. Mrs. L. was familiar and comfortable with the school system. Mrs. L. did not consider the Rex Motel to be a permanent place where she desired to raise her children.

[2] Stipulated by the parties.

In October 2009, the household moved back to the Plaza Motel in Mays Landing. Egg Harbor Township officials put pressure on the Rex motel owner because he had year round tenants living in a motel. This violated local ordinances prohibiting permanent residency at motels. (Egg Harbor Township Ordinance 155-2 and 155-3) The L. family was forced to leave the Rex Motel. But the motel owner also owned the Plaza Motel in Mays Landing, where the family then moved.

M.L. was a senior at Egg Harbor Township high school in October 2009. He petitioned the Egg Harbor Township Board of Education for permission to remain matriculated for the remainder of the 2009-2010 school year because he was a senior (MR-5). Egg Harbor Township high school granted his request.

The household has continued to reside at the Plaza Motel since October 2009. They continue to seek permanent affordable housing. The accommodations at the Plaza Motel are almost identical to those that were at the Rex Motel. Consequently, they do not consider the Plaza Motels as a permanent residence.

APPICABLE LAW

A homeless child is one who lacks a fixed, regular and adequate residence. N.J.S.A. 18A:7B-12; N.J.A.C. 6A:17-2.3. If the child is determined to homeless, the district where the parent or guardian last resided shall be the district of residence. N.J.S.A. 18A:7B-12(c).

N.J.S.A. 6A:17-2.3(a) sets forth several factors to be used in determining homelessness. One such factor is where a family is living in a **motel**. N.J.S.A. 6A:17-2.3(a)1i. N.J.S.A. 18A:38-1(d) sets forth the criteria for determining eligibility for a free public education when a child is homeless. The statute states, in part:

> d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for **one year** or longer shall

> be deemed to be domiciled within the district for the purposes of this section;
>
> [Emphasis added]

The legislature carved out clear and unambiguous exception for funding the educational cost for homeless families. A homeless family does not have to establish domicile[3].

DISCUSSION

There is no state of perpetual homelessness for purposes of providing the children of indigent families with a free public school education. Any person who is domiciled with a district is entitled to a free public school education. N.J.S.A. 18A:38-1. Domicile and residency determinations are very fact sensitive. It is determined by the intent of the person(s) in question. (see footnote no. 2).

Determining the residency, domicile or the intentions of the family when they are facing homelessness poses a more difficult and complex analysis. The intention of homeless families is not driven by reasonable or viable choices. Their decisions are made under hardship circumstances so their actual intentions, as opposed to their viable choices, must be reconciled. Many homeless families move from place to place in short succession. Consequently, allocating tuition cost cannot be determined merely upon distilling the intent of the family as to residency or domicile. Such a determination would be arbitrary and unworkable.

Recognizing this dilemma, the legislature promulgated N.J.S.A. 18A:38-1(d). The legislature clearly waived the traditional elements of domicile for homeless families and replaced it with a "one year rule." N.J.S.A. 18A:38-1(d) deems a homeless family

[3] 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 intends to return. Mercadante v. City of Patterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971).

domiciled in a particular jurisdiction so long as they have "all-year-round dwelling place within the district for **one year** or longer." Id. This way the cost of education is fairly allocated based upon the number on months a particular homeless family resides in a district. Once the family meets the one year threshold, financial responsibility attaches to that district. The statute provides a logical and straight forward mechanism for allocating cost.

A statute must speak for itself and be construed according to its own terms, and a court may not concern itself with motive for enactment unless the language of the statute is ambiguous. State v. AA LaFountain Inc., 67 N.J. Super. 285 (Cty. Ct. 1961). There is no ambiguity here. There is no need for the L. family to establish actual domicile while they are homeless. A homeless family is deemed domiciled if living in a motel for one year or more. N.J.S.A. 18A:38-1(d); N.J.A.C. 6A:17-2.3(a)(i). The facts established that both motels have all the characteristics of temporary housing. So long as the L. family resided either in one location or multiple locations while remaining homeless within a particular jurisdiction for one year or longer, tuition responsibility attaches to that district. They are deemed fixed and permanent in the district after one year, even though they remain in a homeless state.

CONCLUSIONS

The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits which may have been filed with the application. In order for the adverse, i.e. the non-moving party, to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. I **CONCLUDE** that the facts are not dispute and that summary decision is appropriate.

I **CONCLUDE** that the motels described by the L. family were not intended to be permanent housing. N.J.A.C. 6A:17-2.3(a)(i). The affidavits and testimony support this conclusion. The motels lacked the features ordinarily associated with permanent housing including, full kitchens, closets and bedrooms. And the L. family stated they had no intentions of making either the Rex or Plaza Motels their permanent residence. Both motels were default or temporary residences due to financial hardship. See N.J.A.C. 6A:17-2.3(a)(i). Thus the L. family met the definition of "homeless" while living in the "motels."

The facts also established that the L. family resided in Egg Harbor Township for the school years 1998 through 2005. They lived at the Karl-Le trailer park and other temporary places within Egg Harbor Township. This included friends and family that were in or around the Township.

In 2005-2006 the household's residential location changed when they moved to the Atlantis Apartments in Somers Point. Here the family became domiciled in Somers Point pursuant to common law and education law. The Atlantis apartments had all the attributes of permanent housing. The L. family considered Somers Point home. The apartment was the family's domicile upon moving into the apartment. Finally, the L. family met the one year requirement necessary to be deemed domiciled, even if considered homeless. N.J.S.A. 18A:38-1(d). Somers Point funded the education for B.L. at the ACSSS and provided M.L. with educational services at the local school.

For the 2006-2007 school year, the family lived at the Rex Motel in Egg Harbor Township and at the Plaza Motel in Mays Landing. Thus, for the succeeding school year (2006-2007), they were homeless. Tuition responsibility remained with Somers Point because the family did not; 1) establish actual or legal domicile or residency in another jurisdiction; or 2) did not reside in another district for twelve months. N.J.S.A. 18A:38-1(d). Therefore Somers Point became the de facto sending district even though the family moved. And Somers Point would remain responsible until the household established a new residence or met the twelve month criteria set forth in N.J.S.A. 18A:38-1(d).

In August 2007 (school year 2007-2008), the L. family moved into the Rex Motel in Egg Harbor Township. Again, their last permanent residence remained Somers Point until the family meet the twelve month criteria or establish a permanent home. The motels described by the L. family did not fulfill the criteria for permanent housing. Therefore, in order for Egg Harbor Township to become a district of residence the L. family would have to satisfy the one year criteria for homeless families. This occurred in August 2008. I **CONCLUDE** therefore, that Somers Point remained the district of residence for the L. family from 2005 until August 2008. N.J.S.A. 18A:7B-12(c).

Starting in September 2008, Egg Harbor Township became the responsible district for tuition. This was triggered by the L. family living in motels (i.e. deemed homeless) within the township for twelve months or more. N.J.S.A. 18A:38-1(d).

In October 2009, the L. family moved to the Plaza Motel in Mays Landing. This was temporary housing because it is motel. N.J.A.C. 6A:17-2.3(a)(i). And the family testified they are still looking for permanent housing on August 20, 2010. Applying criteria found in N.J.S.A. 18A:38-1(d), the household will pass the twelve month threshold in October 2010. Once the L. family resided in Mays Landing for twelve months, tuition became the obligation of that jurisdiction. Or stated differently, Egg Harbor Township was no longer responsible for tuition.

Lastly, Egg Harbor Township relies upon certain local ordinance violations arguing that the L. family was not lawfully residing in this district. I **CONCLUDE** that local ordinances have no bearing on this matter. This case falls exclusively under state education law. While the local ordinances may have relevance for business operations, they are not applicable when determining domicile, residency, homelessness or education funding matters. N.J.S.A. 18A:7B-12.

To summarize, I **CONCLUDE** that Mainland (Somers Point[4]) bears tuition responsibility from 2005 to August 2008; Egg Harbor Township bears tuition responsibility from September 2008 to October 2010[5].

ORDER

Based upon the foregoing, Mainland's motion for summary decision is **GRANTED.** Tuition shall be allocated as indicated in the summary paragraph set forth above. The relief sought by Egg Harbor Township 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.

[4] Somers Point is part of the Mainland regional district for purposes of allocating the cost of High School education. In 2006 M.L. attended regular high school programs so his educational cost must be allocated to the regional district for the pertinent years. However, B.L. attended the Atlantic County Special School Services from Somers Point for some portion of the contested period. Somers Point was not part of this proceeding. However, if B.L. was not at the high school age or grade level, the tuition cost for the ACSSS would most likely be the responsibility of Somers Point, not the regional district, while the L. family resided at the Altantis Apartments in Somers Point.

[5] Mays Landing will most likely bear tuition responsibility from November 2010 forward assuming the L. family remains in a motel in that district.

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.

10-15-10
DATE

W. Todd Miller
W. TODD MILLER, ALJ

Date Received at Agency: 10-15-10

Date Mailed to Parties: 10-15-10

/sd

WITNESSES

By the Court:

Mrs. F.L.

EXHIBITS

For petitioner:

None

For Mays Landing Regional High School:

MR-1	Registration Form dated 9/4/2007, 0044-0047
MR-2	Certification signed October 31, 2007, 0015
MR-3	Statement to Peter Miller, Egg Harbor Township Administrator, 0019
MR-4	Letter dated 10/13/09, 0016-0017
MR-5	Letter dated 10/09, 0018
MR-6	Picture of Rex motel from Street
MR-7	Exterior picture of Rex Motel numbered units
MR-8	Close up exterior picture of Rex Motel numbered units
MR-9	Picture of Rex Motel Units 151-152 from street
MR-10	Picture of Rex Motel Units 151 and 152 and parking space
MR-11	Close up picture of Rex Motel Unit 152
MR-12	Drivers license abstract
MR-13	Free and Reduced Lunch Application

DOCUMENTS RELIED UPON

Respondent (Mainland's) Motion for Summary Decision, November 13, 2009

Petitioner (EHT's) Response, December 17, 2009

Petitioner (EHT's) Closing Letter Brief, October 4, 2010

Respondent (Mainland's) Closing Brief, October 5, 2010

Respondent (DOE's) Closing Brief, October 6, 2010